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# **Sunken Efforts? Legal Hurdles to Stemming Maritime CBRNE Proliferation**

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## **ABSTRACT:**

For four centuries, the law of the sea has rested on the principle of *mare liberum* or the freedom of the high seas. The oceans have traditionally been regarded as areas over which no state could claim dominion or sovereignty. Nations desirous of countering security threats have found that their efforts are curtailed by the traditional paradigm. The foreign vessel still tends to remain sacrosanct primarily because of the United Nations Convention on the Law of the Sea. Several extant laws, however, aim to contain the spread of CBRNE material through a variety of measures. Typically, merchant vessels in the open seas may only be stopped and searched without flag state consent in rare circumstances. In light of the scourge of a terrorist CBRNE attack hanging like a Damocles' sword upon the world today, this article seeks to discern whether a state possesses the right to interdict and search vessels of another state suspected of ferrying CBRNE material in international waters. Countering the kind of faceless non-state actor threats of the 21st Century would require curtailing some of those freedoms earlier enjoyed in the open seas, while at the same time infringing upon the rights of another sovereign state without permission is questionable. Where does one strike a balance? This paper argues that a better integration of maritime laws, such as the relevant sections of the UNSCR 1540, the PSI and the SUA 2005 with the UNCLOS, is of the essence.

## **I. Introduction**

"Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child live under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us." [1]

These words were uttered by John Fitzgerald Kennedy, the thirty-fifth President of the United States of America, in his address before the UN General Assembly in 1961. Kennedy speaks of nuclear weapons here, which had been developed by only four nations at the time, namely the USA, Soviet Union, UK, and France. Understandably, President Kennedy does not refer to the four-pronged chemical, biological, radiological, nuclear, and explosive (CBRNE) weapons possessed by numerous nations today, complicating issues of global human safety manifold, as in his day, the scourge of non-state terrorist actors with potential access to such weapons, particularly of the nuclear variety, was unthinkable.

Fast forward 48 years and in the post-9/11 world, President Barack Obama exhibited concern over exactly such a possibility. He was “thinking about the unthinkable” [2] as Herman Kahn would perhaps have put it during the Cold War years, and he was thinking aloud. As observed by Obama thoughtfully in his Prague Speech on July 10, 2009, “The challenges of our time threaten the peace and prosperity of every single nation, and no one nation can meet these challenges alone... The theft of loose nuclear materials could lead to the extermination of any city on Earth.” [3]

The paradigm shift in the way global security is approached by many countries today, most notably Western democracies and other advanced nations, leads us to the issue of non-proliferation of CBRNE weapons in the 21st Century. America alone has spearheaded multifarious programs to prevent such incidents. Among these are the Proliferation Security Initiative (PSI), Container Security Initiative (CSI), the Megaports Initiative, the Global Initiative to Combat Nuclear Terrorism (GICNT), Nuclear Trafficking Response Group (NTRG), Preventing Nuclear Smuggling Program (PNSP), Export Control and Related Border Security Program (EXBS), Second Line of Defense (SLD), Global Threat Reduction (GTR), National Strategy for Countering Biological Threats, and the Biological Weapons Convention Inter-Sessional Work Program, among others. [4]. Yes, America takes CBRNE trafficking and nuclear non-proliferation seriously, but at the expense of spending billions of dollars every year to maintain these programs. After all, as has been famously observed in the past, security forces need to win every day. CBRNE terrorists need to win only once.

Not only via land, but the maritime domain is one of the important conduits through which CBRNE trafficking can occur. Sin et. al. (2015) note “that over 58 million twenty-foot equivalent units of containers are shipped around the world over 490 maritime trade routes annually” and, therefore, the “commercial maritime shipping industry is uniquely vulnerable to exploitation by nefarious actors.” [5] Others put the number of containers at over 43 million. [6] Nonetheless, it is quite evident that whatever the number of containers that may exist, having actionable intelligence about CBRNE material is difficult, but without such intelligence the search is analogous to looking for a needle in a gigantic haystack. Routes used for smuggling any kind of contraband may be used to ferry weapons of mass destruction. While this is indeed an earth-shattering thought, major debates and controversies have, despite this threat matrix, surrounded methods employed by certain states to curb proliferation. The heart of the problem lies in a multiplicity of laws (that perhaps can now be more appropriately termed flaws) that have existed untouched for decades to regulate the world’s oceans and maintain decorum in these stormy seas – laws at times built upon age-old customs that had not adequately anticipated the catastrophic problems associated with transnational terrorism, and CBRNE terrorism at that. Laws such as the United Nations Convention on the Law of the Sea (UNCLOS) then uphold the sacrosanctity of a foreign vessel and maintain that it cannot be checked or stopped without express permission from the flag state. They pose in the post-9/11 era, impediments to activities like the PSI, which rely on effective visit-board-search-seizure (VBSS) operations on vessels suspected of illegally ferrying CBRNE material.

