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Legal Analysis of the 2006 U.N. Security Council Resolutions Against North Korea's WMD Development

Eric Yong-Joong Lee*

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Eric Yong-Joong Lee

Abstract

In Part I, the author will clarify the facts regarding the evolution of the incidents and the adoption of the resultant resolutions. In Part II, the author will analyze the legal questions regarding the two resolutions. Part II will first examine the legality of the missile launch on the basis of Security Council Resolution 1540, customary international law and the Chicago Convention on International Civil Aviation. Second, Part II will examine Resolution 1695's terminology by comparing it to previous resolutions. Third, it will discuss the sanctions based on national legal authorities and legislations. Fourth, Part II will examine international law regarding nuclear weapons control. Part III investigates the legally binding force of the two resolutions. Resolution 1695 does not refer to Chapter VII of the United Nations Charter (the "Charter") in its main text, indicating that the Security Council may not take any collective security measures toward North Korea. The legally binding force of the resolution has been controversial since its drafting. That question will be discussed here. Resolution 1718 authorized the Security Council to enact non-military sanctions under Article 41 of the Charter. Resolution 1718 also prevents U.N. Member States from providing any arms or technology related to ballistic missiles or WMD. Furthermore, the United States demanded that U.N. Member States take part in cargo inspection to and from North Korea. The final section will be devoted to analyzing the cargo inspection with respect to the law of the sea.

ARTICLES

LEGAL ANALYSIS OF THE 2006 U.N. SECURITY COUNCIL RESOLUTIONS AGAINST NORTH KOREA'S WMD DEVELOPMENT

*Eric Yong-Joong Lee**

INTRODUCTION

2006 will be remembered as a watershed year for North Korea's ("DPRK") weapons of mass destruction ("WMD") development process.¹ Kim Jong Il's regime conducted missile and nuclear weapons tests in the latter half of that year.² The missile test came first.³ On July 5, 2006, in the early morning and late afternoon, North Korea fired a total of seven missiles toward the East Sea of Korea, including Rodong (labor), Scud and intercontinental ballistic missiles ("ICBM") from missile bases located in Musudan-ri, Hwadae-gun, North Hamgyong Province and Gidaeryeong, Anbyeon-gun, Kangwon-do Province.⁴ Most of the missiles crashed into the northern part of the East Sea.⁵ The ICBM that received the most attention, Taepodong 2, flew on course for less than a minute before crashing into the East Sea.⁶

* Assistant Professor of International Law, Dongguk University, Seoul, Korea. President of YIJUN Institute of International Law (www.yijuninstitute.org), B.A. (U. Washington), M.P.A. (Seoul Nat'l U.), LL.M. (Leiden), Dr.iur. (Erasmus). Much gratitude is extended to the lovely niece of mine, Jenny Suh, who helped me in writing this paper. The author accepts full responsibility for the facts and views expressed herein. Readers' comments are cordially welcomed. The author can be contacted at grotian@yahoo.com.

1. See generally *Chronology of North Korea's Nuclear Weapons Development*, USA TODAY, Oct. 9, 2006, http://usatoday.com/news/world/2006-10-09-nkorea-timeline_x.htm [hereinafter *Chronology*].

2. See *id.*

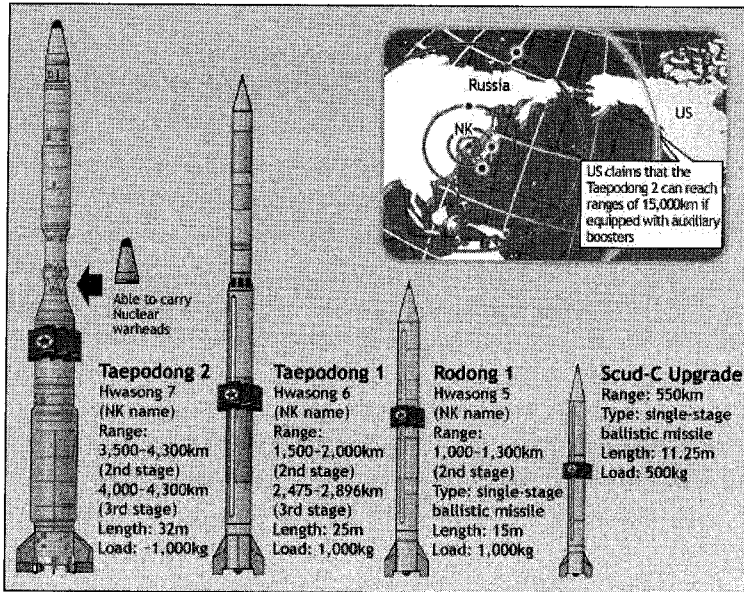
3. See *id.*

4. See *id.*; see also Helen Cooper & Warren Hoge, *U.S. Seeks Strong Measures to Warn the North Koreans*, N.Y. TIMES, July 6, 2006, at 10; Myoung-Gun Lee & Dong-Yong Min, *Slow Response to ICBM Test Criticized*, DONGA.COM, July 6, 2006, <http://english.donga.com/srv/service.php3?biid=2006070699308>.

