THE PROLIFERATION SECURITY INITIATIVE AND NORTH KOREA: PERSUASION OR PRESSURE?

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Following the events of September 11, 2001, non-proliferation has become perhaps the most important global concern. If the struggle against terrorism is to be protracted, the acquisition by terrorists of Weapons of Mass Destruction (WMD) represents, in the new climate, the greatest potential threat to world order. The Proliferation Security Initiative (PSI) is one of a number of measures adopted by concerned countries ostensibly to limit the possibilities open to countries and other actors to transfer WMD or their delivery technologies. These concerns were brought into sharp focus with the boarding of the North Korean vessel, *So San,* in the Arabian Sea in December 2002. Although hidden in the cargo was a shipment of SCUD type missiles bound for Yemen, as no existing regimes had been violated the vessel could not be detained nor its cargo seized. Yet the introduction of such weapons into an already volatile theatre could not be considered to contribute to security or stability.

The PSI has already contributed to the global non-proliferation effort. In October 2003 the interception of a German flagged vessel en route to Libya uncovered a shipment of components for a clandestine uranium enrichment program. This action helped persuade the government of Libya to abandon its WMD program and also provided evidence that led to the exposure of the A Q Khan companies in Pakistan as the source of proliferated nuclear technologies (Richardson 2004: 103-4).

While the PSI is designed as a global regime, United States spokespersons have clearly indicated that it is especially applicable to North Korea. This paper reviews the PSI under four headings. First, the development of the Initiative is outlined. Second, the relationship of the PSI to the current requirements of international law (and particularly to the law of the sea) is analysed. Third, precedents (and especially the Cuba experience) are discussed. Finally, the practicality of the PSI as a non-proliferation measure specifically in connection with North Korea is considered.

The PSI --An Outline

The PSI was first announced on 31 May 2003. Its origins can be seen in the Bush administration's "National Strategy to Combat WMD" of December 2002. The principle of such inspections is, of course, a much older strategy and received, in the case of Iraq, international sanction under UN Security Council Resolution 661 in August 1990.

After six plenary meetings (the most recent in Lisbon and in Warsaw) the states now members of the Initiative have adopted a "Statement of Interdiction Principles" (Department of Foreign Affairs and Trade, Australia 2003). The PSI is described as "a response to the growing challenge posed by the proliferation of WMD, their delivery systems, and related materials worldwide." The Principles in question prescribe four specific policies:

- Measures to interdict the transport or transfer of WMD and related materials "to and from states and non-state actors of proliferation concern."
- Procedures for information exchange in such cases.
- Commitments to strengthen applicable legal measures.
- Undertakings by member states to board ships or require aircraft in transit to land and have suspect cargoes searched and/or seized.

The PSI is restricted, however, in the following respects.

- The ships or aircraft concerned must be within the territorial seas or airspace of member states *or*
- be flagged or registered by a member state *or*
- be flagged or registered by a state willing to cooperate in this specific case or on an ad hoc basis.

Although apparently around sixty states have expressed an interest in the PSI, its most energetic supporters (outside the US) are European countries, including Spain and the United Kingdom. Its Asia-Pacific members were initially restricted to Australia and Japan, with the Australian government especially supportive of the Initiative in the context of the nation's direct participation in the second Gulf War. In the case of Japan, any measures taken under its remit must be labelled as "police exercises", lest constitutional restrictions against armed state action apply. In 2004 Singapore became a member of the Initiative, and most recently Russia has joined. The total number of states now full parties stands at sixteen. While no individual state is identified as a possible target for the Initiative, North Korean ships and aircraft have been listed as possible vessels of interest by some PSI states.

North Korean traffic was indeed the subject of some international scrutiny in 2003. In April, France ordered a French ship to unload a suspect cargo in Egypt. It consisted of 22

mt of aluminium tubes originating in Hamburg being sent to a company in China. The export of these materials had been denied, and they were believed ultimately bound for North Korea and for use in Pyongyang's HEU (Highly Enriched Uranium) program. In the same month, the North Korean vessel *Pong Su* was arrested in Australian waters after 50 kgs of heroin were discovered landed on a beach in the state of Victoria. Allegedly this was part of a strategy to raise funds for North Korea's WMD program.