This paper looks at the complicated dynamics between the various laws that have emerged over time regulating the maritime domain, which often overlap and are at loggerheads with one another. With the plethora of laws in existence, which one prevails, and which one does not? Can interdiction be legally carried out on the high seas of ships belonging to any flag state, whether a state is a signatory to the PSI

or not, in violation of the UNCLOS? The answers get murkier the deeper one delves. While some scholarship looking at the dichotomy between the UNCLOS, and the PSI and associated laws exists, none have provided implementable solutions that might effectively counter the scourge of maritime CBRNE terror. Here, I find that the pre-2000 maritime laws are largely out of sync with 21st Century aquatic nightmare scenarios, and I argue that better integration of such laws is of the essence. The recommendations herein extrapolated more generally should aid policy makers in the unenviable position of upholding national security to tackle the challenge of maritime CBRNE proliferation and channel limited resources more judiciously towards what matters.

## II. Existing Research on Maritime CBRNE Proliferation

The maritime domain has been under the scanner of scholars and policymakers alike as vulnerable to terrorist attacks because it is largely ungoverned. [7] For the very same reasons, the occurrence of maritime arms proliferation, including CBRNE, ends up therefore within the realm of possibility.[8] While for terrorists to traffic CBRNE without state support is far-fetched, so-called “rogue states” such as North Korea may be able to transport such or related materials to their friends internationally, with or without terrorist co-conivance, as seen from the *So San* incident as well as in another case in 2009, among other instances.

In this context, scholars in recent years have studied both the pros and the cons of allowing complete freedom of the seas to ships flying the flag of a certain state that has dominated maritime law ever since the 17<sup>th</sup> Century, disagreements within the scholarly community about the efficacy of the UNCLOS and the PSI abound. While some observe that despite the presence of the UNCLOS, the US-spearheaded PSI is fast becoming international customary law and the cornerstone of a new international maritime norm, [9] others find the “support” for the PSI as not clearly defined. [10] Still others vehemently oppose the notion that the PSI follows, stating that express permission from the flag state is essential before boarding a ship, [11] as the flag state was traditionally known to have the primary jurisdiction over ships registered under its flag. [12] And yet another section of scholars eulogizes the PSI as a “legitimate counterproliferation undertaking.”[13] Thus, there is little consensus when it comes to evaluating the worth of the older UNCLOS vis-a-vis the more contemporary PSI.

## III. The Evolution of Maritime Law

Not many works are as timeless as the Dutch scholar Hugo Grotius’ 1609 CE magnum opus *Mare Liberum* (*The Free Sea*). In *Mare Liberum*, Grotius propounded the new principle that the sea was international territory and all nations would have equal access to it. Grotius directed this argument towards the Portuguese *Mare clausum* (or “closed sea”) policy and their monopolistic practices on trade in the East Indies.

It was another Dutchman that converted Grotius’ idea into practical terms. He was the jurist Cornelius van Bynkershoek. Bynkershoek was especially important in the development of the Law of the Sea (not to be confused with the later UNCLOS). He observed that coastal states have a right to the adjoining waters the width of which had to correspond to the capacity of exercising effective control over it. He argued that such effective control has to correspond to the range of the coastal state's weapons by stating the golden rule that “Power over the land ends wherever the force of arms ends” (*terrae potestas finitur ubi finitur armorum vis*). [14] He defined this based on the calculations of a contemporary Italian, Ferdinand Galiami, who estimated the range of the most advanced cannon at the time to three nautical miles or a league. This idea became common practice and was known as the “cannon shot rule” and was regarded as the internationally accepted measure of the width of the territorial sea.[15]

