



# National Security Law Report

## THE ROLE OF THE MILITARY IN SECURING THE HOMELAND:

### A McCormick Tribune Foundation Cantigny Conference Series Post-Conference Report

#### Executive Summary

On June 25–27, 2003, a group of experts from local, state, and national levels of law enforcement, emergency response, public health, military, academia, and other fields met at the Cantigny Conference Center in Wheaton, Illinois, to discuss the role of the military in homeland security. The McCormick Tribune Foundation sponsored the conference, which was organized by the American Bar Association Standing Committee on Law and National Security and the National Strategy Forum. Participants raised issues, rather than proposing specific recommendations. There was broad agreement on some issues and differing opinions on others. This conference report synthesizes the issues discussed. The main themes of the conference include the following:

- The government’s preparations to counter terrorism, within and across agencies are changing. While different agencies addressed the issue long before September 11, the terrorist attacks of that day set off a new round of reactions, including the creation of the new NORTHCOM command. The role of the National Guard and Reserve Components, in particular, is in flux.
- There was disagreement over the role of the Department of Defense (DoD) in the domestic response to terrorism. Some participants, citing the widespread public support for DoD and its significant resources, argued for a more

visible and vigorous effort by DoD to lead preparedness, such as enhancing surge capacity in hospitals. Others, largely from within the Department of Defense, thought that the best way to maintain support for DoD would be to refrain from an active role in domestic affairs.

- It is important to gain and maintain public support for government action in the wake of a terrorist attack. The best way to obtain this support is to have a clear and consistent message, delivered by trusted communicators, and to make any restrictions on people’s movement voluntary to the greatest extent possible.
- There is a need for regular and consistent coordination among agencies. During a crisis, many legal, logistical, jurisdictional, and personnel issues will arise. Those issues will be easier to resolve if the decision-makers have met one another and worked together previously and have a clear chain of command. Cooperation among agencies is essential in terrorism prevention.
- During many of the incidents discussed at the conference, people and institutions acted effectively under emergency circumstances. From the actions of the public in New York City following September 11, to the calm in Toronto and Ontario during the SARS crisis, to the professionalism of the Mississippi National Guard during an anti-integration riot, discipline and cooperation prevailed when panic and resentment might have been occurred.

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#### The Appropriate Role of the Department of Defense

Some participants, generally from outside of the Department of Defense, advocated a more active role for DoD in homeland security. They argued that the military possesses unique capabilities and commands great respect from the public. In response, advocates of a limited DoD mission argued that funding for DoD is specifically delineated. Any new mission would detract from other missions and, if done without

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authorization, would be illegal. In addition, they maintained that part of the reason the public holds the military in such high regard is that it stays out of day to day domestic affairs. When Marines assigned to guard the US border with Mexico mistakenly shot and killed a young man, local reaction against the military was harsh.

There was general agreement that "all terrorism incidents are local." This means that local authorities—fire, law enforcement, emergency management, public health, agriculture and even veterinary authorities—will be responsible for the immediate response to a terrorist incident and will have the best chance to reduce its impact. The DoD can play a secondary, supporting role, including employment of WMD civil support teams. Some participants recommended that DoD simplify its terminology in order to facilitate interaction with first responders. The Gilmore Commission called for a review of the statutory authority of DoD and its relationship to local and state authorities. Coordination between different agencies at different levels requires advance preparation and exercises.

There was general agreement that following a high magnitude catastrophic incident, such as the decimation of a region, the president would use his Article II authority to reconstitute government in the area. Some argued that it is government's obligation to plan for the unthinkable, and that the public will expect the government to be fully prepared for a terrorism incident. Some participants argued that the Constitution Article I, Section 8 supports use of the military in extraordinary circumstances. The use of Title 32 or Title 10 is a question of policy, not legality, numerous participants said.

DoD activities include routine, temporary, emergency, and extraordinary operations, aimed at deterrence, prevention, and defeat of threats. As the intensity increases, so does the impact on other activities. Routine and temporary activities are relatively easy to plan for. Under the Stafford Act, DoD can assist in an emergency, but it must be subsequently reimbursed. Generally, it is DoD's logistical resources that would be required following a large scale incident.

The structure of the relationships among new and old institutions is being sorted out. DoD is shifting its focus from a threat-based organization to a capabilities-based organization. This change in strategy was criticized as misguided by some participants.

Homeland security and homeland defense are not synonyms. Homeland security is defined as a national effort to prevent terrorist attacks within the US, reduce vulnerability, and maximize ability to respond to an attack. Homeland defense is the protection of US territory, population, and critical defense infrastructure from external threats and aggression.

Representatives of DoD stressed the distinction between these two activities.

One participant called for greater disclosure and explanation by the military in cases requiring domestic support, citing assistance during the recent Washington, D.C. area sniper case as an example of marginally justified activity. One DoD representative said that his main concern in domestic response to terrorism would be a lack of adequate training of military personnel for the exigencies that may occur.

## NORTHCOM

The new NORTHCOM Regional Command was instituted after September 11 to unify land, maritime, and air defense within North America. The Command area ranges from the Bering Strait to the Virgin Islands, including Mexico and Canada. It is similar to other Commands, with the additional mission of providing support to civil authorities.

NORTHCOM's relationship with the Department of Homeland Security (DHS) runs through DoD. A DoD representative noted that NORTHCOM is not intended, and lacks the capacity, to encroach on the role of local first responders. This relationship is governed by the Federal Emergency Response Plan. Military assistance is provided only when requested and directed. NORTHCOM and NORAD share a commander. Some participants raised the possibility that NORTHCOM may need apportioned forces and a full set of rules of engagement to clarify the military's authority in homeland defense or in support of civilian agencies.

