Counter-Proliferation Activities and Freedom of Navigation

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The questions

Have counter-proliferation activities had an impact on freedom of navigation?

No.

Why have we not seen more action on countering proliferation by sea – especially in the case of Small Arms and Light Weapons (SALW)?
Overview

(1) The Proliferation Security Initiative
(2) SUA 2005 and US bilateral boarding agreements
(3) UN Security Council Resolutions regarding WMD, North Korea and Iran
(4) Small Arms and Light Weapons proliferation by sea?
Academic interest in the PSI over time

Books, chapters and articles with “Proliferation Security Initiative in the Title” catalogued by the Peace Palace Library
Proliferation Security Initiative (PSI)

- 2002 *So San* incident: Cambodian vessel intercepted by Spanish forces transporting Scud missiles from North Korea to Yemen.
- President Bush declares the PSI in 2003.
- Statement of interdiction principles.
PSI Interdiction principles

- Not legally binding: political commitments
- Focus on:
  - cooperative measures to interdict WMD materiel
  - take action regarding own flag vessels or with flag state consent
  - take action as a port state or in TS and CZ
  - work to strengthen national law and “when necessary relevant international law”
- BBC China (2003) the usual example given.
How do we assess the impact of the PSI?

• Difficult to come up with a figure for interdictions, seldom publicized.

• OEG meetings (twice a year) and numerous exercises. Focus on Critical Capabilities and Practices (CCP).

• ‘Recent PSI meetings have emphasised capacity-building, best practices and cooperation across agencies and governments’ (CRS 2012).
Impact on international law?

- A key PSI goal was to strengthen “relevant international law”.
- Between 2004-2010 US concludes 11 bilateral boarding agreements with registries covering over 60% of world merchant fleet
- 2005 SUA Protocol on WMD proliferation and related offences includes boarding provisions
- Impact?
Impact of relevant treaty law and PSI practice

• Could this practice change customary international law?
  No.
• No *uniformity* or general principle in the treaty law allowing boarding without flag State consent.
• Unpublicised State practice cannot give rise to new custom either.
• If anything, relevant practice upholds flag State consent and freedom of navigation.
Limitations of SUA 2005

• Boarding provisions only of use if (a) a major naval power could use them and (b) prosecute and offence.

• SUA 2005 membership remains limited. 23 members, no major naval powers, slow pace of ratification.
Limitations of SUA 2005, cont.

• National law covering such offences? Rare. No UK law; Australian legislation planned?

• US law criminalises transporting WMD materiel on the high seas knowing it will be used for terrorism (18 USC § 2283) subject to limitations (18 USC § 2332b(g)(5)(B)).

• Bilateral PSI agreements as an alternative? How likely are proliferators to use the ‘wrong’ flag?
<table>
<thead>
<tr>
<th>Largest Merchant Marine (2010)</th>
<th>US PSI bilateral agreements</th>
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<tbody>
<tr>
<td>Panama</td>
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<tr>
<td>Liberia</td>
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<tr>
<td>China</td>
<td>Croatia</td>
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<td><strong>Malta</strong></td>
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<td>Hong Kong</td>
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<td>Singapore</td>
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<td><strong>Marshall Islands</strong></td>
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<td>Indonesia</td>
<td>Barbados</td>
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<td><strong>Antigua and Barbuda</strong></td>
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<td>Bahamas, The</td>
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<tr>
<td>Russia</td>
<td>Belize</td>
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<td>Greece</td>
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</table>
Conclusion of US PSI bilaterals by date

- covers proliferation to non-State actors
- omits any reference to “interdiction” (China)
- requires States to “adopt and enforce appropriate effective laws” preventing such transfers
- impact on innocent passage in territorial sea?
  1. non-innocent argument
  2. countermeasures argument
  3. *obliged* to enforce laws (Art 27(1), UNCLOS)
UN Security Council Resolutions: UNSCR 1874 (2009)

