

## **Non-proliferation enforcement: North Korea and the UN Security Council**

**Draft concept paper for further research  
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### **Introduction**

The UN Security Council (SC) has ultimate responsibility for enforcement of all the non-proliferation regimes. This authority stems from the non-proliferation treaties, as well as the UN Charter itself. The Statute of the International Atomic Energy Agency (responsible for overseeing the Nuclear Non-Proliferation Treaty) stipulates that the Board of Governors must report non-compliance to the SC; the Chemical Weapons Convention states that the Conference of States Parties shall in cases of particular gravity bring the matter to the attention of the SC; and the Biological Weapons Convention authorizes a party to lodge a complaint with the SC. The treaties do not specify what the SC should do once a matter is referred to it; it is for the Council to decide on a case-by-case basis. And in fact the SC need not wait for a matter to be referred to it from an inspection agency or treaty party. Based on its responsibility to maintain international peace and security, it can decide that an act of proliferation constitutes a threat to peace and adopt appropriate measures under Chapter VII. That point was reinforced at the Security Council Summit in January 1992, when it declared that: “the proliferation of weapons of mass destruction constitutes a threat to international peace and security.”

Although the Security Council has been at the center of the non-proliferation regimes since as long ago as 1970 when the NPT came into force, other than on Iraq, it has acted on three occasions only: in respect of North Korea and Iran, and to condemn the India-Pakistan nuclear tests in 1998 (not under Chapter VII). In this short paper, I consider the North Korea (NK) case as an illustration of both the potential for and limits on the SC acting coercively against the proliferation of weapons of mass destruction (WMD). It demonstrates how the Council can be used to lay the foundation for coercive action, not out of design necessarily, but piecemeal, in reaction to crises as they erupt and as a function of the political dynamics in the SC at any given moment. The particular device being used to ratchet up pressure on NK is the interdiction and inspection of ships suspected of carrying WMD material. While SC resolutions contain language that conceivably could be interpreted to authorize military action for that purpose, the better legal argument is that they do not. Yet they do send a political signal in the form of an implicit threat – collectively issued by the SC – that coercive enforcement is on the table.

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## North Korea and the Security Council: sequence of events

North Korea became a party to the NPT in 1985 and entered into a safeguards agreement with the IAEA in April 1992. After six visits to the country turned up some inconsistencies in NK's declared inventory, the Director-General of the IAEA requested a 'special inspection' of two sites in February 1993. NK refused and in March announced it would withdraw from the NPT in 3 months, which it can do under the terms of Article X of the treaty. Meanwhile, the IAEA declared NK to be in violation of its safeguards agreement and referred the matter to the SC in April 1993. The SC issued a number of condemnatory statements and threatened sanctions.<sup>1</sup> Following diplomatic efforts, NK "suspended the effectuation of its withdrawal" from the NPT in June 1993, just as the three month notice period was about to expire. In October 1994, the Agreed Framework was negotiated by the US and NK, according to which NK would freeze its nuclear program in exchange for light water reactors. The IAEA was allowed back in to the country to monitor suspect sites, but was never able to engage in the full inspections required by NK's safeguards agreement.

A new crisis erupted in October 2002, when the US produced evidence that NK had been cheating on the 1994 agreement as well as the NPT, and was trying to produce enriched uranium. NK kicked IAEA inspectors out and in January 2003 announced it had terminated the "suspension" of its withdrawal from the NPT, claiming that the three month notification period had passed in 1993 and therefore the withdrawal would take effect immediately.<sup>2</sup> In Feb 2003, the IAEA declared NK to be in non-compliance with its comprehensive safeguards agreement and referred the matter to the SC. The Council met briefly on February 19, 2003 and postponed action. It met again on April 9, in closed-door consultations. Afterwards, the President of the Council told reporters "members expressed their concern and the Council will follow up developments on this matter." Other than complete silence, this is the lowest form of action the SC can take. No further action was taken, and diplomatic efforts shifted to the Six-Party talks (involving NK, SK, the US, China, Japan and Russia).

The next twist came when North Korea tested ballistic missiles in June 2006, one of which had the potential to reach the US but malfunctioned. This generated a new sense of

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<sup>1</sup> I am grateful to Marta Mendes, Fletcher School MALD student, for compiling all the relevant Security Council resolutions and Presidential Statements.