5. See Lee & Min, *supra* note 4.

6. See *Lawmakers Chide Roh Administration Over Missile Launch*, KOREA HERALD, July 7, 2006.

FIGURE I-1: THE MISSILES LAUNCHED BY NORTH KOREA



Source: Korea Broadcasting Service⁷

Next came the nuclear arms test on October 9, 2006.⁸ North Korea claimed it conducted a successful nuclear test in Hwade-ri near Kilju city.⁹ On October 16, 2006, the U.S. Office of Nuclear Intelligence announced that “[a]nalysis of air samples collected October 11, 2006, detected radioactive debris which confirms that North Korea conducted an underground nuclear explosion.”¹⁰ According to the statement, the explosion yield was less than one kiloton.¹¹ Seismic signals around the world ranged from a magnitude of 3.5 to 4.2 on the Richter scale, but it is difficult to translate those measurements to explosion yield due to a lack of information on the exact geology of the site.¹²

7. KBS World, Concerns Over the NK's Development of Missiles, http://world.kbs.co.kr/english/event/nkorea_nuclear/news_04c.htm (last visited Sept. 26, 2007).

8. See *Chronology*, *supra* note 1.

9. See Anthony Faiola, Glenn Kessler & Dafna Linzer, *North Korea Announces Nuclear Test*, S.F. CHRON., Oct. 9, 2006, at A1.

10. See SIEGFRIED S. HECKER, CTR. FOR INT'L SEC. AND COOPERATION, REPORT ON NORTH KOREAN NUCLEAR PROGRAM 4 (2006), available at http://cisac.stanford.edu/publications/report_on_north_korean_nuclear_program.

11. See *id.*

12. See *id.*

North Korean experts were reluctant to discuss the exact facts of the nuclear test. The director of the Yongbyon Nuclear Scientific Research Center, North Korea's major nuclear facility, merely confirmed that his facility produced the plutonium metal for the test device, offering no other information.¹³ Diplomatic and military officials of North Korea, however, declared that the nuclear test was "powerful and fully successful."¹⁴

North Korea's missile launches and nuclear test had a profound impact on the global community. First, the missile launches broke the moratorium on missile launching between the United States and North Korea that the two nations had followed for several years.¹⁵ Second, the nuclear test was not in accordance with the basic principles of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT")¹⁶ and other international treaties banning nuclear weapons tests.¹⁷ The United States and Japan strongly criticized North Korea's missile and nuclear tests as threatening global peace.¹⁸ Japanese Chief Cabinet Secretary Shinzo Abe hinted that Japan could assert legitimate self-defense rights to attack North Korea's missile bases preemptively under certain situations.¹⁹ The United States and

13. *See id.*

14. *See id.*

15. The moratorium was initiated in September 1999 after North Korea launched the Taepodong 1 missile in 1998 and it was reconfirmed in October 2000 by a joint communiqué. While North Korea had verbally repudiated the moratorium in June, 2006, it came to an end on July 5, 2006, when North Korea launched the Taepodong 2. *See* Hwang Jae-hoon, *North Korea Abolished the Moratorium Completely in Seven Years*, YONHAP NEWS (S. Korea), July 10, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean); *see also* Helene Cooper & Michael R. Gordon, *N. Korea Disavows Moratorium on Missile Testing*, INT'L HERALD TRIB., June 21, 2006.

16. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] ("Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end, . . .").

17. International treaties prohibiting nuclear weapons tests include the Partial Test Ban Treaty of 1963, the Threshold Test Ban Treaty of 1974, The Peaceful Nuclear Explosion Treaty of 1976, and The Comprehensive Test Ban Treaty of 1996. *See generally* HARALAMBOS ATHANASOPOULOS, *NUCLEAR DISARMAMENT IN INTERNATIONAL LAW* 33-51 (2000).

18. *See* Press Release, Security Council, Security Council Condemns Democratic People's Republic of Korea's Missile Launches, Unanimously Adopting Resolution 1695, U.N. Doc. SC/8778 (July 15, 2006) [hereinafter Security Council Condemns].

19. *See* Editorial, *Japan's Reassertion*, KOREA HERALD, July 13, 2006; Shin Ji-hong, *North Korea Missile - Japan's Plan for Advanced Attack Toward Opponent*, YONHAP NEWS (S.

Japan agreed that bold action should be taken against North Korea at the United Nations ("U.N."). South Korea, also expressing deep regret toward North Korea's missile and nuclear tests, took the decisive position that North Korea must come back to the Six-Party Talks.²⁰ North Korea, however, countered that the missile launches and nuclear test were normal military exercises intended to strengthen the nation's defense.²¹ These missile and nuclear disputes were finally referred to the U.N. Security Council (the "Council") for a diplomatic resolution, resulting in the Council passing two resolutions.²²

This Article deals with the critical issues concerning the two Security Council resolutions (1695 and 1718) condemning North Korea's missile and nuclear weapons testing from a viewpoint of international law. The main focus will be the legally binding force of the resolutions against North Korea. This Article is composed of three parts. In Part I, the author will clarify the facts regarding the evolution of the incidents and the adoption of the resultant resolutions. In Part II, the author will analyze the legal questions regarding the two resolutions. Part II will first examine the legality of the missile launch on the basis of Security Council Resolution 1540, customary international law and the Chicago Convention on International Civil Aviation. Second, Part II will examine Resolution 1695's terminology by comparing it to previous resolutions. Third, it will discuss the sanctions based on national legal authorities and legislations. Fourth, Part II will examine international law regarding nuclear weapons control. Part III investigates the legally binding force of the two resolutions. Resolution 1695 does not refer to Chapter VII of the United Nations Charter (the "Charter")²³ in its main text, indicating that the Security Council may not take any collective security measures toward North Korea. The legally binding force of the resolution has been controversial since its

Korea), July 10, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

20. See Warten Hoge & Choe Sang-Hun, *North Korea Rejects UN Missile Demand*, INT'L HERALD TRIB., July 16, 2006, at 1.

21. See Hwang Jae-hoon, *Military Vanguard Protects South Korea: North Korea's Absurd Claim*, YONHAP NEWS (S. Korea), July 15, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

22. See S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006); S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006).