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The Posse Comitatus Act of 1878 prohibits the use of the military for law enforcement purposes. There is a deep and enduring aversion to military involvement in domestic affairs. However, the exceptions are quite broad. Participants suggested that clear definitions of the rules of engagement of domestic missions for the military are needed.

Some participants noted that both liberal and conservative groups are sensitive to the possibility of the use of the military in domestic law enforcement. Even when experts and policymakers favor military involvement in domestic affairs, there is the risk of negative public opinion. A law enforcement representative called for an expanded DoD role in joint task forces because of the department's unique capabilities abroad. In response, a participant from DoD cited restrictions on such involvement.

Likely uses of military support under Title 10 or Title 32 include suppression of civil unrest, surveillance of drug routes, interdiction of smuggling, and augmentation of law enforcement in border security. Though their authority is broad under the Constitution and court decisions involving the Posse Comitatus Act, there is minimal understanding by law enforcement administrators and senior military commanders of Posse Comitatus legal precedents. There was concern expressed that the war on terrorism could "completely vitiate Posse Comitatus" if domestic operations such as the detention of suspected terrorist Jose Padilla are considered to be military operations.

### **Joint Forces Command**

The Chairman of the Joint Chiefs of Staff, who is the principal military advisor to the President, Secretary of Defense, and the National Security Council, is required to be involved in homeland security. The Chairman of the Joint Chiefs of Staff can provide input from the military services, Reserves, National Guard, and from the combat commands. In reviewing a request for DoD support, the Chairman and his staff review the legal issues involved, any threat of lethality, and the financial and readiness cost.

The Joint Forces Command played an immediate and ongoing role in land, sea, and air response to September 11. On that day the Joint Forces Command Crisis Action Team provided fighter aircraft capability to the NORAD commander. Liaison officers were sent to New York, where the New York State and city authorities had primary responsibility. The military had only a marginal role in responding.

The Coast Guard is an armed force at all times under Title 14. In its day-to-day operations, it serves as a federal law enforcement agency under DHS. It has not been placed under DoD for ongoing operations since September 11. One military representative stated that existing legal authorities under the Ports and Waterways Safety Act and other statutes enable the Coast Guard to provide port and maritime security.

Before September 11 local and private authorities were responsible for airport security. Immediately after the terrorist

attacks, the National Guard was responsible for airport security for a limited time under Title 32 authority. Now, the Transportation Security Administration manages airport security as a federal mission.

For border security, the DoD detailed personnel to the Immigration and Naturalization Services to meet temporary requirements for additional personnel. This was done to avoid violating the Posse Comitatus Act, which restricts the use of DoD personnel in domestic security. Some participants suggested that this fiction was unnecessary because of the broad exceptions in the Posse Comitatus Act.

### **Agency Liaison**

There is a need for preparation, planning, and prior communication among various departments and levels of government. Programs such as Los Angeles' Terrorism Early Warning Group and Joint Terrorism Task Forces that encourage preparation and intelligence sharing among police, fire, health departments, the National Guard, federal law enforcement, and other agencies have been successful. These groups need to meet frequently to maximize their usefulness. Preparation and cross-agency communication also allows resource sharing. In the 1992 Los Angeles riots, it took several days for command and control issues to be resolved. Only recently have governors begun to receive secret level information from federal agencies. The FBI has been criticized also for limited sharing of information; some maintained that this is due to the Bureau's tendency to verify information as much as possible before disseminating it to the agencies.

There are important restrictions regarding the privacy of medical records. The dissemination of medical records to public health and law enforcement agencies, which would be the primary users in a catastrophic incident, raises complex issues. However, limited dissemination of medical records after a declared health emergency is authorized by law. The reciprocal is that public health and law enforcement activities require real-time intelligence information in the event of a catastrophic terrorism incident.

The Centers for Disease Control and Prevention is educating state and local agencies on forensic epidemiology and bringing together law enforcement and public health experts to examine ways in which law enforcement and public health may take the lead in educating lawyers and the public regarding legal issues affecting the general public in the event of a catastrophic terrorism incident.

When an incident requires a variety of responders, such as public health, first responders, emergency management, the military, and law enforcement, there will be many conflicting jurisdictional issues that should be resolved before a terrorist incident.

Public health is a police power, and the Tenth Amendment reserves police power functions to the states. Unfortunately,

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many states have anachronistic laws that are not designed for a catastrophic terrorism incident, although some have recently adopted model state health emergency laws.

First responders argued that assistance from DoD is essential for surge capacity and logistics during a crisis, and for research and development before a crisis. Training, planning, and predeployment are necessary to prepare for chemical and bio-terrorism incidents. Liaison with DoD is important because first responders know what assets may be required and what assets the military may provide in a crisis. Many first responders are facing budget cuts due to state budget crises.

The Navy's Emergency Preparedness Liaison Officer Program advises states regarding available military assets. The National Interagency Civilian Military Institute, a National Guard field operation agency, brings together and educates key players in a geographical area and coordinates response regarding best practices in consequence management.

Because of recent pressures for profitability, surge capacity at hospitals is extremely low. Hospital CEOs expect the military to provide assistance in the event of a crisis. DHS may use its funds for training hospital personnel.