<sup>2</sup> Interestingly, the SC, the parties to the NPT and the Board of Governors of the IAEA have never formally accepted NK's withdrawal from the NPT. Article X grants a right to withdraw on three months notice if a state decides that "extraordinary events, related to the subject matter of the Treaty, have jeopardized the supreme interests of its country". A statement to that effect must be sent to all other Parties to the Treaty and to the Security Council. An interesting legal question is whether that is a purely procedural requirement? Or are the other parties to the Treaty and the SC allowed to question the substance of a claim that "extraordinary events have jeopardized the supreme interests of the country"? The language of Article X seems to suggest that it is up to each party to decide for itself whether the conditions for its withdrawal exist, and yet in 1993, the US, UK and Russia – the three depositories of the NPT – issued a statement: "questioning whether DPRK's stated reasons for withdrawing from the Treaty constitute extraordinary events relating to the subject-matter of the Treaty." In any event, regardless of how one answers that legal question, the SC has the authority to act in response to a withdrawal under Chapter VII of the Charter. Even if the withdrawal is legal, it may be a threat to international peace and security.

urgency, including even talk of pre-emptive military action by some former US officials. The matter was taken up in the Security Council. Resolution 1695 was adopted on July 15, demanding that NK suspend all activities related to its ballistic missile programs. The resolution also prohibits states from providing missiles and related technology to NK. At the insistence of Russia and China, the resolution was not adopted under Chapter VII, because they feared that would be seized on by the US as the basis for military action. Nevertheless, the decision is legally binding.

In October 2006, after a nuclear test by North Korea, the SC adopted resolution 1718 under Chapter VII imposing targeted sanctions (heavy weapons, WMD-related material and luxury goods, plus a financial asset freeze and travel ban on individuals involved in NK's WMD programs). The resolution also "calls upon" all states "to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary" (para. 8(f)). This language leaves plenty of room for states not to do much to enforce the resolution.

The action then shifted back to the Six-Party talks. An outline agreement aimed at ending North Korea's nuclear program was reached in February 2007. Deadlines were not met, tension built and the talks broke down in December 2008. NK's provocations did not end when the Obama Administration came to office in January 2009. In April, it tried to put a satellite in space. The SC condemned this in a Presidential statement (PRST/2009/7, 13 April 2009) declaring it to be a violation of resolution 1718. The Statement also "called upon all Member States to comply fully with their obligations under resolution 1718 (2006)", which could be read as including paragraph 8(f) on inspections.

NK asked for an apology from the SC for this statement and said that if it did not get one, it would engage in nuclear and ICBM tests. On 25 May 2009, NK made good on its promise by conducting a second nuclear test. The SC responded by unanimously adopting resolution 1874 on 12 June 2009, under Chapter VII, expanding the sanctions and setting out a number of provisions on inspections of ships, which I discuss below.

### **SC Resolution 1540 and the Proliferation Security Initiative (PSI)**

Parallel to specific action on North Korea, the SC has acted generically to stem proliferation, though has not yet authorized forcible action for that purpose. In April 2004, the Security Council adopted resolution 1540 which requires all states to adopt laws designed to prevent weapons of mass destruction from falling in to the hands of terrorists. The second 'legislative-style' resolution adopted by the SC, after resolution 1373 on the suppression of financing and other forms of support for terrorism, resolution 1540 was controversial because it imposes binding obligations on all states under Chapter VII for an indefinite period unrelated to a particular crisis. Borrowing terms from domestic government, the SC acted as a legislature rather than an executive body.<sup>3</sup>

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<sup>3</sup> See Ian Johnstone, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit", *American Journal of International Law*, Vol. 108 (July 2008)

When resolution 1540 was adopted, the US sought to include a provision on the interdiction of ships, aircraft or trucks suspected of carrying WMD or related material. The prospect of a Chinese veto led to the deletion of that paragraph. Instead, the Bush Administration launched the Proliferation Security Initiative – an agreement initially among 11 countries, the most important feature of which is a set of interdiction principles. The core principle is that PSI participants will interdict any ship, plane or truck within their territory suspected of carrying WMD-related material. (The most common scenario is to board and inspect a ship in the territorial waters of a participating state).

Since then, more than 90 countries have expressed their support (including Russia but not China and India) and eight ‘flag of convenience’ states (including Liberia, Panama and Marshall Islands) have signed “ship-boarding agreements” with the US, authorizing the latter to board any suspicious vessels flying their flags *on the high seas*. This is part of the general trend away from traditional approaches to non-proliferation. Instead of negotiating a PSI treaty with all states, the US entered into a partnership with a few and has been expanding it incrementally to all who are interested in joining. There is no organization to monitor compliance, nor even legally-binding obligations. It is a cooperative arrangement that works as well as its participants want it to work.

The PSI rests on uncertain legal grounds. Even within the territorial sea of a participating state, the right to board and seize items from traversing ships may conflict with the “right of innocent passage” guaranteed by the Law of the Sea Convention. What counts as non-innocent passage is set out in Articles 17 and 21 of the Convention: “any threat or use of force”, “any act aimed at collection information”, “any act of serious or willful pollution” etc. -- none of which prohibit the transport of WMD, and indeed Article 23 explicitly permits the transport of “nuclear or other inherently noxious or dangerous substance”. On the other hand, the chapeau to Article 19 of the Convention states that “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.” A plausible argument could be made that the transport of WMD-related material is prejudicial to the peace and security of the coastal state.