But if it is supposed that the PSI is especially applicable to North Korea, then any program to restrict the movement of goods in and out of North Korea would require the active cooperation of China and South Korea (Walsh 2003). In these circumstances the DPRK would be likely to regard such actions as tantamount to a hostile blockade. The PSI also tests both the existing international maritime regime, and also raises issues of practicality. Both of these areas are now explored in this paper.

The PSI, High Seas Navigation and International Law

The basis in international law of such measures remains to be defined. Under current norms, the export of missiles by non-MTCR (Missile Technology Control Regime) countries to non-MTCR recipients does not violate any international agreements or obligations. Thus, whether or not the actual cargo in the ship was deliberately hidden, the arrest of the *So San* could not be sustained.

The PSI is intended to be applicable to the movement of prohibited items by ship and also aircraft. Within the jurisdictions of member states and of other states that cooperate with the Initiative on an ad hoc basis, detaining shipping or aircraft (especially if the latter are on the ground) can conceivably be brought within domestic legal regimes. In the LOSC (Law of the Sea Convention) the closer to a state's jurisdiction a vessel approaches, the greater that state's powers, notwithstanding the rights associated with "innocent passage." But in so far as the focus of the PSI is upon North Korea, dealing with shipping on the high seas transporting materials to or from West Asia (as was the task undertaken by the *So San*) will pose the greatest challenge. This aspect of the regime therefore deserves extended analysis.

The freedom of navigation of the high seas has been a fundamental principle of ocean regimes for several centuries. Freedom of the high seas is a central feature of LOSC (article 87) as well as of its predecessor regime, the product of the Geneva Convention of 1958 (article 2).

The scope permitted to states by the LOSC to interfere with high seas navigation is very small. Setting aside such issues as pollution, fisheries and seabed resource extraction (which generally apply only within a state's EEZ), there are only three grounds recognised for states to interfere with such navigation on the part of flagged vessels. According to article 110, warships may only board vessels on the high seas if there is a suspicion that they are involved in piracy or the slave trade, or if they are engaged in unlawful broadcasting. In addition, regarding the special case of un-flagged vessels, warships may take steps to determine their nationality. (Brown 1994; Churchill & Lowe 1999; O'Connell 1982). There is no general right to interfere with vessels suspected of carrying arms or of drug trafficking. And even in situations where some action is appropriate, the powers exercised by warships must be proportional to the circumstances. Warships may approach a ship in order to establish its flag, but doubts on this score are unlikely to justify any other action. Extreme suspicion of actions proscribed by the high seas regime may justify boarding, but an actual search of a vessel or constraint of the master and crew could only be justified on those quite specific grounds (Reuland 1989: 1169ff).

The detention of the *So San* was triggered by her failure to fly a flag, but the boarding party having established her place on the Cambodian ship register, she was then free to resume her course. It is thus arguable that the search that followed (during which a missile cargo was uncovered) was, according to current rules, excessive and unjustified.

The transportation of drugs raises particular questions for high seas regimes. LOSC (in article 108) prescribes that "all states shall cooperate in the suppression of illicit traffic in narcotic drugs .. contrary to international conventions." Though this statement might be thought to preclude drug trafficking by the North Korean authorities themselves, the article in question clearly anticipates such trafficking as being conducted only by private parties, since it also permits states to request international assistance where their flagged vessels are suspected of being used for such purposes. The relevant international convention in this matter is the Vienna Convention Against Illicit Traffic in Narcotic Drugs, concluded in 1988 (United Nations 1988). The provisions of LOSC are reiterated there, with the further requirement that states suspecting the transport of such contraband may request flag states for permission to intercept or board their vessels. None of these points is relevant to the North Korean case. If it is assumed that the North Korean state or its agents are transporting narcotics they could prevent such traffic simply of their own volition and would hardly seek or permit international assistance against their own agents.

Interestingly, article 96 specifically precludes any jurisdiction being exercised by *another* state over flagged vessels owned or operated by a state and on state service. If,

hypothetically, North Korea claimed that its vessels transporting missiles or even nuclear components were on such service, the rules prescribed in LOSC would give those vessels "complete immunity" on the high seas. Even if their flagged vessels were so engaged in a private capacity, the North Korean authorities would need to request international assistance before other nations would be entitled to assume a role.