### National Guard and Reserve Components

DoD is developing a concept of operations that supports the efforts of lead federal agencies, such as DHS and the Department of Health and Human Services, and state governments. DoD response includes:

1. DoD has funds that are available for state planning projects. Incidents that require direct action by state governors for man-made or natural emergencies involving the National Guard troops and federal assets may be reimbursed by the lead federal agency if the Stafford Act is invoked.
2. If events might require DoD involvement and it is likely and desirable for state governors to plan and conduct operations, DoD may provide planning, training, and equipment funds. Governors provide state funds with potential reimbursement under the Stafford Act.
3. The same situation exists as described in number two, but the purposes are preventive and anticipatory; e.g., airport security, counter-drug, border security, and critical infrastructure protection. Governors may conduct operations under federal guidelines with funding from DoD or an appropriate lead federal agency.
4. If events require direct DoD action/intervention, then appropriate National Guard/Reserve Command forces are: (a) placed in a high alert status with appropriate

state/federal agreements, (b) planning, training, equipping funds are provided by DoD, and (c) operations are conducted and funded under DoD chain of command.

The 35-year old Operation Garden Plot maintains an active duty reaction force and authorizes federal funds for states to plan, equip, and exercise forces for use under the Governor's control. Participants called for a newly defined relationship between the Guard and Reserve within each state.

Today, thousands of Guard troops are stationed abroad. Last year, the National Guard provided more than three million man-days of combat, combat support and combat service support in more than 85 nations around the world. Currently, military forces are operating at a high operational tempo, which has had an adverse effect on manning, recruitment, and retention. National Guard and Reserve support is especially useful in addressing bio-terrorism threats because of their expertise and equipment.

The National Guard deploys to overseas combat theaters to join regular Army and Army Reserve units in direct action. Guard units remaining in the United States will constitute an important strategic reserve in the event of new hostilities around the globe. The Guard will continue to play a large role in homeland security by protecting critical infrastructure assets and participating in consequence management.

A key way in which the Guard can provide assistance is as a partner with industry and universities within the existing infrastructure. Some groups have advocated a "coalition of the willing" among states that want to join a regional structure and offer their Guard for federal purposes defined in Title 32. This would be coordinated with NORTHCOM.

### Role of the Public

In September 1962, two thousand white civilians rioted to prevent the integration of the University of Mississippi. In response, President Kennedy federalized the Mississippi National Guard and invoked the Insurrection Act, Title 10 Section 332. Twenty thousand regular Army troops and 11,000 National Guard were deployed. Mississippi National Guard members all reported despite their dislike for integration. The federal troops were able to move in quickly to restore order. Prior education of the public and the media regarding federal authority was cited as a key factor in avoiding more widespread disturbance.

This incident demonstrated the role of a federal military force in promoting public objectives. Still, there is widespread suspicion of federal agencies. Polls show that many more people trust local officials than federal officials. Planning for response to terrorism must account for how the general public will react to various government actions and its concerns during a crisis.

## THE PROLIFERATION SECURITY INITIATIVE AND WMD INTERDICTION ON THE HIGH SEAS

*Robert M. Chesney*

### The Interdiction Dilemma

In late 2002, United States officials learned that an unflagged merchant vessel – the *So San* – had left the North Korean port of Nampo bearing suspicious cargo, heading west toward an unknown destination. The *So San* eventually was intercepted on the high seas some 600 miles off the coast of Yemen by the Spanish frigate *Navarra*, part of the international coalition patrolling the Arabian Sea in search of fleeing members of Al Qaeda and the Taliban. Spanish troops boarded the *So San* by helicopter after it attempted to flee, and with the assistance of U.S. personnel eventually discovered 15 Scud missiles and 24 tanks of rocket fuel additive hidden beneath the *So San*'s declared cargo of cement. The interdiction appeared at first blush to be a rousing counterproliferation success, but there was a catch – the missiles had been legally purchased from North Korea by the government of Yemen. Press Secretary Ari Fleischer accordingly explained that “[w]hile there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. And therefore, the merchant vessel is being released.”

The timing was remarkable. That very day, the White House released the National Strategy to Combat Weapons of Mass Destruction, a policy paper identifying proliferation as a grave threat to U.S. national security. According to the National Strategy, interdiction is a “critical part of the U.S. strategy to combat WMD and their delivery means.” But the *So San* incident dramatically illustrates an important limitation on interdiction as a tool of counterproliferation policy: decisionmakers may be reluctant to use the interdiction option if they lack plausible authority under international law to stop and search the target and to seize dangerous cargo discovered as a result.

### Response: The Proliferation Security Initiative

This dilemma has not gone unnoticed. Speaking in Krakow in May 2003, President Bush surprised many observers by declaring a new counterproliferation initiative:

“When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies . . . have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as

possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.”

Since that announcement, ten states (the United Kingdom, Spain, France, Germany, Italy, the Netherlands, Portugal, Poland, Japan, and Australia) have joined the United States as members of the Proliferation Security Initiative (“PSI”). According to John Bolton, Under Secretary for Arms Control and International Security Affairs, the member states are attempting through a series of multilateral meetings to identify the “practical steps necessary to interdict shipments of weapons of mass destruction, their delivery systems, and related materials flowing to and from states or non-state actors of proliferation concern at sea, in the air, or on land.”

The process is not merely rhetorical. The first PSI interdiction exercises – involving American, Australian, French, and Japanese assets, and observers from at least seven other states – took place in the Coral Sea in mid-September. Nine more exercises are planned at this time, ranging from the Mediterranean to the Arabian Seas.