23. U.N. Charter arts. 39-51.

drafting. That question will be discussed here. Resolution 1718 authorized the Security Council to enact non-military sanctions under Article 41 of the Charter. Resolution 1718 also prevents U.N. Member States from providing any arms or technology related to ballistic missiles or WMD. Furthermore, the United States demanded that U.N. Member States take part in cargo inspection to and from North Korea. The final section will be devoted to analyzing the cargo inspection with respect to the law of the sea.

I. ADOPTION OF THE TWO SECURITY COUNCIL RESOLUTIONS

1. Resolution 1695

Right after North Korea launched the missiles on July 5, 2006, the United States and Japan addressed the U.N. Security Council.²⁴ The next day, Japan completed a draft resolution and started diplomatic negotiations with members of the Security Council, soliciting support for its resolution.²⁵ The draft resolution presented by Japan included sanctions on any funds, commodities, goods and technologies that could be used for the development of WMD in North Korea.²⁶ In addition, Japan requested that North Korea instantly stop the development, experimentation and proliferation of nuclear weapons.²⁷ John Bolton, the United States' permanent representative to the United Nations, reportedly contacted other permanent members of the Security Council and informally discussed North Korea's missile tests.²⁸ On the other hand, China submitted a draft of a Presidential Statement on July 11 that both emphasized the importance of a diplomatic settlement of North Korea's missile test and demanded that North Korea abide by the moratorium on missile launching.²⁹

24. See Dana Priest & Anthony Faiola, *North Korea Tests Long-Range Missile*, WASH. POST, July 5, 2006, at A1.

25. See Security Council Condemns, *supra* note 18.

26. See *id.*; see also Betsy Pisik, *U.S., Japan Lead Push to Sanction Pyongyang*, WASH. TIMES, Oct. 10, 2006, at A1.

27. See Security Council Condemns, *supra* note 18.

28. See, e.g., *U.N. Ambassador Bolton Holds a Media Availability Following a Security Council Meeting on North Korea*, WASH. POST, July 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/05/AR2006070500793.html> (transcript from media availability after Security Council meeting on North Korea).

29. See Kim Gye-hwan, *The Prospects of China's Draft of UN Security Council Resolution*,

FIGURE I-1 TIMELINE OF ADOPTING RESOLUTION 1695

Date (2006)	Evolution of the Process
July 5	North Korea test-fired missiles—Japan called for U.N. Security Council meeting
July 6	Japan completed the draft of a resolution calling for sanctions against North Korea
July 7-13	Assistant Undersecretary of the United States, Christopher Hill, visited Seoul, Tokyo and Beijing
July 10	Japanese Prime Minister, Shinzo Abe, announced the possibility of attacking North Korea preemptively—Japan delayed the Security Council resolution
July 11	South Korea criticized Japan's aggressive position
July 12	China and Russia propose a new draft of the Security Council resolution against North Korea
July 15	After extensive debate and bargaining, the Security Council passed Resolution 1695

The Security Council called for experts to discuss the question of North Korea's missile tests.³⁰ Since the positions of the United States and Japan clashed with those of China and Russia, however, the Council had difficulties coming to a unanimous agreement. On July 12, Russian Foreign Minister Sergey Lavrov pointed out that the Security Council's sanctions could obstruct the actual solution to the problem.³¹ He urged Japan to change its standpoint toward North Korea.³² Although the Council was trying to adopt the final draft resolution, it was delayed because China and Russia were expected to veto the resolution drafted by Japan.³³ As a compromise, France and Britain proposed a two-step approach which was composed of adopting a Presidential Statement criticizing North Korea, and then passing a resolution with sanctions.³⁴ On July 12, China and Russia proposed a

YONHAP NEWS (S. Korea), July 11, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

30. See *North Korea Calls Missile Launches Successful, Threatens More*, WHITE HOUSE BULL., July 6, 2006.

31. See *Japan's Stand on North Korea "Unacceptable" Russian Foreign Minister Says*, BBC WORLDWIDE MONITORING, July 12, 2006; *U.S. Envoy Says N.K. Unlikely to Return to 6-Party Talks*, KOREA HERALD, July 13, 2006 [hereinafter *U.S. Envoy*], available at http://www.koreaherald.co.kr/archives/result_contents.asp?id=20060713004&query=lavrov.

32. See *U.S. Envoy*, *supra* note 31.

33. See Lee Dong-min, *China, Russia Introduce Alternative NK Resolution*, YONHAP NEWS (S. Korea), July 13, 2006.

34. See Shin Ji-hong, *Britain and France Suggest A Resolution with Chapter Seven Omit-*

new draft resolution demanding that North Korea return to the Six-Party Talks.³⁵ The amended draft of China and Russia strongly criticized North Korea's missile tests and urged it to re-declare the moratorium on missile launching.³⁶ It also asked for other U.N. Member States to stop providing resources and technology that could be used in missile development.³⁷ France and Britain comprehensively revised the China-Russia draft, combining it with that of the United States and Japan.³⁸ In the end, on July 15, the Council unanimously passed Resolution 1695, which demanded that North Korea discontinue missile discharge. The main points of Resolution 1695 are outlined below:³⁹

The Security Council,

Reaffirming its resolutions 825 (1993) of 11 May 1993 and 1540 (2004) of 28 April 2004, . . .