• targets North Korea, follows UNSCR 1718 (2006)
• prohibited transfers and exports: WMD materiel and large weapon systems (1718); all other weapons but not SALW (1874)
• calls for port State cargo inspection
• calls for all States “to inspect vessels, with the consent of the flag State, on the high seas” on reasonable suspicion of prohibited cargo (para 12)
• such flag States, if they don’t consent, must proceed to port (para 13)

- targets Iran, follows UNSCRs 1747, 1803 (2007-8)
- prohibited transfers/exports: major weapons systems and ballistic missile technology
- calls for port State cargo inspection
- *notes* States may inspect vessels on the high seas with flag State consent and calls upon all States to cooperate (para 15)
UN Security Council Resolutions: conclusions

• No modification of exclusive flag State jurisdiction
• Are “no bunkering” provisions more effective at preventing proliferation? UNSCR 1874, para 17; UNSCR 1929, para 18.

- *Kang Nam 1* episode of 2009
Proliferation of Small Arms and Light Weapons (SALW)

• “SALW pose a far more real threat to more people than do … [WMD]” (Carr 2007)
• Easy access to small arms undermines human security by “creating and sustaining a culture of violence” (Grillot 2011)
• Consensus that SALW proliferation intensifies and protracts internal conflicts (UN POA).
• Such “destabilising commodity flows” often move by sea (Griffiths and Jenks 2012)
### SALW Proliferation: international instruments

<table>
<thead>
<tr>
<th>Universal instruments</th>
<th>Regional instruments</th>
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<tbody>
<tr>
<td>• UN Program of Action (2001 - )</td>
<td>• Nairobi Declaration (2000)</td>
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<tr>
<td></td>
<td>• OSCE Document (2002)</td>
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<td>• Inter-American Convention (2007)</td>
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Proliferation by sea is seldom expressly considered.
Gaps in the Arms Trade Treaty 2013

• Wide state-to-state transfer exemption; voluntary reporting; very broad export assessment criteria
• No provision on weapons marking/tracing
• No inspection regime or post-shipment follow-up
Gaps in the Arms Trade Treaty 2013, cont

• Lack of detail in transnational criminal cooperation provisions (compare UNTOC)
• No provision on criminalisation of smuggling, diversion or document fraud
• No VBSS provision (e.g. Narcotics Convention, Migrant Smuggling Protocol, SUA 2005)
SALW proliferation by sea and the Security Council: situation specific responses

- UN maritime arms embargoes:
  - Iraq: UNSCRs 661 & 665 (1990);
  - Yugoslavia: UNSCRs 713 (1991) & 787 (1992);
  - Haiti: UNSCRs 875 (1993);
  - Sierra Leone: 1132 (1997).
- Not always addressed: e.g. UNSCR 1874.
Why is SALW proliferation so hard to address?

- Legitimate uses of SALW (law enforcement, etc)
- Inherently easy to smuggle: may follow both legitimate and illicit maritime trade routes
- Circulation of guns between conflicts
- Limited constituency for WMD proliferators while major powers are also the top 6 arms exporters: US, Russia, Germany, France, China, UK (SIPRI)
- Those exporting SALW are generally not those facing the ‘negative externalities’ of SALW.
# Efrat’s influence and preference model

<table>
<thead>
<tr>
<th>Low export/consumer influence</th>
<th>Low negative externality influence</th>
<th>High negative externality influence</th>
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<tbody>
<tr>
<td>Low</td>
<td>Favours moderate regulation of SALW</td>
<td>Favours strong regulation of SALW</td>
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<tr>
<td>High</td>
<td>Favours weak regulation of SALW</td>
<td>Support varies</td>
</tr>
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</table>
Common problems

- ‘Legitimate’ trade in SALWs and dual use materials
- A reluctance to target State-to-State transfers
- States are obviously reluctant to support arrangements where they bear costs for little gain
- Lack of common preferences favours the status quo or negotiating position of the most powerful