PSI raises a number of fascinating issues from the perspective of international law. But, bearing in mind the *So San* incident, this essay addresses only two. First, to what extent does current international law authorize interdiction of WMD and missile shipments on the high seas (in contrast to aerial interdiction, maritime interdiction in territorial waters, or port searches such as that which led to the discovery of dual use chemicals on board a North Korean vessel in Taiwan’s Kaohsiung Harbor in August 2003). Second, what are the options for expanding that authority, if necessary?

### The Status Quo: Current International Law on High Seas Interdiction

Notwithstanding the release of the *So San*, Under Secretary of State John Bolton recently stated that “[w]e are prepared to undertake interdictions right now and . . . there is broad agreement within the group of 11 that we have that authority.” What, then, is the status quo with respect to international law and high seas interdiction?

Any assertion of a right to stop and search a vessel on the high seas – let alone seize its cargo – is in tension with freedom of navigation, which John Negroponte once described as “perhaps our oldest customary international law doctrine,” one without which “[m]aritime commerce as we know it would not exist.” In practical terms, free navigation

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means that a ship on the high seas is subject to the jurisdiction only of the state to which the ship is registered (the "flag state"), and may not be interfered with by the ships of other states. If taken as an absolute principle, then, high seas interdiction would be legal only when carried out by the target's own flag state. PSI operations on the high seas – which inevitably will target ships registered to foreign states – would rarely meet this test.

Fortunately, freedom of navigation is subject to a few exceptions which permit boarding by the ships of other states even on the high seas. These are identified most clearly in the United Nations Convention on the Law of the Sea (the United States has not yet ratified the Convention but nonetheless accepts that its navigation provisions reflect customary international law). As discussed below, these exceptions provide authorization for PSI interdiction operations in limited circumstances.

### • *Interdiction by Permission*

The Convention confirms that states may waive freedom of navigation by agreement with one another. Accordingly, an effective way to ensure that PSI operations comport with international law is to obtain from other states express permission to interdict their ships upon reasonable suspicion that they carry illicit WMD or missiles. Such permission can take the form of a treaty or exchange of diplomatic notes specifying the circumstances in which interdiction would be permitted and the consequences in the event WMD materials or missiles are discovered. The British employed this approach during the 19<sup>th</sup> Century in the course of their effort to suppress the international slave trade, and the U.S. has relied on it more recently in connection with counternarcotics.

But what if a formal agreement cannot be obtained prior to interdiction of a ship registered to a particular state? This situation arises routinely in the narcotics context, and U.S. practice is to seek permission on an ad hoc, contemporaneous basis – first from the master of the target vessel itself, and then if necessary the request is relayed via the State Department to the government of the flag state. These ad hoc requests are granted routinely, but for a number of reasons the formal agreement approach is preferable for PSI purposes. Under the ad hoc approach, there always is a risk that permission will be denied (especially if the flag state is Iran or North Korea). Even when granted, ad hoc requests entail a degree of delay which may enable the crew of the target to dispose of some or all of the suspect cargo. Finally, there is some question as to the propriety of the ad hoc approach given that the Convention refers to the use of a "treaty" to establish a waiver of freedom of navigation.

### • *Interdiction of Stateless Vessels*

A vessel which is not properly registered to any state (either because it is unregistered or because its registration is fraudulent or defective) is a ripe target for maritime interdiction. Such ships lack nationality, and the Convention clearly establishes a right to visit such ships to inquire into their status. But can such ships be subjected to the jurisdiction of other states for purposes of searching for and seizing illicit WMD and missile technology? Some dispute the claim that stateless ships are subject to the jurisdiction of all states, but the U.S. has consistently asserted this position in other contexts (e.g., narcotics trafficking and driftnet fishing). Unfortunately, one cannot expect WMD and missile shipments will often be carried by stateless vessels.

### • *Interdiction Where the Vessel in Reality Is of the Same Nationality*

Freedom of navigation of course is no shield against assertions of jurisdiction by the flag state itself, which is free to interdict ships of its own registry. In addition, where there is reasonable suspicion to believe that the flag flown by an apparently foreign ship is false and that the ship in truth is registered to the interdicting state, a warship is permitted to stop it and confirm its nationality. Again, however, one cannot expect this scenario to arise often in the context of WMD and missile shipments.

### • *Interdiction to Suppress Prohibited Activities*

The Convention specifies three types of undesirable activities justifying interference with freedom of navigation: piracy, slave trading, and unauthorized broadcasting. Proliferation concerns, in contrast, are not mentioned at all in the Convention. Does customary international law nonetheless recognize proliferation as an undesirable activity for which there is an exception to free navigation?

The answer appears to be no, although PSI itself might mark an important development in the evolution of such an exception. One could point to the statement by the U.N. Security Council in January 1992 that "[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security." One might also point to the complex system of treaties (in particular, the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention), supplier groups, nuclear weapon-free zones, and export control regimes which collectively establish a global network operating to suppress WMD proliferation. But none of the WMD treaties expressly authorize ad hoc enforcement through interdiction, and there is little or no support for a proliferation exception to freedom of navigation in past state practice (the legal significance of the 1962 Cuban Missile Crisis is the subject of considerable dispute among scholars). The absence of any such exception in the Convention itself, of course, also cuts against a WMD proliferation exception.

The argument is weaker still with respect to missile technology proliferation, for in that context the only relevant international agreement – the Missile Technology Control Regime – is merely a set of voluntary guidelines for export controls subscribed to by thirty-three member states. The *So San* incident, moreover, is a fresh example of state practice indicating that there is not a proliferation exception to freedom of navigation with respect to missiles. Accordingly, the suspected presence of WMD or missiles aboard a foreign vessel on the high seas does not – standing alone – authorize search or seizure at this time. It should be noted at this point, moreover, that warships and government vessels engaged in non-commercial activity on the high seas have complete immunity from the jurisdiction of other states notwithstanding any exceptions that otherwise might apply.