Over the next few hundred years, whenever states have sought to extend their jurisdiction to encompass larger tracts of maritime space, other states have displayed an attitude of resistance in accordance with their preference for maintaining the *mare liberum* principle. Any new claims of exclusivity over ocean space or resources have most commonly been viewed as a curtailment from the pre-existing freedoms of the open seas (also known as “the high seas” or “international waters”) and have been mostly quashed. [16] Nations have generally agreed that this freedom of the open seas entailed certain responsibilities or implied restrictions. [17] “The purpose of such regulation was to safeguard the exercise of the freedom in the interests of the whole international community.”[16]

#### IV. United Nations Convention on The Law of The Sea

The right of innocent passage is currently a well-established customary law rule. Even Roman Law recognized the principle of the freedom of the seas. [18] It was, however, in 1949, that the International Law Commission (ILC) first began its work on draft law of the sea conventions. [19] The First United Nations Conference on the Law of the Sea was held in 1958 in Geneva. [20] It was a good start but left certain questions unresolved. It was thus followed by a second conference in 1960, also in Geneva. [20] This effort proved to be by and large fruitless. The third and final round so far was started in 1973 in New York and continued until 1982 with participation from one hundred and sixty nations. [20] This resulted in the genesis of a convention, which came into force in 1994. The United Nations Convention on the Law of the Sea (UNCLOS) was born. It substituted the antiquated 'freedom of the seas' idea. Concluded in 1982 in Jamaica and in effect from 1994, the UNCLOS has become part of contemporary international law governing maritime activities.

Almost all countries of the world abide by the UNCLOS. That is, 168 states have ratified it and another 14 are signatories. The USA has been a notable exception to the ratification of the Convention, although it recognizes the UNCLOS as a codification of customary international law. [21] The UNCLOS's definitions of a 12-mile territorial sea and a 200-mile exclusive economic zone (EEZ) have become the gold standard of maritime law involving littoral states. In addition to the right of innocent passage in the territorial sea and EEZ, ships of all countries are allowed “transit passage” through straits used for international navigation under the UNCLOS. [22] Further, all states enjoy the right to passage in international waters in accordance with the principle of *mare liberum*. [22]

Part VII of the UNCLOS deals with provisions for the high seas, including piracy, illicit drug trafficking and the suppression of criminal activity. However, it does not discuss CBRNE or arms smuggling as a prohibited activity like piracy or slave trading. [23] The section accords warships and government-owned ships on non-commercial voyages immunity from the jurisdiction of any state other than their flag state. Further, while Article 89 of the UNCLOS declares that “No State may validly purport to subject any part of the high seas to its sovereignty,” which means no extraterritorial enforcement of its laws, [22] Article 111 permits “hot pursuit” when the foreign ship is located anywhere within the internal waters up to the extent of the contiguous zone of a nation, which is twenty-four nautical miles from the coast. A high seas pursuit is possible only if there has been no interruption in the pursuit from the time it started in the territorial waters or contiguous zone of the pursuing nation, and the pursuit ends once the fleeing ship enters the territorial waters of its own nation or that of a third state [22, 24].

Therefore, other than such indirectly related provisions, there are no explicit provisions in the UNCLOS allowing maritime interdiction of CBRNE material. In fact, on the contrary, the laws of the UNCLOS make the concept of “visit-board-search-seizure” (VBSS) complicated. VBSS is the term used by the US military as well as other American law enforcement agencies to refer to maritime interdiction acts intended to combat terrorism, smuggling, piracy, and so on. Considering that the greatest hazards to security on the oceans stem from “nightmare scenarios” such as CBRNE material placed in a container on a vessel, or the hijacking of a ship ferrying potentially lethal cargo – either of which could be primed to

detonate in a crowded port or city, global cooperation is required to effectively neutralize such an untoward incident from occurring. [25] This is where the UNCLOS preferably needs to be updated to account for the realities of the age. I do not necessarily advocate for curtailing *mare liberum* but argue that even merely recognizing that there is a potential problem of CBRNE-related proliferation would be a welcome first step.

While the UNCLOS makes it legally challenging to board ships belonging to another nation suspected of ferrying materials related to crafting weapons of mass destruction, newer "activities" and Resolutions have felt the need to address the glaring security lacunae present in the UNCLOS. At the other end of the spectrum from the latter lie these laws and initiatives, which proactively bolster non-proliferation and, in some cases, even favor armed interdiction of suspect CBRNE-ferrying vessels in the high seas, actions that would breach UNCLOS guidelines. Most notable among them are the Proliferation Security Initiative (henceforth PSI) announced in 2003, the UN Security Council Resolution 1540 (henceforth UNSCR 1540) of 2004, the International Ship and Port Facility Security (henceforth ISPS) Code of 2004 and the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (henceforth SUA 2005).