It should be noted at this point that not all PSI member states are parties to the LOSC. Though the United States had been an active participant in the conference round that produced LOSC, UNCLOS 3, Washington did not ratify the convention. The grounds were principally that it would obstruct the mining of minerals on the deep seabed, though some security and revenue implications were also cited. In 2004 the George W Bush administration decided to support treaty ratification, on the grounds that US naval (and air) forces operating in international theatres would thereby enjoy the protection of international law. To this point, however, the US Senate has yet to give its approval.

The law of the sea, then, would seem not to legitimise the more ambitious strategies envisaged by the PSI. However, additional justifications under international law have been advanced by some PSI parties. The right of self-defense (though not specifically codified in LOSC or its predecessor) as a right located in customary international law is also generally held to be as applicable to circumstances on the high seas, as elsewhere. (Reuland 1989: 1206ff). The US has specifically grounded its actions under the PSI in the right of self-defense.

Here the precedent established in the *Caroline* case is the starting point for analysis of the position in international law. According to this precedent, such acts should be performed only if it can be demonstrated that there is the "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." (Brownlie 1963: 43, quoting US Secretary of State Webster) In such cases the use of force should be reasonable and proportionate to the threat. How far the *anticipation* of threats may justify forcible and pre-emptive action is an issue that has generated much debate in the international law community. Though it is generally held that the advent of nuclear weapons has broadened the application of the principle, there are clearly limits to what actions, on the part of other states or parties, that can reasonably be considered as threatening to vital interests.

The international legal regime in this difficult area is far from static. In September 2003 President Bush proposed to the UN that a resolution effectively endorsing the PSI program should be passed. This proposal built upon the "Global Partnership Against the Spread of WMD" initiated by the G8 in 2002. He followed this suggestion in February

2004 with a proposal to the IAEA (International Atomic Energy Agency) that the Agency should be part of a new global regime to discourage any further development of nuclear technology beyond those states that already are in possession of it. However, many nations were unprepared to accept these initiatives. The result to date of this campaign was reflected in the unanimous UN Security Council vote--in Resolution 1540 (2004)--on 28 April 2004 to require all states to take steps to prevent the trafficking of WMD and their means of delivery. While the Resolution does state that WMD proliferation is a "threat to international peace and security" and calls on all states to strengthen their commitment to existing non-proliferation regimes, the principal aim of the Resolution is to prevent trafficking by "non-State actors" (United Nations 2004).

The more stringent regulation of shipping and transport is clearly a step forward in the cause of non-proliferation. However, restricting the target agents to non-state actors may not be as effective a strategy as might be supposed. As the revelations regarding the trade in missile and nuclear technologies by the A Q Khan enterprises have demonstrated, a measure of apparent state complicity may serve to shield those who market such systems.

There are further changes to existing legal regimes currently under review. In November 2001 the Assembly of the International Maritime Organization resolved to explore amendments to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (of 1988) to deal both with terrorism and also with WMD proliferation. One such amendment currently under review would prohibit the use of ships to transport materials that could be used to produce WMD. An international conference is likely to be convened to consider this and other measures in the coming year (International Maritime Organization 2003; Jesus 2003).

In an additional legal development, in February 2004 the US negotiated an agreement with Liberia to be given in principle approval to inspect Liberian flagged shipping on the high seas in circumstances where there was reasonable suspicion that WMD or related materials were being transported. As Liberia is the second largest of the flag countries of convenience, this considerably extends the jurisdictional reach of the PSI coalition. A similar arrangement was negotiated with Panama in May 2004.

Despite these developments, it is not yet possible to reconcile the ambitious intentions of the PSI with current international law and practice. Further cooperation with key states will be necessary, and a greater degree of UN endorsement will be required. Given the difficulties that have attended previous negotiations on the law of the sea, neither of these may be forthcoming even given the threat posed by WMD proliferation.

The PSI, "Cuba lite?"

The expedient of interdicting the shipping and aircraft of states is as old as the international system. There have been notable examples of shipping and transport blockades mandated or endorsed by the United Nations. Here the most relevant to the PSI are the Beira and Iraq blockades. The "quarantine" of Cuba undertaken by the Kennedy administration is also a significant precedent, bearing in mind the PSI's current status.