• *Interdiction as a Form of Anticipatory Self-Defense*

There is a final possibility. One might argue that high seas interdiction of WMD or missile shipments would be justified by “anticipatory self-defense” in at least some circumstances. Traditionally, the propriety of a claim of anticipatory self-defense has been measured by the test stated by Secretary of State Daniel Webster in connection with the famous case of the *Caroline*. The *Caroline* was an American ship destroyed in 1837 by the British on the theory that it was going to be used in aid of a Canadian insurrection. In an exchange of diplomatic notes with his British counterpart debating the propriety of this purported exercise in anticipatory self-defense, Webster famously contended that the doctrine applied only where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

The imminence element traditionally associated with anticipatory self-defense would seem to preclude reliance on that theory to justify the PSI interdiction program, absent extreme circumstances

such as a shipment bound for a state literally on the verge of engaging in hostilities with the interdicting state. But it is no longer clear whether anticipatory self-defense remains limited by Webster’s strict imminence requirement in cases involving WMD. When the Bush Administration produced its National Security Strategy of the United States in September 2002, it proclaimed what many observers took to be a sharp departure from the traditional approach:

“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. . . . Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . . The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”

This interpretation triggered a fierce debate – driven largely by the war in Iraq – with some taking the view that the scope of anticipatory self-defense is now in flux and many others (especially outside the United States) adamant in their adherence to the traditional approach. Accordingly, there will be those inclined to reject the argument that PSI interdiction could ever be justified on the ground of anticipatory self-defense. Indeed, some states not strongly motivated to voice resistance to the broad reading of anticipatory self-defense in the Iraq context may react differently now if they perceive a threat to their oceangoing commerce.

For those willing to accept the argument that the WMD threat requires a more flexible interpretation, however, PSI interdictions may be justified by sufficiently exigent

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740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035 – FAX: (202) 662-1032

*E-mail:* [hcmahon@staff.abanet.org](mailto:hcmahon@staff.abanet.org)

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circumstances. Key factors in this analysis would include the identity of the intended recipient, the nature of the illicit materials, and the nexus between the shipment and the perceived danger.

### Options for Generating Additional Legal Authority

The "Statement of Interdiction Principles" released in connection with the most recent PSI meeting in Paris suggests awareness of and appreciation for the principles of international law discussed above. Insofar as it discusses interdictions which might occur on the high seas, the Statement merely emphasizes self-policing by flag states and encourages the practice of flag states granting permission to others to conduct searches. It does not in any direct way raise the issue of a self-defense rationale for high seas interdiction. Insofar as this and other public statements reflect, then, PSI interdictions on the high seas will comport with settled norms of international law.

This does not rule out the possibility, of course, that PSI members will take steps to increase the authority for high seas interdictions beyond the status quo described above. In that event, the U.S. and its allies might consider pursuing some combination of the following strategies:

- **Expand the Permission Network**—The quickest route to enhance legal authority for PSI is to obtain the greatest possible number of formal agreements from other states waiving freedom of navigation where their ships are reasonably suspected of carrying illicit WMD or missile technology. The effort should, of course, prioritize those states whose registered ships are most likely to be involved in North Korean proliferation. The net effect would be to steadily reduce the range of relatively safe options for oceanic shipping available to would-be proliferators. And although ad hoc requests are a poor substitute for formal agreements, steps nonetheless should be taken to prepare the ground and streamline procedures for ad hoc PSI requests where no formal agreement applies.
- **Amend the Convention**—As noted, the Convention permits interference with freedom of navigation to suppress certain undesirable activities such as illicit broadcasting. An effort could be made to add illicit WMD and missile transactions to this list.
- **Amend the Proliferation Treaties**—There is a pressing need to strengthen the compliance regimes of all the WMD treaties, and to create a corresponding treaty regime dealing with ballistic missile technology. Among

other things, the new and enhanced compliance regimes could provide authority for PSI interdictions in the event of an illegal WMD or missile transfer.

- **Playing the Security Council Card**—Security Council approval would eliminate all questions of authorization for PSI interdictions. But the prospects for success in that forum are highly uncertain in the face of a potential Chinese or Russian veto (the Chinese have sent mixed signals regarding their view of the legality of PSI, with their initial negative assessment giving way to more neutral language in August, followed by more statements of concern in September). Perhaps for this reason, when President Bush discussed PSI in an address to the General Assembly in September he did not broach the possibility of a Security Council resolution endorsing PSI interdictions. Instead, he proposed a resolution calling on member states to criminalize WMD proliferation—a step which would not expressly authorize PSI interdictions on the high seas but which nonetheless might enhance the argument for an evolving WMD exception to freedom of navigation.
- **Seek the Endorsement of Regional Organizations**—As part of the larger effort to establish a consensus supporting the legality of WMD and missile interdictions, PSI members could seek the approval of regional organizations such as NATO and OAS (it would be desirable to obtain ASEAN's endorsement, of course, but the prospects for doing so are weak).