## V. Proliferation Security Initiative

Announced by President George W. Bush in Krakow, Poland on May 31, 2003, the PSI arose, in part, due to the difficulties of searching ships of concern on the high seas. In December 2002, acting on US intelligence, the *So San*, a Cambodian-registered North Korean ship, transporting missiles to Yemen was intercepted by Spanish commandos. However, as it was not permissible to confiscate the cargo under international law, namely the UNCLOS; many felt this was a potentially dangerous "loophole" that needed to be closed. [25] President Bush announced that the United States would lead a new effort, the PSI, to interdict shipments of CBRNE material and related goods to terrorists and countries of proliferation concern whether on land, at sea, or in the air. [26] The initiative's aim would be "to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies," Bush declared. [27]

The US and ten other nations, namely Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom were at the forefront of shaping and promoting the initiative. The number of participants has increased rapidly over the last decade and half and attained a total of 105 countries that have publicly committed to the initiative. Membership in PSI only requires a state to endorse the PSI's "Statement of Interdiction Principles", a non-binding document that lays out the framework for PSI activities. [28] PSI participants always affirm that PSI is "an activity not an organization" [29, 30] to steer clear of bureaucratic red tape that is often associated with full-fledged organizations. Though the Chinese government has been invited by its American counterpart to join the initiative, China has refrained claiming concerns of legality related to interdiction. [31]

PSI is not a formal pact among countries. As of now, the criteria by which interdictions are to be made apart from the clause that the cargo may be destined for a recipient, which may use it to harm the United States or other countries, remain undefined. So far, the PSI has conducted around fifty maritime interdiction exercises since its inception.[32]

The initiative does not create new law, but rather relies on existing international law to conduct interdictions in international waters. PSI participants are encouraged to develop their national laws and help promote international treaties that criminalize CBRNE-related trafficking. By concluding bilateral agreements, PSI members hope to hasten the process to interdict deadly shipments.

On May 28, 2013, representatives from seventy-two PSI member states held a meeting in Warsaw on the 10th anniversary of the PSI's formation. Attending states affirmed four joint statements pledging to conduct "more regular and robust" PSI exercises; promote international treaties criminalizing CBRNE-related trafficking; share expertise and resources to enhance interdiction capabilities; and to expand "the influence of the PSI globally through outreach to new states and the public." [33]

A UN Security Council meeting in 1992 held, among other things, that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end. This statement is frequently cited in documents relating to the PSI. The statement does support the spirit of the PSI but lacks any legal value.

## **VI. United Nations Security Council Resolution (Unscr) 1540**

A year after the PSI declaration, the UNSCR 1540 was adopted unanimously on 28 April 2004. Under Chapter VII of the United Nations Charter, the Resolution lays down the regulations for all Member States to develop and enforce appropriate legal measures against CBRNE proliferation and focuses especially on preventing these materials from landing in the hands of non-state actors. [34, 35] It is noteworthy that it recognizes proliferation of CBRNE by non-state actors as a threat to the peace under the terms of Chapter VII of the United Nations Charter and creates an obligation for states to modify their internal legislation. Proliferation to or among non-state actors was not recognized earlier. [36]

Further, the resolution requires every state to criminalize various forms of non-state actor involvement in CBRNE and its related activities in its domestic legislation and, once in place, to enforce such legislation. Before the inception of the UNSCR 1540, nonproliferation regimes were scattered, often having overlapping jurisdictions and less synchronization. Now the UNSCR 1540 complements and strengthens the growing number of treaties, conventions, and protocols that address WMD proliferation. [37] Nonetheless, there remain gaps for many states in their implementation and governments must continually adapt to the kinds of proliferation threats they face.

