

Legal Issues : Proliferation Security Initiative (PSI) and Regional Maritime Security Initiative (RMSI)

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Proliferation Security Initiative (PSI) aims to combat proliferation activities to ensure that weapons of mass destruction (WMD) are not passed on to terrorist groups or their state sponsors. The initiative is a part of overall doctrine of integrated strategy of norms, treaties and coercion to keep the WMD threat in check.¹ It strives for international legitimacy for promulgation of norms and regimes and coercive measures to enforce discipline.² The avowed objective of the Initiative is to "prepare for searching planes and ships, trains and trucks carrying suspected cargo and to seize weapons or missile shipments that raise proliferation concerns".³ The activity is operationally focused. It is not a theoretical exercise aimed at moulding public opinion. The aim is to conduct interdiction of WMD trafficking at sea, in the air and on land. Such an initiative has been tried out with an expectation that it would emerge as a new tool for addressing non proliferation.

The ground work for PSI envisages development of military and law enforcement capabilities and preparation for interdiction after gathering real time intelligence. It strives to attract new and stronger action by the international community. Success of PSI would require total integration of legal, diplomatic, economic, military and other tools. What is the importance of legal aspects? According to the US Under Secretary of State John Bolton, "..... PSI interdiction efforts rest on existing domestic and international authorities. The national legal authorities of each participant will allow us to act together in a flexible manner, ensuring actions are taken by participants with the most robust authorities in any given case".⁴ PSI is expected to complement other non proliferation mechanisms like Missile Technology Control Regime (MTCR) and Non Proliferation Treaty (NPT).

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The Indian Government may, at some time in the future, wish to take a position on the PSI. It may decide whether it is in its interest to join the initiative or steer clear of it. For a thorough evaluation, it would be necessary to examine what would be the relevant legal rationale to assist Indian participation in such an Initiative in a robust and effective manner. An appraisal of the national legal framework would be needed to evaluate its adequacy. What is its legitimacy in international law? Would use of coercive means or non-consensual steps be legally defensible? Are there any gaps that should be filled either through national legislation or policy or international action to join the Initiative? Such a study would require a close look at the constitutional, statutory and judicial provisions.

The nature of PSI pre-supposes use of legal framework under established domestic law and its translation into a bold and legally sustainable use to deal with proliferation. Would the Indian legal system permit its membership? The Constitution of India (1950) has incorporated a number of provisions that contain guiding mandate and enabling mechanism in this regard. Articles 51(a) and (c) pertain to promotion of international peace and security.⁵ The connotation of 'security' is not limited to internal safety. The use of word 'security' is not to be given a narrow meaning as it indicates demonstrated concern for security aspects viewed in the global context. Article 253 relates to legislation for giving effect to international agreements.⁶ The same, therefore, presents requisite constitutional framework to attain the desired purpose.

The legislative competence of the Indian Parliament to enact suitable laws in this regard emanates from a combined mandate of entries to List I of the Seventh Schedule to the Constitution with regard to which the Union Parliament has full and exclusive power to legislate.⁷ Their cumulative potency would facilitate acceptance of the Initiative and drawing of necessary legal instruments relating to WMD search and seizures, recourse to preventive measures and international co-operation.

Penal Provisions

Section 2 of the Indian Penal Code (IPC) deals with the intra territorial operation of the Code. It makes the IPC universal in its

application to all parts of India.⁸ Every person is made liable to punishment, without distinction of nation, rank, caste or creed, provided the offence with which he is charged has been committed in some part of India.

Sections 3 and 4 of the Code⁹ deal with any person liable by any Indian law to be tried for an offence committed beyond India. It does not deal with the power of the Indian police to investigate a crime committed outside India. They apply to offenders of Indian nationality committing offence beyond India.

Legislative Competence

Any executive intention showing domestic resolve to join the Initiative would need to take into account available legislative sanctions. There are a number of existing statutes which would govern different aspects concerning PSI. Firstly, Export Control Regime in India is based on Foreign Trade (Development and Regulation) Act, 1992. Section 3(2) of the said Act empowers the Central Government to make provisions for prohibiting, restricting or otherwise regulating the import or export of goods. The definition of 'goods' is not restrictive in approach. The Act contains flexibility to facilitate national export controls and enforcement measures. This may also be applicable to deal with any illegal consignment.

Prevention of Terrorism Act, 2002 (POTA) enacted by the Indian Parliament incorporated a number of significant provisions which would assume significance in the context of PSI. It has a territorial as well as extra territorial application. Its provisions apply not only to the Indian citizens outside India but also to "persons on ships and aircraft registered in India, wherever they may be". Secondly, the definition of a terrorist act is quite elaborate and includes use of lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature. Those using bombs and WMD with the intent of threatening the unity and integrity of the nation can be booked under this law (Section 4). It makes possession of explosive substances or other lethal weapons capable of mass destruction a terrorist act punishable with imprisonment that may extend to life term. Membership of an association declared as

'unlawful' under "Unlawful Activities (Prevention) Act, 1967" would also be treated as a terrorist act. So would be the act of raising funds intended for the purpose of terrorism. Further Section 8 of the POTA provides for forfeiture of proceeds of terrorism. Chapter V of the Statute deals with interception of wire, electronic or oral communication. However, It is to be noted that POTA is meant to punish terrorists and cannot prevent terrorist activity. The Government of India has decided in principle to repeal POTA. Some of its provisions are expected to find place in the Unlawful Activities Prevention Act.