### A Few Words of Caution

PSI has the potential for widespread application, but for the moment it is relevant primarily as an element in the ongoing dispute with North Korea. Accordingly, any effort to enhance the legal authority for PSI raises the question whether the effort will be so provocative as to be counterproductive in the larger scheme of things. Seeking Security Council approval may be especially problematic in this regard. In contrast, it may be possible to expand the network of permission for PSI interdictions without causing undue provocation. We must also bear in mind our own long term interest in preserving freedom of navigation around the globe, an interest we pursue today in areas such as the South China Sea. In the coming years, growing regional powers may challenge freedom of navigation to our detriment, and we should consider the extent to which PSI (and especially the doctrine of anticipatory self-defense) may become a precedent to be used against us and our allies in the future.

*Robert Chesney is an assistant professor at Wake Forest University School of Law, and a member of the Executive Committee of the National Security Law Section of the Association of American Law Schools*



## INTERNATIONAL PREVENTION OF BIO-CRIMES

*Barry Kellman*

Among the taboos that comprise the laws of armed conflict, perhaps the strongest, least subject to reservation or qualification, is the taboo against weaponizing disease. Biological weapons ("bio-weapons") threaten thousands of casualties and unprecedented panic levels; their indiscriminate consequences will afflict civilians as horribly as combatants. A contagious disease, *e.g.* plague, can turn victims into extended biological weapons, carrying an epidemic virtually anywhere. Terrorists have proven that anthrax can be fatally disseminated. If terrorists get smallpox, the death toll and ensuing social chaos exceed calculation. More fundamentally, humanity has waged a species-long struggle against disease; to deliberately foment contagion is an act of treason – a fundamental crime against humanity.

Despite the grave threats posed by bio-weapons, law enforcement's capabilities to prevent a catastrophe are constrained by inadequate legal authorization to detect and interdict bio-weapons preparations. Curiously, although the Biological Weapons Convention prohibits States from engaging in bio-weapons activities, it is legal in most nations for persons to acquire pathogens and weaponization equipment and to actually make a weapon. Stated more boldly: (1) weaponization of pathogens by terrorists is not now an international crime; (2) weaponization of pathogens is not a national crime under the laws of all but a handful of nations; (3) no aspect of international law authorizes any law enforcement activity to detect or interdict preparation of bio-weapons; and (4) even if such law enforcement activity were authorized, there is no international organization and scant national capability to carry out law enforcement obligations. Without laws that criminalize bio-weapons preparations, there is no basis for law enforcement to investigate disease weaponization or for legal assistance and cooperation to combat trans-national bio-weapons production and smuggling.

To enhance law enforcement poses unique challenges. First, strategies must be preventive – to focus only on managing the consequences of a bio-attack and to limit law enforcement to post-event apprehension, prosecution, and punishment of the perpetrators will not protect many victims from disease and death. Second, effective measures must advance international cooperation. Criminal networks can transport lethal biological agents through any airport or customs checkpoint without detection; once released, a contagious outbreak will have no respect for borders. The key strategy, therefore, is to restrict access to relevant bio-capabilities and to interdict programs in progress. This strategy must be promoted both by strengthening the capacities of national law enforcement as well as by focusing the efforts of international organizations. This strategy may be termed *bio-criminalization*.

### **Concept: Criminalizing Biological Weapons Activities**

*Enact Prohibitions:* An international law enforcement system to prevent bio-crimes must assert that use, possession, production, diversion, or trans-national movement of pathogens for hostile purposes by anyone is a crime. States must enact relevant prohibitions and develop mechanisms to detect and interdict illegal activities. A preeminent virtue of criminalization is to powerfully reinforce the norm against intentional misuse of biology, clarifying that such conduct is outside the bounds of tolerable behavior, regardless of whether the perpetrator is a State or a non-State actor. Thus, weaponization of disease should be illegal everywhere. National laws should specifically disallow purported justifications that bio-weapons are legitimate in the name of national defense or to promote a political agenda. The scope of legal jurisdiction over such crimes should broadly reflect the reach of domestic law enforcement, with provisions to reach the behavior of legal entities and to enable prosecution of participants in trans-national conspiracies. And, of course, national laws should ensure that competent authorities prosecute offenders unless another State has superior jurisdiction and the offender is extradited to that State in accordance with legal process.

*Require Law Enforcement Cooperation:* Mutual legal assistance obligations should enable each State's law enforcement officials to work jointly with their counterparts in other States by sharing information, conducting investigations, and prosecuting apprehended terrorists. State cooperation both in gathering intelligence and using that information to prevent criminal activity is limited, however, by the absence of legal instruments, leading to gaps in prevention of trans-national criminality. A serious problem needing immediate attention is the lack of information about national laws pertaining to biological agents and equipment. That there is no database or other repository of State laws precludes effective law enforcement and complicates development of standards and expert assistance. Worse, many States lack capabilities (technical, financial, and know-how) to implement mutual legal assistance obligations. Mechanisms should be advanced whereby States with highly developed law enforcement resources can help other States to develop necessary capabilities.

*Implement Standards for Bio-Security:* Criminalization requires implementation of prevention measures, including denying access to materials and equipment. Although pathogens may be collected from natural sources, weaponizing those pathogens poses substantial technical hurdles. For all

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but the most sophisticated bio-terrorist, it is more efficient to obtain disease strains from laboratories. States can increase security by impeding access to these sources of pathogens, which should be coded and traceable. Equipment that is critical to effective weaponization should be tagged, thereby improving law enforcement's ability to track capabilities. Legitimate entities and facilities that handle dangerous pathogens should be registered, and registration should be granted only upon adoption of rigorous security measures to prevent illicit diversion. This is important both to encourage implementation of those standards and to raise challenges for any criminal applicant. These measures include strengthening physical security and containment as well as restricting access to sensitive laboratories only to properly trained and screened persons. Licensed entities in compliance with relevant standards should be presumed to be using pathogens or critical equipment for purposes unrelated to bio-criminality. Conversely, possession of pathogens by someone lacking proper registration should be a crime, without need for further evidence of malevolent intent.