## **VII. International Ship and Port Facility Security (ISPS) Code**

Also, in effect, is the International Ship and Port Facility Security (ISPS) Code, which is the 2002 amendment to the Safety of Life at Sea (SOLAS) Convention (1974/1988) [38] on minimum security arrangements for ships, ports and government agencies. In force since 2004, it prescribes responsibilities to governments, shipping companies, shipboard personnel, and port/facility personnel to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade. [39, 40]

Consisting of two sections, the first of which is mandatory and the second more of recommendations, [41] the ISPS Code was a brainchild of the International Maritime Organization (IMO) based in London, and the process of its creation was dramatically catalyzed after attacks such as 9/11 and on the French oil tanker *MV Limburg*. [42] The code observes three levels of security – Level 1 for normal ship and port operations, Level 2 for a heightened security risk for either ship or port, and Level 3 when there is probable or imminent risk of a security incident. [43] While in theory the security regulations penned by the IMO may seem meticulous, but oftentimes the onus of implementing those regulations lies in private sector hands, and the IMO can do little more than observe or recommend. [42] Thus, if it really came to a situation of maritime CBRNE trafficking, whether the private sector in all those countries adhering to

IMO guidelines would have the technical expertise of identifying and helping counter-proliferate remains a major question mark.

## VIII. SUA Protocol

Lastly, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation or the SUA, 1988 (also known as the Rome Convention, 1988) is also an attempt at maintaining security at sea and seaports. The latter is a multilateral treaty by which states agree to prohibit and punish behavior, which may threaten the safety of maritime navigation. It is not the original SUA Convention, which is of the essence in our case, however, but its second Protocol.

On 14 October 2005 in London, a second supplementary Protocol to SUA was concluded. The 2005 Protocol to the Rome Convention adds a new article, Article 3bis, which states that a person commits an offense within the meaning of the SUA Convention if that person unlawfully and intentionally commits one of the acts listed, if it is the purpose of this act to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act. This article, hence, criminalizes the use of ships to transfer or discharge CBRNE weapons. However, the Protocol specifies that transporting nuclear materials is not an offence if it is transported to or from the territory or under the control of a state party to the Treaty on the Non-Proliferation of Nuclear Weapons of 1970 (henceforth NPT).[44]

## IX. The Treacherous Waters of International Maritime Law

From the preceding discussion then of the varied laws in existence, the case in point that emerges is: while containing CBRNE proliferation is of the essence, can interdicting states legally use ‘optimal force’ to stop and search a vessel suspected to be carrying CBRNE material, with different sets of extant laws allowing or disallowing the same things? That is, could the interdicting state legally use VBSS-like techniques to ensure with a physical examination that the suspected vessel in international waters is “clean”, without express flag state permission?

While the PSI’s ‘Statement of Interdiction Principles’ only expressly deals with interdictions within waters or upon vessels under member states’ jurisdiction, the *So San* incident illustrates that intercepting shipments may sometimes only be practical in international waters. If the PSI conducts future high seas interdictions, it will raise questions regarding the limits of self-defense under the Charter of the United Nations, the applicable laws of armed conflict in international waters, and the protection afforded to neutral shipping during armed conflicts. Merely upon “reasonable suspicion” and “at their own initiative”, [45] intervention by a state’s armed forces in the affairs of another sovereign state is highly questionable. Based on what right could such an action possibly be permitted? Interestingly, while a dedicated body christened as the International Tribunal for the Law of the Sea (ITLOS) was created in 1982 comprising 21 judges from 21 countries to uphold the UNCLOS and the sovereign maritime rights of states, [46] none of the twenty-nine cases submitted to the Tribunal since its inception deals with “aggressive” PSI behavior despite numerous interdiction instances occurring.

Interdiction of weapon of mass destruction may occur in several scenarios, such as in cases where:

- a state is transporting CBRNE material to an ally and a third state interdicts that shipment alleging that it feels threatened even though there is no proof of a forthcoming attack;
- a state claims ‘self-defense’ and intercepts CBRNE material being shipped to a non-state actor in advance to prevent a possible terrorist attack;
- a state is participating in an armed conflict and interdicts a shipment of CBRNE material which is destined for use by its adversary.

The principle of exclusive flag state jurisdiction, however, is not absolute. For common interests, states may board a foreign-flagged ship on the high seas in certain exceptional circumstances. A few situations merit boarding such a ship: if the ship is engaged in piracy or slave trade, the ship is engaged in unauthorized broadcasting and where the ship is without nationality.

Following boarding of the ship, further examination is not to be conducted unless suspicion exists relating to the reasons for boarding the vessel. “Reasonable grounds” are required to board. With “reasonable grounds” undefined, the UNCLOS contains a provision allowing for compensation for the boarded vessel for unjustified boarding. The right of visit (i.e. boarding a ship), should not be an abuse of power. To board and examine a suspicious vessel is one thing; to seize the vessel and the goods on it is another. The jurisdiction of boarding states over ships without nationality or those that may be assimilated to ships without nationality is not addressed in the UNCLOS. Usually, a state with a genuine link to the persons on the ship would assert diplomatic protection, unless the vessel is literally “stateless.”

