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North Korea and the UN: Resolution 1718 and Its Legal Dimensions

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IN response to the nuclear test conducted by North Korea on 9 October 2006, the United Nations Security Council acted on its enforcement powers under Chapter VII of the UN Charter. On 14 October, it unanimously adopted Security Council Resolution 1718 (SCR 1718). The response of the Security Council to North Korea's nuclear test was in many ways predictable. There was little doubt that the Security Council would condemn the test as a "threat to international peace and security". This enabled it to exercise its enforcement powers under Chapter VII and order sanctions that were legally binding on member states. Although the Security Council could authorize under Chapter VII the use of force against North Korea, it was clear that two permanent members of the Security Council -- China and Russia -- would not support the authorization of military force under Article 42 of the UN Charter. Therefore, it is not surprising that SCR 1718 refers specifically to the fact that the sanctions are being imposed under Article 41, which provides for measures not involving the use of force.

Impact of SCR 1718 on North Korea

The Security Council was able to obtain a consensus to take serious and comprehensive sanctions against North Korea. The sanctions will make it extremely difficult for North Korea to obtain any assistance or technology from other states for its nuclear weapons and ballistic missile programmes. SCR 1718 prohibits the direct or indirect supply, sale or transfer to North Korea of materials, equipment, goods, and technology that could be used in its ballistic missile or weapons of mass destruction (WMD) programmes. It also requires states to prohibit their nationals from providing any technical advice or assistance relating to the provision, manufacture or maintenance of its nuclear weapons and ballistic missile programmes. Further, it requires member states to freeze the funds and other assets in their territories by persons or entities designated by the Security Council as engaged in or providing support for North Korea's WMD or ballistic missile programmes.

Also, the sanctions in SCR 1718 will make it extremely difficult for North Korea to export its nuclear technology to other states or to non-state actors, as it has similar prohibitions on the sale or transfer of the prohibited items from North Korea.

Diplomatic victory for the US?

This is a diplomatic victory for the United States. A major goal of the Bush Administration since 2003 has been to stop the spread of WMD. It has been especially concerned about the sale or transfer of WMD from "rogue states" to state or non-state actors for terrorist purposes.

One of the states it identified as a “rogue state” was North Korea. The sanctions will also make it extremely difficult for North Korea to increase its capability for an armed conflict using conventional weapons. SCR 1718 places restrictions on the transfer of conventional weapons to and from North Korea. This includes tanks, artillery systems, combat aircraft, attack helicopters, warships, missiles and missile-systems. Finally, the sanctions also require states to prohibit the entry into their territory of persons designated by the Security Council as being responsible for promoting North Korea’s WMD and ballistic missile programmes, together with their family members.

The most controversial aspect of the resolutions concerns its methods of enforcement. The major issue was whether the Security Council would authorize the interdiction and inspection of ships and planes coming in and out of North Korea in order to prevent the proliferation of WMD or related materials and technology from North Korea to states or non-state actors who might use it for terrorist purposes. Significantly, the draft resolution submitted by the U.S. and Japan on 10 October contained no provision authorizing the interdiction of ships. This is likely because the U.S. knew that China would not support the resolution if it contained language authorizing the interdictions of ships in international waters.

Although SCR 1718 contains no language on interdictions, it does contain a paragraph on inspections. It was obviously very difficult for the permanent members to reach agreement on the wording of the paragraph on inspections; the draft originally proposed by the U.S. and Japan was amended twice before a consensus was reached on the final text which reads as follows:

(f) in order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including thorough inspection of cargo to and from the DPRK, as necessary; (emphasis added).

Interdiction or inspection?

There are several significant points about the paragraph on inspections.

First, it calls for cooperative action. It is likely that the U.S. will want to use the Proliferation Security Initiative (PSI) as the major mechanism for the cooperative action called for in the resolution, as the PSI contains principles on the interdiction, boarding and search of ships. However, given that China and South Korea are not members of PSI, negotiations will be required to convince them to cooperate with the PSI or not oppose cooperative action among other states through the PSI.

Second, the language used in this paragraph makes it “non-mandatory”. In the paragraph on inspections, the language used is “Member States *are called upon*” whereas in the other operative paragraphs in SCR 1718, the language used is “Member States *shall*”. Therefore, this paragraph was intended to give Member States some leeway as to whether and how they will take cooperative action with respect to inspections. Therefore, negotiations will be required between the U.S. and other major stakeholders such as China and North Korea.

Third, the paragraph makes it clear that any cooperative action must be consistent with international law. SCR 1718 did not intend to change the existing rules of international law

governing the boarding of ships in international waters. Therefore, the principle that ships in international waters cannot be boarded without the consent of the flag state remains unchanged.

Fourth, the cooperative action is limited to preventing trafficking in WMD. It does not cover two other categories of items that are included in the sanctions – conventional weapons and luxury goods. Although SCR 1718 is silent on the interdiction of ships, interdictions can take place under the PSI by cooperating states. Interdictions under the PSI must also be consistent with international law. Most inspections under the PSI will take place when ships are in ports.

SCR 1718 will make it easier to interdict and inspect ships suspected of carrying prohibited items to or from North Korea under the PSI. All members of the UN are legally obligated under SCR 1718 to cut off all transactions with North Korea relating to WMD material or technology. They are also under a legal obligation to take cooperative action to ensure that no WMD material or technology is shipped into or out of North Korea by their national or aboard ships flying their flag. Therefore, all UN members are likely to take cooperative action to inspect suspect ships in their ports and to permit the interdiction and inspection of ships flying their flag if there is evidence that their ships are being used to violate the sanctions imposed in SCR 1718.

However, one possible loophole remains. This is when the suspect material is shipped from North Korea on a ship flying the North Korean flag. Since SCR 1718 was not intended to change the existing state of international law on this issue, it will not be possible to legally interdict ships flying the North Korean flag in international waters with the consent of North Korea. Therefore, the only recourse will be to inspect North Korean ships if they enter the port (or possibly the territorial sea) of another state.

SCR 1718 therefore represents a major step by the UN Security Council to deal with the threats raised by the North Korean nuclear test and the proliferation of WMD. If SCR 1718 is enforced through cooperative action under the PSI that is consistent with international law, it will demonstrate the ability of the major powers to set aside their differences and work together to deal with common threats to international peace and security.

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