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Proliferation security initiative: legal consequences from the standpoint of international law

Working paper of the Republic of Cuba

I. Brief background information

1. The intention to create the Proliferation Security Initiative (PSI) was first announced by United States President George W. Bush on 31 May 2003, in a speech in Cracow, Poland.
2. The countries promoting and participating in the Initiative have declared that this is a political agreement, not a legal one, and have emphasized that it is not a question of an “organization” but rather of an “activity” open to any State or international organization which endorses the Statement of Interdiction Principles and makes an effective contribution to the Initiative.
3. The Statement of Principles, adopted on 4 September 2003 during a PSI meeting in Paris, explains the scope of the Initiative, and actually constitutes a kind of constituent charter.
4. The Statement presents the Initiative as “a response to the growing challenge posed by the proliferation of weapons of mass destruction, their delivery systems, and related materials worldwide” and establishes the commitment of participants to a series of specific principles (see annex). Most of them, if applied, would violate basic principles recognized in international law and the Charter of the United Nations.
5. With this Initiative, the United States of America and its principal allies have once again tried to impose on the international community their selective approach and double standards in addressing disarmament and arms control issues, disregarding the fact that the prohibition and total elimination of weapons of mass destruction is the only guarantee that such weapons will not fall into the hands of terrorists.
6. A multilateral, non-discriminatory approach is the only effective way to prevent the use of weapons of mass destruction by terrorists. Instead of contributing to international unity on the issue and the strengthening of the role of the United

Nations and the international disarmament and arms control treaties, the Initiative weakens them.

II. Legal consequences of the Proliferation Security Initiative from the standpoint of international law

Principles of international law and the Charter of the United Nations

7. As stated earlier, some of the elements or principles of the Proliferation Security Initiative are contradictory and would in practice violate basic principles set out in the Charter of the United Nations and recognized in international law which prohibit interference in the domestic affairs of States, resorting to the threat or use of force against the territorial integrity or political independence of any State and carrying out actions in any manner inconsistent with the purposes of the United Nations, given the recognized principle of the sovereign equality of all States.

8. The Initiative falls within the general approach followed by the United States and other developed countries, which is to redefine international law to make it conform to their own economic and security interests. The immediate theoretical precursor to this misguided creation was the report entitled “The Responsibility to Protect”, issued by the so-called International Commission on Intervention and State Sovereignty.

9. That report expounds a “new doctrine” designed to modify the conduct of Member States of the United Nations acting in conformity with the principles established in the Charter. It proclaims that States and the United Nations supposedly have the obligation or duty to protect the life, liberty and basic human rights of citizens and that if a State is unable or unwilling to fulfil this responsibility, the international community has a responsibility to act in its place.

10. In practical terms, the conclusions set out in that report constitute nothing less than a redefinition of sovereignty and the general principles of international law, and an intention to legitimize intervention as a norm and principle of law in international relations.

11. The architects of the Proliferation Security Initiative are trying to outline another “new standard of conduct” for States, which like the so-called “responsibility to protect” blatantly dismisses State sovereignty. In this case, the “new doctrine” would involve States’ “duty or responsibility to prevent” in the present international order.

12. Both the “responsibility to protect” and the “duty to prevent” start from the same premise: that the norms on the use of force and other principles set out in the Charter of the United Nations are inadequate, or not relevant in the current system of international relations, because they correspond to the system established in 1945 after the Second World War. It is therefore necessary to update or modify them, in the thinking of the main proponents of these “doctrines”.

13. The Initiative, moreover, is fully consistent with the political and military doctrine designed by the Bush Administration and complements its new National Security Strategy,¹ centred on the preventive-strike doctrine, as well as its new

¹ Signed by the United States President on 17 September 2002.

National Strategy to Combat Weapons of Mass Destruction.² These two new strategies alter the doctrine that prevailed until now, based on dissuasion and restraint, and give priority to the concept of offensive measures against States or “hostile groups”, including preventive strikes, in clear violation of the principles of international law and of the Charter of the United Nations.

14. In practice, the Initiative poses a serious threat to multilateralism, cooperation and control in the area of non-proliferation of weapons of mass destruction, as defined in the multilateral legal framework of the existing treaties in the field, including the Treaty on the Non-Proliferation of Nuclear Weapons, and in the mandates of the relevant international organizations such as the International Atomic Energy Agency, which all have wide international recognition.