*Restrict and Record Pathogens Transfers:* Transfer of weapons-capable pathogens should be restricted to registered entities. It should be illegal to sell or distribute pathogens to someone that has not subjected itself to the registration process. All legitimate transfers should be reported, including the name and location of both the transferor and the transferee. A database of the names and locations of registered facilities, the dangerous agents they possess or transfer, and information about those agents could enable health and law enforcement officials to identify the origin or source of a dangerous agent that causes harm to the public. Nations should fortify customs and border controls and require that pathogens in transit be tightly packaged and secure from diversion. In addition, shipments of pathogens and other potentially dangerous biologic products should comply with packaging and labeling requirements and procedures for notification of successful delivery. International organizations responsible for oversight of the transport of potentially dangerous items should assist nations and be attentive to the unique challenges of trying to impede movement or diversion of pathogens.

*Detect, Investigate, and Interdict Bio-Smuggling:* Pivotal to preventing a catastrophic use of bio-weapons is early detection of illegal weapons-development activities. The challenge here, from the perspective of building a rapid response capability, is how to know the unknown — how to detect covert behavior. Relevant answers may be usefully discussed under the rubric of *expanded surveillance*, which aims to identify anomalous conduct that hint at a need for more information. This entails gathering vast and diverse information as to where biological research and related activities are occurring. That information should be linked

with data about criminal networks and smuggling operations from police and customs files. Identification of an anomaly by sophisticated analysis of database information should provoke follow-up inquiry, either by requesting clarification from a relevant State, by assigning a "task force" to gather more facts, or by authorizing an investigation. Thus, *expanded surveillance* necessarily connotes an elaborate system to gather information from wholly diverse sources, analyze that information through complex and integrated databases, and clarify or investigate anomalies. It will be crucial to know how gaining relevant information can be systematically accomplished without violating privacy or confidentiality rights.

### **Problem: Inadequate Law Enforcement Authorization and Capacity**

Law enforcement personnel (police, customs and border officials, regulatory inspectors, etc.) comprise the primary system for effectuating *bio-criminalization*. Law enforcers must enforce bio-security measures, detect unlicensed activities that might constitute bio-crime preparations, interdict illicit efforts to use territory to trans-ship pathogens, gather and analyze data for purposes of expanded surveillance, apprehend perpetrators, and mitigate the consequences of a bio-attack and restore order if prevention efforts fail. While law enforcement personnel bear these responsibilities in every State, only in highly developed States are they assisted by networks of professional associations, public health systems, and emergency responders. Unfortunately, in the vast majority of States — from where bio-crimes may be more likely to emerge — law enforcement personnel undertake these responsibilities essentially alone.

To carry out these responsibilities with maximum efficacy, law enforcement personnel need authorization and capability. "Authorization" refers to the legal empowerment to conduct bio-crime prevention and response functions, without which no law enforcer may legitimately act. As noted above, most States' laws do not authorize law enforcers to conduct such functions, thereby precluding effective action. To correct this condition by implementation of proper laws and regulatory measures is necessary but is not, by itself, sufficient. Execution of relevant responsibilities demands unique capabilities that entail understanding biological science as well as the operations of research laboratories and pharmaceutical facilities. Moreover, there are challenges of knowing how to detect pathogens that are essentially invisible and are inherently dual-use. To gather, analyze, and share large amounts of technical data requires sophisticated information technology and the training to put that technology to optimal use. In the event of a bio-attack, law enforcement personnel will need sensors and diagnostic equipment and, similarly, training as to how to use it. Again, there is an unfortunate convergence that the States lacking proper authorization tend also to be most deficient in relevant capabilities.

There is also a convergence in efforts to address these deficiencies. Law enforcement personnel who propound the importance of enhanced authorization will likely perceive that they lack capabilities to carry out their new responsibilities and will demand better equipment and training. Law enforcers who receive new equipment and training to address a profound threat will likely identify the inadequacies of existing law and put pressure on legislators to broaden authorization. Thus, efforts to advance *bio-criminalization* by strengthening law enforcement should proceed symbiotically by encouraging law reform and by equipping law enforcers.

### Priorities: Implementing Bio-Criminalization

*Bio-criminalization* is complex and layered, compelling multilateral commitments with differentiated and mutually reinforcing responsibilities that consider the difficulties of isolating legitimate from wrongful behavior as well as the sovereignty of States to enforce criminal prohibitions. Altogether these commitments and responsibilities will push the margins of international law.

Specifically, a program of implementing *bio-criminalization* weaves three efforts into a resilient net that is designed to deter, to prevent, to detect, and to interdict bio-crimes without unnecessarily impeding the pursuit of legitimate science.

1. Ensure that States define and establish criminal jurisdiction with regard to prohibited conduct as well as provide each other legal assistance and cooperation.
2. Promulgate internationally harmonized bio-safety and bio-security standards for activities involving dangerous pathogens.
3. Strengthen international information-gathering and analysis capabilities to identify and investigate and thereby thwart illegal activity.

To facilitate law enforcement, especially trans-national legal cooperation, obvious gaps that pertain to the scope of jurisdiction, procedures for extradition, and application to threats and hoaxes can and should be promptly remedied. That said, these law reform measures are substantially insufficient to prevent preparations for bio-crimes. Ascribing the status of criminality to capabilities that might lead to actual use of deadly agents, however, raises a risk of snaring legitimate activities within the prohibitions against bio-weapons. The solution here is for States to regulate legitimate scientific activities: properly registered activities are presumptively legal; non-registered activities are presumptively criminal.