The previously noted boarding and searching of the *So San* freighter in 2002 was, in all probability, legal. It was flying no flag, although a North Korean flag was painted over on the ship’s funnel. The master claimed that the vessel was registered in Cambodia. The Cambodian government confirmed that a vessel meeting the description was registered there, but under the name of *Pan Hope*. These facts would give the Spanish Navy sufficient grounds to board on suspicion of the vessel’s stateless status, particularly when the ship maneuvered to evade its pursuer. Upon forceful boarding the Spanish Navy inspected the ship’s papers, which indicated its Cambodian registration. 15 medium-range Scud missiles packed under a pile of cement, along with conventional high explosive warheads and drums of fuel were recovered. [47, 48]

Developments since the conclusion of the 1982 UNCLOS created a gap in maritime security by limiting the options for the right of visit. It has been argued that the possibility of such a development was envisaged in the wording of Article 110 of the UNCLOS where it provides that boarding is permitted “where acts of interference derive from powers conferred by treaty.” Allegedly at the first implementation meeting of the PSI, the United States pushed participants to

- prevent the import and export of CBRNE and missile-related materials;
- impede the movements of ships believed to be involved in the transportation of such hardware through the participating nations’ territorial waters; and
- conduct joint inspections on the open sea when the need arose.

The third clause met with severe opposition from many nations as they felt this would be a breach of international maritime law.

In October 2003, a proposal for concluding bilateral ship-boarding agreements was presented by the United States at the London PSI Meeting, the fourth such plenary session held anywhere. [49] These agreements would provide authority and establish procedures on a bilateral basis to board, search, and seize vessels suspected of carrying illicit shipments of CBRNE, their delivery systems, or related materials in waters seaward to the territorial sea of any state.

Apart from the bilateral treaties, another initiative taken to provide a treaty-based right of visit (boarding) was to amend the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA). The 1988 SUA Convention had been a response to the growth of unlawful acts which threatened the safety of ships and the security of their passengers and crews in the 1980s; in particular, the seizure in 1985 of the *Achille Lauro*.

In October 2005, amendments to the 1988 Convention were adopted at a conference under the auspices of the IMO, which broadens the offenses to include the use of a vessel as an instrument of or platform for terrorist activity, the transport of CBRNE and “any equipment, materials or software or related

technology that significantly contribute to design, manufacturing or delivery” and the transport of a person who has committed a terrorist act. Article 8 of the 1988 SUA was also amended to provide for non-flag state ship boarding with or without the consent of the flag state. The 2005 Amendment entered into force on July 28, 2010. As of October 2011, 19 states have accepted the 2005 Amendment.

Treaties are not known to impose binding rules on states. However, with repeated usage and with a growing number of nations accepting the principles, it may probably grow into a sort of customary law. Despite all of this, as demonstrated above, the principle of flag state jurisdiction remains by and large unimpaired by the bilateral agreements and the 2005 SUA Amendment. The authorization of boarding, search, detention, and even the waiving of jurisdiction is still a matter of law enforcement assistance. Therefore, it is clear, that no such customary principle is taking shape. [11]

Having said this, if evidence of CBRNE proliferation is found, could the end, prima facie conforming to the purpose of international law, justify the means of contradicting the UNCLOS?

If any inappropriate means is attributable to a state and constitutes a breach of an international obligation of that state, there is an internationally wrongful act. The International Law Commission (ILC) Draft Articles provide that necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act:

- a) is the only way for the state to safeguard an essential interest against a grave and imminent peril; and
- b) does not seriously impair an essential interest of the state or states toward which the obligation exists, or that of the international community.

An unconsented interdiction does not seem to be the only way to curb proliferation of CBRNE and could seriously impel the subject state’s core interests. In any event, the plea of necessity as embodied in the ILC Draft Articles is not intended to cover conduct that is in principle regulated by primary obligations. It is recognized that the proliferation of CBRNE, their delivery systems, and related materials constitutes a threat to international peace and security. While affirming this, states disagree as to whether unconsented interdictions should be a means to curb it, not only because it interferes with the freedom of the seas but, more fundamentally, it goes against the principle of sovereign equality. That the proliferation of CBRNE constitutes a threat to international peace and security does not equate to or lead to the situations that possessing CBRNE is illegal. Otherwise, it is hard to explain why transport of CBRNE among some states should be curbed while the same activity involving other states is tolerated. It is because of this that boarding and searching a vessel is one thing while seizing cargo is another.