An example of international blockade used as a tool to influence the policy of an aberrant state elite is the action taken by Britain and the states of the British Commonwealth in relation to the illegal independence declaration taken by the administration of the former colony of Rhodesia (now Zimbabwe). Following the UDI adopted by the government of (Southern) Rhodesia in 1965, Britain sought to pressure the minority regime by imposing economic restrictions on its external commerce. Rhodesian assets abroad were seized and reacting to the concern of the Commonwealth (especially newly independent African states) Britain sought to impose a naval blockade in order to interdict oil supplies to the former colony passing through the Mozambique port of Beira (Mobley 2002). This blockade received international sanction in 1966 through United Nations Security Council Resolution 221, and was in effect until, upon independence, post-colonial Mozambique undertook not to accept any oil for trans-shipment to Rhodesia. While the internal guerrilla struggle in Rhodesia/Zimbabwe was undoubtedly a major factor in the displacement of the minority regime, the economic pressure reflected in the naval and financial embargo was instrumental in undermining its foundations and capacity to resist. However it should be noted that Rhodesia was able to resort to alternative supplies of oil through South African territory when the blockade prevented its transport by way of the pipeline through Mozambique. With extensive investments in South Africa the UK was unwilling to take any more stringent steps to interfere with energy supplies to that country.

Whatever its practical impact, the Rhodesia/Zimbabwe case deserves further study as a precedent for the PSI. It apparently demonstrates that only a specific Security Council resolution can unambiguously legitimise an effective blockade. Britain began by seeking the cooperation of those countries whose flagged vessels were thought to be carrying oil supplies to Rhodesia, but this arrangement was far from satisfactory. Further, only after the cooperation of France was obtained (so that aircraft based in neighbouring Madagascar could be used to patrol the Mozambique Channel) as a result of representations by African Commonwealth members, was the blockade a practical success.

Post-Cold War, such blockades have become recognised strategies for pressuring states and regimes. Security Council Resolution 661 imposed an embargo on shipments of oil to Iraq and Kuwait, and this embargo was a major feature of the Anglo-American campaign of constraint on the regime of Saddam Hussein prior to the second Gulf War (Galdorisi and Vienna 1997). Security Council Resolution 665 specifically requests coalition naval forces in the Gulf to detain and inspect Iraqi shipping to ensure the provisions of the suite of Resolutions pertaining to Iraq were observed. Until the advent of the second Gulf War, this measure was employed as the legal basis for a continuing regime of inspections. In the Iraq case, of course, it was always clear that many interceptions would occur not on the high seas but within territorial waters.

Critics of the PSI have described it as 'Cuba lite'. This particular historical precedent, though it occurred in a very different global environment, requires a more extended analysis.

In his national broadcast on 22 October 1962, President Kennedy revealed the extent of Soviet missile deployment in Cuba, heretofore clandestine, and announced in response a "strict quarantine on all offensive military equipment under shipment to Cuba," to be enforced by the US Navy. The quarantine would continue until the USSR reversed these deployments; meanwhile the US would respond to any nuclear attack on any nation in the hemisphere from Cuba by a retaliatory attack upon the Soviet Union itself. In condemning this Soviet stratagem, Kennedy referred to its having violated both the Rio Treaty of 1947 and the Charter of the United Nations, and called for an immediate meeting of the Organ of Consultation of the Organization of American States (OAS) (Stebbins 1963a: 374-80).

The following day the OAS duly obliged, resolving to take "all measures, individually and collectively, including the use of armed force" to prevent further offensive armaments from reaching Cuba and to forestall their use (Stebbins 1963b: 380-83). In his official proclamation of the quarantine, Kennedy cited, along with his domestic powers and responsibilities the resolution adopted by the OAS, though he made no reference to the United Nations. Under the terms of the proclamation, the US assumed the right to search and if necessary divert or take into custody any ship bound for Cuba thought to be carrying weapons (Stebbins 1963c: 383-4).