The United Nations Convention on the Law of the Sea

15. The ultimate objective of the Proliferation Security Initiative is clearly to change the international norms and practices for the interception of vessels transporting weapons of mass destruction, by creating a new legal regime expanding them.

16. There would be absolutely no guarantee that the prerogatives the Initiative participants have arrogated to themselves would not be manipulated, particularly by States with greater military power, in order to act abusively against vessels and aircraft of other States for a variety of reasons.

17. The Initiative could be invoked to authorize acts that are in clear violation of key provisions of the United Nations Convention on the Law of the Sea. PSI participants would be hard put to apply some of their principles without violating the following articles of the Convention:

(a) Article 19 recognizes the right of innocent passage of ships through the territorial waters of a State and lists the specific activities which would cause the passage of a foreign ship to be considered prejudicial to the peace, good order or security of the coastal State in question. Included in that list is any threat or use of a force or threat against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State;

(b) Article 23 allows nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to exercise the right of innocent passage through the territorial sea, specifying that they must carry documents and observe special precautionary measures established for such ships by international agreements;

(c) Article 38 recognizes the right of transit passage of all ships and aircraft in straits which are used for international navigation;

(d) Article 32 recognizes further the immunities of warships and other government ships operated for non-commercial purposes;

² Adopted on 10 December 2002.

(e) With respect to the jurisdictional regime for the high seas, article 92 establishes clearly that in the high seas ships are subject to the exclusive jurisdiction of the flag State. Only that State could authorize PSI participants to stop and search a vessel flying its flag;

(f) Articles 99 to 109 of the Convention enumerate illicit activities on the high seas (transport of slaves, piracy, which States must cooperate to repress, the illicit traffic in narcotic drugs or psychotropic substances, unauthorized broadcasting from the high seas). Those exceptions aside, article 87 sets out the principle of the freedom of the high seas.

III. Security Council resolution 1540 (2004)

18. The Security Council's adoption of this resolution is an obvious attempt to legitimize the Proliferation Security Initiative. Paragraph 10 is ambiguous enough to be manipulated by some States and allow them to invoke it to assert that the Council has legitimized this dangerous Initiative, which, as we have argued earlier, is in clear violation of basic principles of international law and of the Charter of the Organization itself, as well as of the United Nations Convention on the Law of the Sea.

19. Furthermore, resolution 1540 (2004) is, like the Initiative, yet another decision prompted by the selective approach and double standards applied at the behest of the United States and its principal allies in addressing questions relating to disarmament, non-proliferation and arms control. It is an approach that gives priority to combating horizontal proliferation and ignores the concerns raised by vertical proliferation as well as the fact that the only guarantee against allowing weapons of mass destruction to fall into the hands of terrorists would be to prohibit and eliminate such weapons entirely.

20. It is extremely dangerous to have framed the operative part of the resolution under the aegis of Chapter VII of the Charter of the United Nations. That gives free rein to the most powerful States, and the United States in particular, to manipulate the Security Council and bring before it, as a threat to international peace and security, any incident or country which they, with their selective, discriminatory approach and their double standards, deem to be promoting the proliferation of weapons of mass destruction or related acts of terrorism. The Council would then be obliged to take steps or make recommendations to maintain or re-establish international peace and security, including the possible use of force under Article 42.

21. Cuba rejects the arbitrary manipulation or interpretation of resolution 1540 (2004). In that context, it rejects any use of the resolution as pre-authorization for the unilateral use of force by any country against specific "non-State actors", or against States in which such actors are present.

22. Furthermore, Cuba believes that this resolution has granted to the Security Council prerogatives and functions in the sphere of disarmament, non-proliferation and arms control which are not appropriate to it and should be exercised only in the context of legally binding international treaties and agreements, negotiated at the multilateral level, which establish equal legal obligations for all States. Such obligations should not be created for States Members of the United Nations without

their full participation and sovereign acceptance through signature and ratification. In that regard, it is very disturbing that the Security Council, with its limited membership, has adopted a resolution on a subject that should continue to be addressed at the international forums that specialize in disarmament, non-proliferation and arms control.

23. The formation of a Security Council Committee under this resolution would seem to imply the establishment of a separate non-proliferation regime which would erode and could even, in practice, replace the role and functions of the treaty regimes and international organizations existing in this area.