- *Condemns* the multiple launches by the DPRK of ballistic missiles on 5 July 2006 local time;⁴⁰
- *Demands* that the DPRK suspend all activities related to its ballistic missile programme. . . ;⁴¹
- *Requires* all Member States, . . . to exercise vigilance and prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programmes; . . .⁴²
- *Underlines* . . . the need to show restraint and refrain from any action that might aggravate tension . . . ;⁴³
- *Strongly Urges* the DPRK to return immediately to the Six-Party Talks . . . and to return at an early date to the Treaty on Non-proliferation of Nuclear Weapons⁴⁴

ted—China, Japan, and United States of America Consider Adopting the Suggested Resolution, YONHAP NEWS (S. Korea), July 15, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

35. See Lee, *supra* note 33.

36. See Warren Hoge, *U.S. Hits Obstacle to Action by U.N. on North Korea*, N.Y. TIMES, Oct. 14, 2006, at A1; Warren Hoge & Sheryl Gay Stolberg, *Bush Rebukes North Korea*, N.Y. TIMES, Oct. 10, 2006, at A1 [hereinafter *Bush Rebukes North Korea*].

37. See Lee, *supra* note 33.

38. See *U.N. Agrees on Resolution Against North Korea*, N.Y. TIMES, July 15, 2006; see also Yoshikazu Shirakawa & Takaharu Yoshiyama, *France, U.K. Key Deal Brokers*, DAILY YOMIURI (Tokyo), July 17, 2006, at 3.

39. S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006).

40. *Id.* ¶ 1.

41. *Id.* ¶ 2.

42. *Id.* ¶ 3.

43. *Id.* ¶ 5.

44. *Id.* ¶ 6.

North Korea immediately rejected Resolution 1695. Park Gil-yeon, North Korea's permanent representative to the United Nations, criticized the Security Council's decision, stating that his country "resolutely condemns the attempt of some countries to misuse the Security Council for the despicable political aim to isolate and put pressure on the [DPRK] and totally rejects the resolution"⁴⁵ Park also added, "[t]he situation is clear enough to show that there is no need for North Korea to discontinue the missile discharge and North Korea's missile launches not only preserve peace and stability in Northeast Asia, but counterpoise the power balance among countries as well."⁴⁶

2. Resolution 1718

Following the missile test-firing, North Korea created even more controversy in the global community with its nuclear weapons test of October 9, 2006, which alarmed the world. It immediately became the most serious problem that the members of the Security Council needed to address.⁴⁷ The United States and Japan agreed that the Security Council should take effective action in concert with the countries of the Six-Party Talks.⁴⁸ The United States drafted a resolution calling for both international inspections of all cargo moving into and out of North Korea to detect weapons-related materials, and a freeze on any transfer or development of WMD.⁴⁹ The United States' proposals highlighted the Proliferation Security Initiative ("PSI")⁵⁰ which aims

45. See Hoge, *supra* note 20.

46. See Lee Rae-woon & Kim Gye-hwan, *UN Security Council Adopts Final Resolution Toward North Korea*, YONHAP NEWS (S. Korea), July 15, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

47. See e.g., *Annan Presses for U.S. Talks with N. Korea*, N.Y. TIMES, Oct. 12, 2006, at A22; Press Release, General Assembly, Reduction of Nuclear Arsenals Verification, Cluster Munitions, Among Issues Raised, As First Committee Continues Debate, U.N. Doc. GA/DIS/3328 (Oct. 16, 2006).

48. See Jin Dae-woong, *Bush, Abe Urge Bold U.N. Action*, KOREA HERALD, Oct. 10, 2006.

49. See *U.N. Considers Tough Sanctions*, KOREA HERALD, Oct. 11, 2006.

50. The Proliferation Security Initiative ("PSI") (inaugurated in June 2003) is an international effort led by the United States to prevent the proliferation of nuclear, chemical and biological weapons and materials. The Initiative is designed to work within the framework of other international agreements. The PSI consists of 15 core countries including the United States of America, Britain, Australia, Canada, France, Germany, Italy, the Netherlands, Japan, Norway, Portugal, Singapore, Spain, and Russia. A further 60 countries have agreed to cooperate on an *ad hoc* basis. For more details, see John R. Bolton, Under Secretary for Arms Control and International Secur-

to encourage member countries to interdict weapons from North Korea, Iran and other states of concern.⁵¹ Japan proposed even more stringent measures; these included banning all North Korean ships and planes from all ports if they are suspected of carrying nuclear or ballistic missile-related materials.⁵² Japan also insisted that the new resolution contain Chapter VII of the Charter, authorizing the Security Council to take military measures against threats to international peace and security.⁵³ South Korea underscored the need to take calm, strategic and well-coordinated actions based on discussion and cooperation among the allies in accordance with the Charter.⁵⁴ China and Russia took a cautious approach to the subject of military action. China warned North Korea that its nuclear test would harm friendly relations among neighboring countries and called on the United Nations to take appropriate measures to push North Korea to abandon its nuclear program.⁵⁵ Chinese Foreign Ministry Spokesman, Liu Jianchao, emphasized the importance of diplomatic efforts, asserting that it was not the right time for punishment, much less military action.⁵⁶ Also stressing the need for a diplomatic solution, Russian Foreign Minister Sergey Lavrov said Russia was prepared "to participate in joint efforts by interested parties with the aim of a peaceful, diplomatic settlement of the situation."⁵⁷

On the other hand, the United States insisted that the resolution be drawn up under Chapter VII of the Charter, which authorizes punishments including breaking diplomatic ties, imposing economic sanctions, naval blockades and military action.⁵⁸ China opposed the inclusion of a general reference to Chapter

ity Affairs, Proliferation Security Initiative: Statement of Interdiction Principles, Remarks at Proliferation Security Initiative Meeting, (Sept. 4, 2003) available at <http://www.state.gov/t/us/rm/23801.htm>.