The Atomic Energy Act, 1962 (33 of 1962) came into force on 21 September 1962. Its provisions too, would, be applicable in certain situations in the context of PSI. The preamble of the Act records its resolve for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith. It equips the Central Government with power to obtain information regarding materials, plant or processes (Section 7) and power of entry and inspection (Section 8). The Government is invested with the authority to prohibit the manufacture, possession, use, transfer by sale or otherwise, export and import and in an emergency transport, and disposal of radio active substances (Section 16). The Central Government is empowered to exercise control over production and use of atomic energy (Section 14).

The geographical location of India indicates its importance in relation to proliferation pathways. A decision to join such an Initiative would warrant a careful examination of strategic, legal and political aspects before a wholesome position can be taken as to its objective and modalities of implementation. Are there significant gaps to be found in the legal and institutional framework to combat proliferation regimes? The available information as of now shows a few grey areas necessitating further exchange of views. A number of relevant questions emerge about the credibility of the PSI, legality of its operations and modalities of its implementation.¹⁰

A doubt arises whether the charter of PSI states a clear and persuasive aim? Is there a commonly accepted definition of WMD and the items that may be classified as raw materials or components

and spare parts? This may be necessary lest a surgeon's knife is confiscated as a lethal dagger! Secondly, there could be situations where such material being transported and targetted for interception may have been intended for bonafide and genuine non criminal use. How would such complex contingencies be taken care of? Dual use commerce could be mistaken as shipments of WMD components even if they are being traded purely for a civilian use. It would be necessary to carefully articulate guidelines affording objective conclusions whether or not the shipment is meant for harmless use.

The Initiative is expected to target "would be proliferators". The document is ambiguous on the question of who all fall in this category, i.e. whether state or non-state actors? A valid criteria is to be evolved at the operational level to prompt raising of a suspicious finger at such potential proliferators. Otherwise the basis on which the PSI members arrive at a finding about the proliferators may appear to be based on arbitrariness. The yardstick for "reasonable suspicion" should be so postulated as to be incapable of misuse.

What is the legal sanctity for the proposed action? As far as high seas are concerned, ships can be interdicted only after authorisation from either the Security Council or the General Assembly. United Nation Convention on the Law of the Sea (UNCLOS) Articles 92 and 110 may be attracted to effect non consensual boardings in the event of stateless vessels, or with regard to universal crimes such as piracy or slave trade.¹¹ While Article 92 pertains to 'Status of Ships', Article 110 enumerates reasonable grounds for suspicion that validate a 'right of visit'.¹² The process of interdiction as envisaged should be tested on the legal crucible of reasonable suspicion. The policeman's role on the high seas should be attempted only if it is consistent with domestic and international laws. There may not be any objection if a ship is intercepted with the consent of flag state or if it is a stateless vessel. Such an action would also be justifiable in case of universal crimes or in the contingency of self defence or as a matter of belligerent right. Care needs to be taken that any abortive mission in the shape of non-consensual boarding does not invite

international censure as being unaccountable action revealing high-handed attitude.

The international community in the past has been reluctant to confront the proliferation of WMD to and from Pakistan. The acceptance of an innovative and pragmatic Initiative would depend greatly upon the transparency and sincerity of its purpose. Viewed in that light, it may not appear quite convincing that one proliferator is proposed to be dealt "politically and diplomatically" whereas another party is to be tackled by "military intervention". The foundation of nuclear containment would be shaky if the logic of non-proliferation is kept separated from the logic of disarmament. Norms and criteria of intervention should be indiscriminately applied to all cases without double standards of politicisation.

Under Indian domestic law search and seizure operations undertaken as part of law enforcement incorporate effective safeguards and appeal provisions. Such provisions would need to be crafted for the proposed interdiction activity.

The statement of interdiction principles views proliferation of all WMD as a threat to international peace and security. Counter measures against the threat of nuclear terrorism is one of the main challenges before the International Atomic Energy Agency (IAEA). It would, therefore, be logical that the Initiative should attempt at greater legitimacy by striving to secure the United Nations (UN) backing. It may be safe to adhere to the view that "there is still no substitute for the UN as a font of international authority and legitimacy".¹³

The Initiative principles encompass interception within national territories or airspace. This would be particularly significant in relation to those countries whose domestic laws do not cater for such interception. Actions may also be taken by port states in internal waters or by coastal states in territorial waters.

Additional protocols developed for the IAEA present a very intrusive arrangement which a sovereign state may not be enthusiastic to agree. There could be cogent reasons for apprehensions. For example, in a situation where a ship of

proliferation concern is unwilling to give consent for search leading to a decision for interdiction by use of military means with consequential physical injury, would the laws of war be applicable? There could be instances of the resistance offered in such contingencies. Would the principles of use of proportionality and command responsibility be attracted?