24. The scope of the resolution adopted is equally disturbing. Although its main proponents have insisted that it is directed against so-called “non-State actors”, in reality it goes beyond the stated objective of preventing them from acquiring weapons of mass destruction, their means of delivery or related materials. In various parts of the text reference is made to international treaties and agreements that States have adopted in this sphere, and States are enjoined to enforce them fully.

IV. How to deal with the problem of terrorism and its links with weapons of mass destruction. Position of Cuba.

25. Cuba firmly supports general and complete disarmament under strict international control and, in particular, supports the total elimination of nuclear weapons and all weapons of mass destruction, aware of the danger posed by their very existence to all mankind.

26. Cuba shares the concern about the risk of links between terrorism and weapons of mass destruction and fully supports all legitimate international efforts to prevent terrorists from acquiring such weapons and their means of delivery.

27. However, this threat cannot be confronted through a selective and discriminatory approach limited to combating horizontal proliferation and ignoring vertical proliferation, specifically the qualitative improvement of nuclear weapons on the part of nuclear-weapon States, and disarmament, which must have the objective of the total elimination of weapons of mass destruction.

28. Cuba is in favour of the establishment and strengthening of an international coalition of all States against the use of weapons of mass destruction by terrorists, but this effort must be carried out under two basic conditions:

(a) This threat must be confronted through international cooperation, within the framework of the United Nations and relevant international treaties;

(b) The question of proliferation in all its aspects must be resolved by political and diplomatic means, within the framework of international law, including the Charter of the United Nations.

29. Cuba reiterates that the prohibition and total elimination of weapons of mass destruction, including nuclear weapons, is the only guarantee that such weapons will not fall into the hands of terrorists. In that context, nuclear-weapon States have an obligation, under article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and together with the other States parties to the Treaty, to hold negotiations to achieve nuclear disarmament.

30. Cuba has always maintained that the isolated application of the principle of non-proliferation is inadequate to eliminate nuclear weapons. Only a systematic approach, also including components of disarmament, verification, assistance and cooperation, will be able to guarantee the total elimination of nuclear weapons. Cuba is prepared to initiate negotiations immediately on a multilateral convention which would apply this concept and believes that the Conference on Disarmament, as the only multilateral negotiating forum in the area of disarmament, is the appropriate framework for carrying them out.

31. Furthermore, Cuba believes that the States parties to the various legal instruments in force should take advantage of the review processes for these instruments to reaffirm their commitment to adopt all necessary measures at the national level to prevent terrorists from obtaining weapons of mass destruction and the materials and technologies needed for their manufacture. In this respect, the seventh review conference of the Treaty on the Non-Proliferation of Nuclear Weapons is an ideal framework for taking up concerns about the link between terrorism and nuclear weapons and deciding collectively on measures to be taken to deal with them.

32. Other types of initiatives, such as the Proliferation Security Initiative, which tries to impose a mechanism of selective, non-transparent composition and would operate outside the bounds of international law, only undermine multilateralism and international cooperation and are designed to dismantle and replace existing international treaties in the area of disarmament, arms control and non-proliferation to which most States of the world are parties.

33. Cuba is firmly convinced that respect for the principles of international law and the Charter of the United Nations is the only viable guarantee of international peace and security. The world must be governed by a system of collective security based on cooperation that can provide full guarantees for all.

Annex

Principles included in the Paris Statement of Interdiction Principles, adopted by the countries participating in the Proliferation Security Initiative

1. Undertake effective measures for interdicting the transfer or transport of weapons of mass destruction, their delivery systems and related materials to and from States and non-State actors of proliferation concern which are therefore subject to interdiction. These are:

(a) Those which try to develop or acquire chemical, biological or nuclear weapons and delivery systems;

(b) Those which in any way transfer weapons of mass destruction, their delivery systems or related materials.

2. Adopt procedures for the rapid exchange of information concerning proliferation activity.

3. Strengthen national legal authorities where necessary to accomplish the objectives of the Proliferation Security Initiative.

4. Take specific action in support of interdiction efforts regarding cargoes of weapons of mass destruction, their delivery systems or related materials, 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) On their own initiative or at the request of another State, 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 any such cargoes that are identified.

(c) To seriously consider giving consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other States, and to the seizure of such weapons of mass destruction 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 vessels that are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern and to seize any such cargoes that are identified; and (2) to impose 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.

On their own initiative or at the request of another State, to (1) 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; (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.