Interdiction *on the high seas* is almost certainly illegal unless the interdicting country has the permission of the flag state. A 2005 Protocol to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation would allow for interdiction on the high seas, but the Protocol is not yet in force and in any case will be binding only on the states that sign and ratify it.

In addition to the legal uncertainties, the PSI lacks clear standards as to when an interdiction would be warranted – which states and non-state actors are ‘of proliferation concern’ (terminology used in the statement of PSI principles), when to interdict the ships of other states, how much proof is necessary to justify an interdiction and who gets to see the evidence, what redress there is when an interdiction is not justified, etc.<sup>4</sup>

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<sup>4</sup> Jack Garvey, “The International Institutional Imperative for Countering the Spread of WMD: Assessing the PSI”, *Journal of Conflict and Security Law*, Vol. 10, No. 2 (2005): 125-47.

In any case, even if legal, the PSI in itself is not a full solution, because it only applies in the territorial waters of participating states or on the high seas with respect to flag of convenience states. It does not apply on the high seas generally.

### **Resolution 1874 and the use of force**

The legal uncertainty and concerns about biased implementation could be mitigated by having the PSI enshrined in a Security Council resolution a) obliging all states to board suspicious vessels in their territorial waters, and b) authorizing states to board any vessel on the high seas. This is what the US tried to do with resolution 1540, but China's veto prevented that. There does not seem to be any more appetite for a "PSI resolution" today.

With resolution 1874, the SC came close to authorizing military action to interdict suspicious North Korean ships on the high seas or to force them into port. However, a careful reading of the resolution indicates it did not go that far. The key provisions are as follows:

11. *Calls upon* all States to inspect, in accordance with their national authorities and legislation, and consistent with international law, all cargo to and from the DPRK, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions;

12. *Calls upon* all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions;

13. *Calls upon* all States to cooperate with inspections pursuant to paragraphs 11 and 12, and, if the flag State does not consent to inspection on the high seas, *decides* that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities pursuant to paragraph 11.

What are the legal implications? First of all, the resolution "calls upon" states to inspect suspicious ships in their territorial waters and it "calls upon" flag states to consent to inspection on the high seas. The term "calls upon" has been used by the SC in the past to impose binding obligations (the ICJ has said that such a resolution can, but does not always, constitute a 'decision' within the meaning of Article 25 of the UN Charter). However, in the context of resolution 1874, in which the words 'demands' 'decides' and 'requires' are used in other paragraphs, the term 'calls upon' can not reasonably be read as

a binding obligation. It in effect strongly urges states to engage in and allow such inspections, but they are not legally obliged to do so.

The most interesting provision is paragraph 13. It stipulates that if a flag state does not consent to an inspection the SC "decides the flag state shall" direct the vessel to a nearby port. That is a binding obligation. But what if North Korea refuses? Can military action be employed to force the ship into the territorial waters of a sympathetic country (or to board and inspect the ship)? **No**. Not all binding obligations are enforceable through military action (resolution 660 on Iraq was binding but did not authorize enforcement action - that came later, with resolution 678). The US or others may some day seek to interpret resolution 1874 that way, but China voted for the resolution based on the opposite understanding (stated explicitly in its explanation of vote). Significantly, no other SC member - not Russia, not Vietnam, not Libya – made a similar statement. On the other hand, in their explanation of votes, neither the US nor any other country explicitly stated they had the legal authority to use force to interdict ships.

It is conceivable that there will be a row over how to interpret this resolution in the future (like 1441 on Iraq and the resolutions on Kosovo pre-1999), but in my view the better legal argument is that coercive interdiction on the high seas has not been authorized. Action so far has been consistent with this interpretation. And in fact the US, China and Russia reportedly agreed in mid-June that they would implement the resolution by ordering ships to stop but not board them by force.<sup>5</sup> This does not preclude a more robust interpretation of the resolution later, but does suggest that the matter will not come to a head soon.

## **Conclusion**

Security Council action on North Korea is a good illustration of how the Security Council can move in the direction of authorizing coercive action, incrementally and not necessarily according to any design on the part of a particular SC member. As I noted in the introduction, it occurs piecemeal, in reaction to crises as they erupt and as a function of the political dynamics within the Security Council at a given moment. Arguably, China is now closer to accepting coercive interdiction of suspicious North Korean vessels than it was five years ago.

The larger point is that effective diplomacy can be used to create precedents, build coalitions and push the Council in a direction that serves US interests, incrementally and over time. In the particular case of North Korea, high level diplomacy combined with arms and economic sanctions remain the best option by far, but diplomacy backed by the implicit threat of limited force – from the SC – may well pay dividends in the ongoing effort to contain NK. Reports that a North Korean freighter destined for Myanmar and tracked by the US navy has turned back suggest this is already starting to happen. <sup>6</sup>

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<sup>5</sup> David Sanger, "US to confront, not board, North Korean ships", *New York Times*, June 17, 2009.

<sup>6</sup> Choe Sang-Hun, "South Korea Says Freighter from North Turns Back", *The New York Times*, July 7, 2009.