Within the Kennedy administration there was some debate on the legality of the blockade. Secretary of State Dean Rusk considered it important to frame US action in terms of the principles of the UN Charter, though he was concerned that overt reference to Article 51 (enjoining "individual or collective self-defense") might be cited by the Soviet Union as

grounds for attacking Turkey. Robert Kennedy, his brother's Attorney General, held that view that the action would be "illegal" without the support of the OAS (*FRUS* 1961-63a: 152). In this sentiment he was echoing the opinion of legal counsel Leonard C Meeker (*FRUS* 1961-63b: 117) who had pointed out that, as a UN Security Council resolution in support was unlikely, nevertheless UN mechanisms could still be of some utility given the provisions in Chapter VIII of the Charter on the role of "regional arrangements" in the maintenance of peace and security.

The OAS was just such an arrangement, given the obligation of its member states, under the Rio Treaty, to undertake "reciprocal assistance to meet armed .. aggression." As might be expected, Khrushchev entirely rejected the legitimacy of any part played by the OAS, insisting on following only "the principles of international law" and "the norms which regulate navigation on the high seas" (*FRUS* 1961-63c: 186). The origin of the reliance upon the OAS for legitimation seems to lie with a suggestion made by Republican Senator Kenneth B Keating, a critic of Kennedy's Cuba policy. He advocated mobilising a coalition of support by consulting with the OAS as well as with Washington's NATO allies (White 1996: 89-114). The wider context of this proposal was the fact that it was largely as a result of US instigation that the drafting of the UN Charter included a reference to the possible security role of regional organizations, though as the Cold War gained momentum the OAS came to fulfil a role much more extensive than that originally envisaged in the Rio Treaty.

In Kennedy's analysis of the changed circumstances of the nuclear age he raises the issue of the new requirements of self-defense in the age of WMD:

> Neither the United States of America nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definitive threat to peace. (Stebbins 1963d: 376)

In the event, though two ships were boarded, the Soviet Union ensured that no vessels carrying weapons approached Cuba. On 28 October Khrushchev agreed to dismantle the Soviet missile systems from Cuba and the crisis was defused.

If the steps taken during the Cuba case are to serve as a precedent, it must be claimed that the threat posed by the weapons of ideological antagonists during the Cold War is comparable to the threat of terrorism now faced by members of the PSI coalition. Though this assessment is currently a matter of some debate, the Cuba experience is revealing of the logic of coalition building in global politics. It demonstrates that the US has been prepared to employ naval blockade as an instrument of policy without direct reference to the United Nations. It shows also that, even when threatened with nuclear attack, Washington did feel the need to legitimate its response by seeking the support of an international coalition. The coalition in question was chosen, however, because its support was virtually guaranteed. In retrospect, this strategy suggests that the Kennedy administration knew a wider legitimation for the quarantine was required, but the use of the UN Security Council to provide one was not feasible in the conditions of the Cold War.

The PSI, North Korea and Non-Proliferation

From the beginning the PSI was a coalition operation. The cooperation of a coalition of countries was required if sea routes across the globe were to be comprehensively scrutinised and, if necessary, ships using those routes were to be interdicted. A coalition was required also if the strategy was to acquire international respectability. So far and given the fact that North Korean shipping traffic to West Asia is of the greatest concern for weapons shipments, the coalition delivers more respectability (if not legitimacy) than effectiveness. In particular, China has expressed reservations about the use of the Initiative, arguing that the strengthening of existing mechanisms would be a more appropriate method (Foreign Ministry of China 2003). On the other hand, there have been press reports that in 2003 Chinese authorities, acting on US intelligence information, intercepted at least one shipment of a cargo of nuclear precursor chemicals transiting China by train. Significantly, the government of South Korea, though expressing some sympathy for the principles of the initiative, has declined to join it lest this step be interpreted as pressuring Pyongyang.

The purpose of the PSI has been variously described. It is both part of a global strategy to limit weapons proliferation, but is also especially applicable to North Korea. If its use *specifically* in connection with North Korea is considered, the promotion of non-proliferation may be seen as part of a broader intention to promote a change in behaviour from the regime. Whatever other goals may be pursued within the "Six Party" framework, the principal goal pronounced by the US and its allies is the "complete, verifiable and irreversible" nuclear disarmament of North Korea. At the very least this strategy intends to produce the containment of North Korea's WMD ambitions though it might also

provide the foundation for a broader economic and diplomatic re-engagement of the country with the region.