Yet, from the perspective of prioritizing an implementation strategy, the cure – to coin a phrase – may be worse than the disease, entailing a broad set of bio-security measures that, for most States, would be both costly and irrelevant. For all but the few States where research and pharmaceutical use of weapons-capable pathogens is concentrated, these

requirements present burdens of establishing a regulatory authority and promulgating intricate safety and protection measures; more onerous is that the police must be trained and equipped to investigate compliance and the penal system must be capable of distinguishing inadvertent transgressions from behavior designed to cause catastrophic harm.

Of undeniable significance here is that many of these nations are facing urgent public health crises with radically insufficient resources; nature is manifesting disease terrors that far surpass the as yet only hypothetical fears associated with bio-crimes. It makes more sense to appreciate the global distribution of biological science and to impose regulatory obligations that are commensurate with potential risks. It is worth noting in this regard that advanced biological science is proliferating – the number of States that are hosts to sophisticated laboratories is expanding, and that trend is likely to accelerate. Moreover, the expansion of biological science is outstripping effective bio-security standards.

Targeted efforts to ensure consistent application of standards to evolving dangerous behaviors could achieve optimal application of law enforcement resources. Promulgation of harmonized bio-security standards, therefore, connotes creating a “bargain” between States whereby the magnitude of bio-security burdens is based on the size and risk of a nation’s life sciences activities and where acceptance of these burdens is both an incentive for and a condition of encouraging new life sciences capabilities. The security of all States could improve by integrating *bio-criminalization* into a broader international commitment to advance the life sciences with regulatory oversight that is targeted to promote security and consistently applied.

The active involvement of the life sciences communities, transcending national boundaries, is critical. Engagement of the scientific community in this context necessarily means coordinated interaction with the international law enforcement community that is and will be directly responsible for interdicting those who might misuse biology. *Bio-criminalization* policies must respect the aspirations and requirements of scientific inquiry, the economics of producing pharmaceuticals, and the exigencies of trying to enhance public health.

All of the above directly points to a central and as yet unresolved hole in the international system: there is no organization that has responsibility for implementing *bio-criminalization*. For potentially catastrophic threats, this condition is unique. Threats of nuclear crimes have provoked extensive prevention measures that are designed and coordinated by the International Atomic Energy Agency (IAEA); threats of chemical crimes are provoking promulgation of similar measures by the Organization for the Prohibition of Chemical Weapons (OPCW). But no alarms of bio-crimes are ringing. As previously mentioned, there is no database of relevant national laws, and no organization has

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the mandate to prepare it. Outreach efforts to remedy gaps in national laws or to train law enforcers have neither an advocate nor, if support for such efforts were to be available, anyone formally responsible for carrying out those efforts. More significantly, there is no body with a mandate to undertake the complex tasks of forging multilateral commitments among developed and developing States, among global sources of capital and pharmaceutical interests, among the life sciences and law enforcement communities.

### The Interpol Program on Prevention of Bio-Crimes

The fact that Interpol, the 191-member international police organization, has assumed leadership for *bio-criminalization* is indicative of how measures to address global threats are increasingly perceived as law enforcement issues, in contrast to weapons control issues. Indeed, in May, the Counter-Terrorism Committee of the U.N. Security Council (CTC) was briefed by the IAEA on nuclear terrorism, the OPCW on chemical terrorism, and by Interpol on bio-terrorism – a striking display of how bio-threats are treated differently than other WMD threats. In the post-9/11 world, where terrorism has become intertwined with more traditional threats of weapons proliferation, the success or failure of Interpol's program is significant for the future of international security.

### Conclusion

Bio-crimes are currently, for the most part, an abstraction. The anthrax attacks in 2001 and other isolated crimes

demonstrate that concerns are not fanciful, but far more damage has been inflicted by conventional bombings and plane hijackings. Yet, the trend lines are disturbing. Unquestionably, the availability of sophisticated scientific knowledge, materials, and technology means that criminals will find it increasingly easier to wage a catastrophic bio-attack. The global expansion of bio-research and pharmaceutical sectors means that the chances are ever-growing of finding a source of weaponizable pathogens in a remote location. Perhaps most challenging in the longer term is that explosions in genetic research are opening opportunities for producing an immeasurable catastrophe that could scarcely have been imagined only a few years ago.

If the seriousness of the threat is accepted, then the necessity of international action within a legal context cannot be denied. The inherent nature of this threat is global; little can be done to seal off any country from criminal conduct or its effects. Multilateral coordination and specific delineation of responsibilities and obligations, while undeniably posing diplomatic challenges, is essential to enhance security. Ultimately, to address threats of bio-crimes demands strengthening international institutions under the rule of law. That is not an ideological argument – disease has no more respect for ideological distinctions than it does for borders – it is an unavoidable implication of biology's dangers at this time.

*Prof. Barry Kellman is Director of the International Weapons Control Center at DePaul University College of Law*

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The Annual Review Conference will take place on November 20-21 at the Crystal Gateway Marriott Hotel in Arlington, Virginia. The Conference will once again provide an informational forum for discussion and debate on national security legal issues facing us today. William J. Haynes, General Counsel for the Department of Defense has confirmed as one of several keynote speakers during the conference. Panel Discussions will include:

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- Reconstruction Efforts in Iraq and Afghanistan—Building Security, Democracy and the Rule of Law
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