51. See generally *id.*; Michael A. Fletcher, *Bush Fails to Persuade S. Korea on Sanctions*, WASH. POST, Nov. 19, 2006, at A24; *U.N. Considers Tough Sanctions*, *supra* note 49.

52. See *U.N. Considers Tough Sanctions*, *supra* note 49.

53. See *China Gets Tough on N. Korea*, KOREA HERALD, Oct. 12, 2006; see also U.N. Charter arts. 39-51.

54. See Jin, *supra* note 48.

55. See *id.*; Colum Lynch & Maureen Fan, *China Says It Will Back Sanctions on N. Korea*, WASH. POST, Oct. 11, 2006, at A1.

56. See Jin, *supra* note 48.

57. See *id.*

58. See *Bush Rebukes North Korea*, *supra* note 36; *U.S. to Impose Nonmilitary N.K. Sanctions*, KOREA HERALD, Oct. 14, 2006; see also U.N. Charter arts. 39-51.

VII, preferring that retaliatory measures be limited to those authorized by Article 41, which allows only non-military sanctions.⁵⁹ Following harsh debates within the Security Council, the two sides adopted a new draft resolution, which stated that the Council would only take measures provided by Article 41 in acting under Chapter VII of the Charter.⁶⁰

TABLE I-2: PROCESS OF ADOPTING RESOLUTION 1718

Date (2006)	Evolution of the Process
October 9	North Korea conducted nuclear test
October 10	Japan said response could include military measures
October 13	South Korea's President, Rho Moo-hyun, and Chinese Communist Party General Secretary, Hu Jintao, agreed to resolve the question of North Korea's nuclear test diplomatically
October 14	The Security Council passed Resolution 1718
October 16	US Office of Nuclear Intelligence issued the statement on the analysis of air samples

On October 14, 2006, the Security Council unanimously passed the draft as Resolution 1718.⁶¹ The resolution, acknowledging North Korea's nuclear test as a clear threat to international peace and security, imposed certain sanctions on North Korea.⁶² Specifically, Resolution 1718 calls on all U.N. Member States to inspect cargo vessels leaving or arriving in North Korea in order to prevent any illegal trafficking in unconventional weapons or ballistic missiles.⁶³ Park Gil-yon of North Korea continued to blame the United States, saying its "threats, sanctions and pressure" forced North Korea to "prove its possession of nukes to protect its sovereignty and right to existence from the daily increasing danger of war from the United States."⁶⁴

The main points of Resolution 1718 are outlined below:

59. *See U.S. to Impose Nonmilitary N.K. Sanctions, supra* note 58; *see also* U.N. Charter art. 41.

60. *See U.S. to Impose Nonmilitary N.K. Sanctions, supra* note 58.

61. S.C. Res. 1718, U.N. Doc. S/RES/1718 (October 14, 2006).

62. *See id.*

63. *See U.N. Imposes Sanctions on N.K.*, KOREA HERALD, Oct. 16 2007.

64. *See id.* For more details on North Korea's reaction, *see* Press Release, Statement of the Foreign Ministry of North Korea in Response to UN Security Council Resolution 1718 (Oct. 17, 2006), available at <http://se2.isn.ch/serviceengine/FileContent?serviceID=PRIA&fileid=BAAE5799-9CF8-D6A3-3F27-D605A21418D7&lng=en>.

The Security Council, . . .

*Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,*⁶⁵

- *Condemns* the nuclear test proclaimed by the DPRK on 9 October 2006 . . . ;⁶⁶
- *Demands* that the DPRK not conduct any further nuclear test or launch of a ballistic missile;⁶⁷
- *Demands* that the DPRK immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons;⁶⁸
- *Demands* further that the DPRK return to the Treaty on the Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency (IAEA) safeguards . . . ;⁶⁹
- *Decides* also that the DPRK shall abandon all other existing weapons of mass destruction and ballistic missile programme in a complete, verifiable and irreversible manner;⁷⁰
- *Decides* that:
 - (a) all Member States shall prevent the direct or indirect supply, sale or transfer to the DPRK . . . of:
 - (i) any battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems, . . . ;⁷¹
 - (ii) all items, materials, equipment, goods and technology as set out in the lists in documents S/2006/814 and S/2006/815. . . ;⁷²
 - (d) All Member States shall . . . freeze immediately the funds, other financial assets and economic resources. . . ;⁷³
 - (f) . . . all Member States are called upon to take . . . cooperative action including through inspection of cargo to and from the DPRK, as necessary;⁷⁴
- *Calls upon* the DPRK to return immediately to the Six-Party Talks without precondition and to work towards the ex-

65. S.C. Res. 1718, *supra* note 61, pmb1.

66. *Id.* ¶ 1.

67. *Id.* ¶ 2.

68. *Id.* ¶ 3.

69. *Id.* ¶ 4.

70. *Id.* ¶ 7.

71. *Id.* ¶ 8(a)(i).

72. *Id.* ¶ 8(a)(ii). These other items are those that could contribute to North Korea's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programs. *Id.*

73. *Id.* ¶ 8(d).