Despite various imperfections and unanswered questions, the very fact that PSI has been launched and combined exercises have been held at different locations signals a new determination to combat proliferation menace. Moreover, the acceptance by some countries is demonstrative of a return to multilateralism to deal with the problem.

The former Indian Prime Minister, Mr Atal Behari Vajpayee, was of the view, "In order to combat the proliferation of weapons of mass destruction, relevant laws, regulations and procedures will be strengthened, and measures to increase bilateral and international cooperation in this area will be employed. These joint efforts will be undertaken in accordance with our respective national laws and international obligation".¹⁴

Regional Maritime Security Initiative

Reservations and gaps in PSI have led to introduction of a new concept in the form of Regional Maritime Security Initiative (RMSI). The goal of RMSI is "to develop a partnership of willing regional nations with varying capabilities and capacities to identify, monitor and intercept transnational maritime threats under existing international and domestic laws".¹⁵ This collective effort will empower each participating nation with timely information and capabilities it needs to act against maritime threats in its own territorial seas. Enhanced situational awareness is expected to speed-up the process of international decision making facilitating maritime interdiction. RMSI may also be employed as a law enforcement effort directed against transnational criminal offences like drug trafficking, illicit trade in small arms, human slave trade and money laundering attempts etc which all have a close nexus with global terrorism.

The differences between PSI and RMSI are noticeable. The two are related but the PSI is a global effort to contain proliferation of WMD and their delivery systems. PSI does not address other transnational threats. Regional co-operation proposed by the RMSI will hopefully emerge as an effective tool to create secure environment and simultaneously present workable legal answers to criminal designs of dangerous non state actors. Due care will be needed to devise appropriate legal form for the new arrangement. In the words of Sir Nicholas Goodison, "Law cannot reach where enforcement cannot follow".¹⁶

End Notes and References

1. PSI was announced by President George W Bush on 31 May 2003 in Krakow, Poland. A number of countries have joined the PSI.
2. Editorial, *USI Journal*, January-March 2004.
3. K Subramanyam, 'US Security Initiative : An invitation India cannot Turn Down'; *Times of India*, 13 October 2003.
4. US Under Secretary of State John Bolton's remarks at the Institute for Foreign Policy Analysis Conference in Washington, DC, 2 December 2003.
5. Relevant extracts of Article 51. "The State shall endeavour to -
 - (a) Promote international peace and security.
 - (b) xxx
 - (c) Foster respect for international law and treaty obligations in the dealings of organised people with one another.
 - (d) xxx
6. Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.
7. Relevant entries from List I of the VII Schedule to the Constitution in this regard are:-

1. Defence of India and every part thereof
- 2 to 5. xxxxx
6. Atomic energy and mineral resources necessary for its production.
- 7 and 8. xxx
9. Preventive detention for reason connected with defence, foreign affairs, or the security of India, persons subjected to such detention.
10. Foreign affairs, all matters which bring the Union into relations with any foreign country.
- 11 and 12. xxx
13. Participation in international conferences, associations and other bodies and implementation of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
- 15 to 17. xxxx
18. Extradition.
19. Admission into, and immigration and expulsion from India,

20. xxx
21. Piracies and crimes committed on the high seas or in the air;-----
8. **Section 2.** Every person shall be liable to punishment under this Code, and not otherwise for every act or omission contrary to the provision thereof, of which he shall be guilty within India.
9. **Section 3.** Any person liable, by any Indian Law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

Section 4. The provisions of this code apply also to any offence committed by:-

- (1) any citizen of India in any place without and beyond India;
- (2) any person on any ship or aircraft registered in India wherever it may be.

10. C Raja Mohan, *The Hindu*, New Delhi, 6 October 2003.

11. The USA is not a signatory to the UNCLOS.

12. **Status of ships.** Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in port of call, save in the case of a real transfer of ownership or change of registry.

A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect of any other state, and may be assimilated to a ship without nationality.

Right of visit. (1) Except where acts of interference derive from powers conferred by the treaty, warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that :

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorised broadcasting and the flag state of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

(2) In the cases provided for in Paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this

end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

(3) If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

(4) These provisions apply mutatis mutandis to military aircraft.

(5) These provisions also apply to any other duly authorised ships or aircraft clearly marked and identifiable as being on government service.

13. Ramesh Thakur, 'The United Nations and the Three Pillars of Arms Control : Norms, Treaties and Coercion', *USI Journal*, January-March 2004, p.6.
14. Shri Atal Behari Vajpayee, 'Next Steps in Strategic Partnership with USA', 13 January 2004, *Strategic Digest*, February 2004, p.115.
15. Thomas B Fargo, Admiral, Commander US Pacific Command in his keynote address at the 17th Annual International Military Operations and Law Conference held at Victoria, BC, Canada from 3-6 May 2004.
16. *The Times*, 16 January 1986.