## **X. Ship Boarding Instances Under PSI**

There has been a plethora of instances of ship boarding on the high seas by various countries this side of the new millennium. The following is a brief list of some of the major cases:

Table 1: Brief List of PSI Interdictions

<b>INCIDENT/ YEAR</b>	<b>INTERDICTING NATION</b>	<b>RESULTS/ FINDINGS</b>
Operation (Op.) Full Disclosure, 2014; Victoria Affair/ Op. Iron Law, 2011; Francop Affair, 2009; Karine A. Affair, 2002	Israel	Long-range missiles destined for Gaza, weapons, radar systems, etc.

December, 2009	Thailand	Shipment of mixed arms and missile technology
September, 2009	South Korea	North Korean anti-chemical clothing
BBC China, 2003	Germany	Uranium centrifuge parts
So San, 2002	Spain (Based on US intelligence)	15 Scud missiles

Forceful boarding of vessels may be preceded, for example, by firing warning shots across the bow. For unconsented boarding, a question arises as to whether a threat or use of force against a foreign merchant or private vessel falls into the realm of the prohibition of Article 2(4) of the UN Charter, which states that all member states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

## XI. Conclusion

To conclude, it would be apt to observe that the proliferation of maritime CBRNE material remains a serious challenge to international peace and security. The best bet today lies in sorting out the differences between the extant set of laws which remain at best nebulous and, at worst, totally mum about interdicting foreign vessels on the high seas and come out with a reasonable and effective denouement to this scourge of CBRNE proliferation.

With the PSI well under way, the participants now must enhance the initiative's overall efficiency and effectiveness. While often criticized by some states as intrusive and aggressive behavior, the institutions designed in the 1960s soon after the Kennedy era to prevent proliferation to state actors have not been adequately able to address adequately the new challenge presented by non-state actors. The PSI, on the other hand, has a clean record in terms of having maintained consistency with international law, especially maritime. [50] A good majority of the nations of the world need to legitimize this kind of action. Otherwise, interdiction will not be effectively carried out. The future of the PSI now lies in extending these initial bilateral agreements to an ever-larger sphere of states— either through bilateral or regional multilateral agreements—thereby tightening the global interdictions net around the WMD proliferators of the world.

Through Resolution 1540, the UN and other international organizations are gradually establishing a universal legal basis for interdiction. In this sense, Resolution 1540 acts as a legal complement to the ongoing activities of the PSI. However, the Security Council still lacks the legal backing required to effectively implement the 1540 Resolution in a maritime environment. By pursuing and signing bilateral and multilateral ship boarding agreements, the participants in the PSI are effectively permitting the states of the world to share their naval and law enforcement capabilities to ensure that non-state actors do not take advantage of the principle of exclusive jurisdiction on the high seas to skirt Resolution 1540's obligations. It would be laudable if measures could be taken so that the UNSCR 1540 can implement more such ship-boarding agreements between states, which are less capable of interdicting, with the powerful navies of the world.

A reasonable option would entail allowing the possibility of interdicting vessels on the high seas under some sort of “emergency situations”, which could be defined under law. It could encompass those cases

where there is a reasonable suspicion that a ship is ferrying lethal CBRNE material or components to a dangerous location, viz. a state which is not party to the NPT. For the interdiction to work, the suspect vessel would have to be stripped off its national jurisdiction for a short while. However, as a safety measure in the latter's favor, there would be severe penal provisions for the abuse of such power by the boarding party if found that their actions have been frivolous and with mala-fide intent. Thus, suspicion of proliferation of CBRNE should be a new basis for the right of visit.

The legitimacy of interdiction actions could be gained by adding express relevant enforcement or ship boarding clauses to CBRNE non-proliferation treaty regimes like the Article 3bis(1)(a) of SUA 2005 to the UNCLOS. The final goal to be borne in mind should be introducing across-the-board provisions and better integrating maritime laws, such as the relevant sections of the UNSCR 1540, SUA 2005 and PSI with the UNCLOS into a single coherent maritime interdiction law, which would allow interdictions in those exigent circumstances. A little extra maritime caution could after all come as a blessing for securing precious human life on terra firma.

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