74. *Id.* ¶ 8(f).

peditious implementation of the Joint Statement issued on 19 September 2005 by China, the DPRK, Japan, the Republic of Korea, the Russian Federation and the United States.⁷⁵

II. LEGAL QUESTIONS OF THE TWO SECURITY COUNCIL RESOLUTIONS

A. *Is a Missile Launch of a Sovereign State in Violation of International Law?*

1. Resolution 1540

The legality of a missile launch was first addressed by the Security Council's Resolution 1540 of April 28, 2004, which was referred to at the beginning of Resolution 1695. Resolution 1540 states that the proliferation of WMD, "*as well as their means of delivery*, constitutes a threat to international peace and security."⁷⁶ By this resolution, the international community recognized that the launch of a missile was in violation of international law. Before Resolution 1540, missile development or firing was not a question of international law because it was regarded as a matter of a country's right to self-defense. Even at the time of North Korea's Taepodong 1 missile discharge in 1998, in spite of the international community's strong desire for sanctions against North Korea, the Security Council could do no more than release a Presidential Statement. At that time there was not a clear international legal ground outlawing missile test-launches. International treaties concerning WMD, such as the NPT,⁷⁷ the Chemical Weapons Convention ("CWC"),⁷⁸ and the Biological and Toxin Weapons Convention ("BTWC")⁷⁹, do not

75. *Id.* ¶ 14.

76. S.C. Res. 1540, pmb., U.N. Doc. S/RES/1540 (April 14, 2004) (emphasis added).

77. *See* NPT, *supra* note 16.

78. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, G.A. Res. 47/39, U.N. GAOR, 47th Sess., 74th mtg., U.N. Doc. A/RES/47/39, 32 I.L.M. 800 (1993) [hereinafter CWC].

79. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter BTWC]. On the prohibition of biochemical weapons, see Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

directly refer to missile firing. The United States, thereupon, encouraged the Security Council to adopt a resolution preventing the development of WMD and their delivery systems.⁸⁰ The Security Council adopted Resolution 1540 on April 28, 2004 as a result of these efforts.⁸¹

Resolution 1540 was a monumental decision in the fight against terrorism. It clarified that not only the proliferation of nuclear, chemical and biological weapons, but also their means of delivery constituted a threat to international peace and security.⁸²

Specifically, Resolution 1540 mandated that all States adopt and enforce effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes.⁸³ Resolution 1540 also stated that none of the obligations set forth in that Resolution shall be interpreted so as to conflict with or alter the rights and obligations of the State Parties to the NPT, the CWC and the BTWC, or alter the responsibilities of the International Atomic Energy Agency ("IAEA") or the Organization for the Prohibition of Chemical Weapons ("OPCW").⁸⁴

A primary aim that the United States wanted to achieve through Resolution 1540 was to restrain North Korea's missile development and export. At that time, North Korea was suspected of supplying missiles to international terrorist groups. For instance, in 2002, a United States patrolling vessel halted a North Korean ship on its course to Yemen with fifteen Scud missiles, but had to disengage as international law did not then grant any authority to stop missile exports.⁸⁵ Now, it is no longer acceptable within international law for a country to export mis-

80. See Press Release, Security Council, Security Council Decides All States Shall Act to Prevent Proliferation of Mass Destruction Weapons, Resolution 1540 (2004) Adopted Unanimously, Focuses Attention on Non-State Actors, U.N. Doc. SC/8076 (Apr. 28, 2004).

81. See *id.*; see also S.C. Res. 1540, *supra* note 76.

82. See S.C. Res. 1540, *supra* note 76.

83. See *id.* ¶ 2.

84. See *id.* ¶ 5.

85. See James Harding, Mark Huband & Peter Spiegel, *U.S. Releases Missiles Ship for Yemen Missiles Seizure North Korean Weapons Could Have Been in Transit for Onward Passage to Libya, Syria or Iran*, FIN. TIMES (London), Dec. 11, 2002, at 10.

siles freely due to Resolution 1540.⁸⁶ Recently, the PSI, inaugurated by the United States following Resolution 1540, has been establishing a global network to constrain international terrorist groups from smuggling WMD and their delivery systems.⁸⁷ Because States cooperating with the PSI exercise joint operations and share information about terrorism and WMD, the PSI is expected to effectively blockade the missile trade between international terrorist groups and terrorism-supporting nations. It is not clear, however, that such activities under the PSI are allowed under current international law. There is criticism that the PSI will infringe upon state sovereignty, which is a fundamental principle of modern international law, while it is actively trying to suppress terrorism.⁸⁸

2. Customary International Law

The legal characteristics of missile tests can be examined from a perspective of customary international law. First, customary international law prohibits a State from the unauthorized use of the air space above another State.⁸⁹ Thus, if the North Korean missiles had entered Japanese air space, there would have been a definite violation of international law. Since all the missiles wound up in the East Sea of Korea, outside Japanese territorial waters, North Korea may argue that there was no violation of international law.⁹⁰ This stance, however, would give rise to a number of objections.

International law does not prohibit the testing of unarmed missiles over the oceans, unless ships at sea or other lawful users of ocean or air space are harmed. By not giving prior notice of its missile test, however,⁹¹ it could be assumed that North Korea

86. S.C. Res. 1540, *supra* note 76, ¶ 1.

87. See generally U.S. Department of State, The Proliferation Security Initiative, <http://usinfo.state.gov/products/pubs/proliferation/> (last visited Sept. 23, 2007).

88. See Mark K. Valencia, *Japan in a Corner Over Interdictions at Sea*, INT'L HERALD TRIB., Oct. 22, 2005, at 6; see also Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY, June 2004, http://www.armscontrol.org/act/2004_06/Joseph.asp.

89. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 118 (June 27) (1986); see also I.H.PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 12-13 (7th rev. ed. 2001).

90. See Frederic L. Kirgis, *North Korea's Missile Firings*, ASIL INSIGHT, July 24, 2006, <http://www.asil.org/insights/2006/07/insights060724.html>.

91. *Id.*; see also S.C. Res. 1695, *supra* note 39, pmbl.

violated a procedural norm of international law because it endangered ships and aircraft that might have unknowingly been in the missiles' path.

Second, North Korea broke the principle of good faith (*pacta sunt servanda*) by abolishing the moratorium of 1999 and the Pyongyang Declaration of 2002 (the "Declaration").⁹² North Korea, however, has refuted that because the moratorium and the Declaration called for merely a suspension, or delay, of missile discharge, and not permanent termination of its program, and because those agreements were never formalized, it is not legally bound by the statements it may have made.⁹³ Nevertheless, some similar declarations have been treated as binding under international law. In the *French Nuclear Tests Cases* of 1974, the International Court of Justice ("ICJ") treated as binding a unilateral public declaration by the French government that no further nuclear tests would be held in the atmosphere in the South Pacific.⁹⁴ The Court noted that unilateral acts can create legal obligations.⁹⁵ Even if North Korea's missile test did not directly violate concrete regulations of international law, it could be considered a grave threat to international peace and security. At that point, North Korea's stance is contrary to fundamental norms of the international community.⁹⁶

3. The Chicago Convention on International Civil Aviation

It has also been claimed that North Korea's missile discharge violated the Chicago Convention on International Civil Aviation of 1944 ("Civil Aviation Convention").⁹⁷ Reviewing safety regulations including Article 3(d)⁹⁸ and Article

92. See Security Council Condemns, *supra* note 18; see also Pyongyang Declaration, Japan-N. Korea, Sept. 17, 2002, available at http://www.mofa.go.jp/region/asia-paci/n_korea/pmv0209/pyongyang.huml. See generally *supra* note 15 and accompanying text.

93. See Kirgis, *supra* note 90.

94. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 261, 270 (Dec. 20); *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

95. See *Nuclear Tests Case (Austl. v. Fr.)* 1974 I.C.J. 253, 270, 271 (Dec. 20).

96. See Kirgis, *supra* note 90; see also U.N. Charter arts. 39-51.

97. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter *Civil Aviation Convention*]; see Cho Joon-hyung, *North Korea's Missile Firing: Violation of International Law?*, YONHAP NEWS (S. Korea), July 15, 2006, <http://www.yonhapnews.co.kr/cgi-bin/naver> (available only in Korean).

98. "The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." *Civil Aviation Convention*, *supra* note 97, art. 3(d).

44(d)&(h)⁹⁹ of the Civil Aviation Convention, these regulations are general standards for safe air navigation of civil aircraft and are not suitable to apply to the rules of the nonproliferation of WMD and their delivery systems, such as missiles. Relevant conditions regarding the missile firing, including the orbit and the point of impact, should be scrutinized in order to examine the legality of North Korea's missile discharge.

a. Will the Terminology Used in Resolution 1695 Create Binding Force Over North Korea?

Japan first presented the draft of Resolution 1695 on July 6, 2006, and after conciliating with the draft that China and Russia submitted, it was finally passed on July 15.¹⁰⁰ Japan's original draft was considerably different from China's, especially concerning the level of sanctions against North Korea.¹⁰¹ The differences are vividly illustrated by the terminology used in their drafts. First, with respect to Chapter VII of the Charter, Japan tried to explicitly include Chapter VII in the draft, while China omitted it.¹⁰² This was the biggest controversy in the course of adopting Resolution 1695. The final draft did not explicitly refer to Chapter VII, but it stated that the Security Council acts "under its special responsibility for the maintenance of international peace and security." Second, regarding the moratorium on missile launching, Japan tried to use the term "decides" in order to re-establish the pre-existing commitments to the moratorium, while China preferred the term "calls on." The parties chose "demands" after conciliation.¹⁰³ Third, on the prohibition of transferring missile and missile-related items, materials, goods and technology to North Korea, Japan insisted on the term "de-

99. "The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to: (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; (h) Promote safety of flight in international air navigation." *Id.* art. 44(d), (h).

100. See Edith M. Lederer, *U.N. Imposes Limited Sanctions on N. Korea*, WASH. POST, July 15, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/15/AR2006071500538.html>; Security Council Condemns, *supra* note 18

101. See Lederer, *supra* note 100.

102. See e.g., John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: United States Supports UN Sanctions, Vigorous Enforcement Following North Korean Missile and Nuclear Tests*, 101 AM. J. INT'L. L. 216 (2007); Hoge, *supra* note 20.