It remains the case, however, that despite the advent of the multilateral talks on Korea in Beijing, the Bush administration has not repudiated the harsh view of North Korea expressed in 2002 in the President's "axis of evil" pronouncement. This assessment holds that only with regime change in Pyongyang will the danger North Korea poses to the US and to world order be removed. This is the case since "rogue" regimes do not necessarily operate according to the conventional canons of deterrence, nor can they be trusted not to pass WMD to terrorists. Pressure on North Korea may therefore be interpreted as being intended to promote this solution to the issue.

Instruments intended to achieve the objective of regime change, however, may not encourage a change in regime behaviour. Without discussing this topic exhaustively, and without claiming that the two ends are always mutually exclusive, the following points should be noted. First, as a matter of first principles, it is generally conceded that political leaders respond to the given structure of incentives and disincentives they encounter with respect to any given policy. Disincentives may deter, but by themselves they can hardly be expected to induce more than negative behaviour. And in North Korea's case, where the very survival of the system is at issue, a stringent package of disincentives or sanctions may possibly provoke a desperate response.

Whatever the imperfections of the "Agreed Framework" of 1994, it contained many incentives designed to reward Pyongyang if it addressed the sources of tension on the peninsula and especially engaged with the South. The disincentives were not initially spelled out, but with perhaps a million fatalities in the Korean War, the government in Pyongyang was well aware of the costs of a possible conflict. Later, with the development of the "Perry Package," US negotiators were privately more forthcoming on the alternatives to engagement. At the time, however, the problem of managing the alliance with Seoul impeded greater explicitness on this score. In retrospect this absence was a major weakness of the US position. In short, both carrots and sticks are needed. On this score the PSI should be part of a broader approach to North Korea, coordinated with the other "Six Party" powers, which includes significant potential rewards.

Second, as the experience of Iraq has demonstrated, engineering regime change is a difficult task and its pursuit may unleash a host of unintended consequences. The coalition of nations responsible have to agree on the final objective, the United Nations must be dealt in to (or out of) the game, and an alternative government must be found. A major complication in the Korean case is the fact that once the existing regime in North

Korea has been destabilised, sooner or later Seoul will become responsible for the citizens and territory of the North. It is clear from current public opinion data, however, that many South Koreans are reluctant to take part in any such undertaking, either because of the risks of conflict, or of the costs entailed in reconstruction, or because for nationalist reasons they believe that foreigners should not be involved in the making and un-making of governments on the peninsula. If the PSI is actually intended to help achieve this result, at the very least South Korea would need to be a member.

The position of North Korea may be compared with that of another member of the axis, Iraq, prior to the second Gulf War. As has been observed (by a scholar who subsequently joined the Bush administration) regarding the conflicting purposes of the sanctions regime on Iraq:

> Although the sanctions on Iraq were effective, they were not unconditionally so nor as effective as they might have been in other circumstances. Sanctions were a key factor in achieving a successful measure of containment, but they failed to bring about the fall of the regime or to exact any notable change in its behavior. The most basic reason for this selective effectiveness is that sanctions were used to pursue too many conflicting objectives simultaneously. Pursuing each goal in the most effective fashion would have demanded a range of sanction strategies--a particular sanctions regime accompanied by different policy tools for each purpose. Attempting to advance the goals of regime change, containment, and behavior change all at once inevitably meant that some elements of the strategy used to advance one goal occasionally undercut efforts to achieve the other goals. Not surprisingly, on all three fronts, the results of this almost haphazard use of sanctions and their companion tools fell short of what might have been achieved with a more focused strategy. (O' Sullivan 2003: 115)

The PSI has attracted the appellation of 'Cuba Lite'. Whether or not this parallel is appropriate there is a lesson in the events of 1962 for contemporary policy makers in the PSI countries. It now appears that in the calculations that led to the Cuba crisis, each of the communist leaders thought they were principally serving the other's interests--Khrushchev protecting Cuba from invasion and Castro enhancing Soviet strategic capability (Gaddis 1997: 260-80). Confusion or obfuscation of the purposes of the PSI might similarly result in a crisis with dimensions as serious as that confronting Kennedy. This is even more likely in the absence of full international legitimation.

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