103. See Crook, *supra* note 102; Hoge, *supra* note 20.

cides,” while China continued to propose “calls on.” The Security Council chose the term, “requires” in the final resolution. Fourth, with regard to the prohibition of the procurement of missiles or missile related-items, materials, goods and technology from North Korea, and the transfer of any financial resources in relation to North Korea’s missile or WMD programs, Japan once again insisted on the term “decides,” while China again proposed “calls on.” Usage of the term “requires” resolved the conflict. Lastly, Japan urged North Korea to discontinue all nuclear weapon-related activities and return immediately to the Six-Party Talks, while China called on North Korea to return to NPT and IAEA Safeguards. The final draft contained both propositions.¹⁰⁴

As shown in Table II-1, the final draft is closer to China’s position than Japan’s. It is noticeable that Resolution 1695 does not use the term “decides” in its main statements, while it is referred to in most of the previous Security Council resolutions related to major crises threatening international peace and security. Therefore, the terminology laid down in Resolution 1695, such as “demands,” “requires,” and “urges,” must be examined to ascertain whether they have any legally binding force rather than just a psychological impact or normative coerciveness. In Security Council resolutions, the term “decides,” generally implies a compelling force. Thus, if a targeted country does not comply with a clause containing the term “decides,” compulsive measures will be taken. On the contrary, the terms “demands,” “requires” and “urges” give a sense of strong recommendation rather than a mandate. In this case, measures of force can hardly be called upon. Most of the previous Security Council resolutions with compelling measures contained terminologies such as “decides” or “authorizes.” An example is Resolution 1333, adopted on December 19, 2000, which included coercive statements against the Taliban regime in Afghanistan.¹⁰⁵ In Resolution 1333, the term “decides” was stipulated a total of ten times among the twenty-six declared statements.¹⁰⁶ Resolution 1718 is also a similar case. Because the Security Council had the clear intention to condemn North Korea’s nuclear test, “de-

104. See S.C. Res. 1695, *supra* note 39.

105. S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

106. *Id.* ¶¶ 5, 6, 8, 10-12, 22-24, 26.

TABLE II-1: COMPARISON BETWEEN THE DRAFTS OF
RESOLUTION 1695

Content	Japan's draft	China's draft	Final draft
Chapter VII of U.N. Charter	Included	Not Included	Not included: The Security Council acts under its special responsibility for the maintenance of international peace and security
The re-establishment of moratorium of North Korea missile launching	Decides	Calls on	Demands
The prohibition on export of missiles and related material to North Korea	Decides	Calls on	Requires
The prohibition on the procurement of North Korea's missiles and transfer of technology	Decides	Calls on	Requires
The reference to North Korea's nuclear weapon related activities	Demands: Discontinuation of every nuclear weapon related activity— Immediately return to Six Party talks.	Calls on: Return to NPT and IAEA Safeguards	Adopted both propositions: Return to Six Party Talks without any precondition— Urged cooperation with NPT and IAEA safeguards
Enforcement of the Resolution	Enforced duty of U.N member states	Recommendation without compulsion	Dissension about enforcement

cides" was referred to eight times among the seventeen main statements in the resolution.¹⁰⁷ Considering the aforementioned cases, the fact that the Security Council passed Resolution

107. S.C. Res. 1718, *supra* note 61, ¶¶ 5-10, 12.

1695 with terms such as “demands,” “requires” and “urges,” instead of Japan’s preference, “decides,” demonstrates the Council’s hesitation to enforce the resolution against North Korea. Therefore, considering the terminologies used in the resolution text, Resolution 1695 does not create substantial binding force towards North Korea.

B. *Can The U.N. Member States Stop North Korea’s Missile Launch In Accordance With Their National Legal Authorities And Legislation?*

The third and fourth clauses of Resolution 1695 contain the phrase, “in accordance with their national legal authorities and legislation”¹⁰⁸ Whether the U.N. Member States can sanction North Korea’s missile test-fire by their national laws is, thus, another issue that has to be addressed in an examination of Resolution 1695. It is traditionally recognized that national law is considered a mere fact before an international tribunal.¹⁰⁹ Article 27 of the Vienna Convention on the Law of Treaties of 1969 states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹¹⁰ Article 38(1) of the Statute of the International Court of Justice does not refer to domestic law as a source of international law either.¹¹¹ From this perspective, Resolution 1695 contradicts the general principle of international law, given that it presents domestic law as a call to action for the international community. Paradoxically, the fact that the Security Council Resolution mentioned national legal authorities and legislation as a ground for sanctions against North Korea signifies that there is no general international law that can effectively control North Korea’s missile launches and exports, except for a few statements in Resolu-

108. S.C. Res. 1695, *supra* note 39, ¶¶ 3-4.

109. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 38-40 (4th ed. 1990). In the case of *Certain German Interest in Polish Upper Silesia*, the Permanent Court of International Justice observed: “From the standpoint of International Law . . . municipal laws are merely facts which express the will and constitute the activities of States” See *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25).

110. See The Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 144 (2000); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 84 (1984).

111. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

tion 1540 and the PSI. Considering contemporary world politics, it is highly questionable whether any U.N. Member States can restrain the missile firing or exports of the biggest military powers, such as the United States or Russia, by their domestic laws. One-sided sanctions would infringe upon the principle of mutuality in international law. Overcoming this discrepancy may be the key to restraining the proliferation of WMD.

C. Does International Law Prohibit a Sovereign State from Possessing Nuclear Weapons?

In Resolution 1718, the Security Council, condemning the nuclear test, urges North Korea to abandon all existing WMD and ballistic missile programs “in a complete, verifiable and irreversible manner.”¹¹² A question may arise whether a sovereign state ever has the right to possess nuclear weapons.

North Korea’s obligation to abide by Resolution 1718 may stem from two bases. The first includes international treaties of nuclear disarmament including the NPT. The NPT, however, has been criticized for creating a double standard. Although some nuclear states such as India, Pakistan, and Israel, as well as the nuclear superpowers, remain outside the NPT system, they are not at a disadvantage in any category of the international community. Unfortunately, the numbers of existing nuclear weapons of the nuclear powers are not decreasing significantly, in spite of a series of nuclear test bans and limitations of strategic arms treaties concluded since the Cold War era. As long as the nuclear superpowers do not substantially eliminate their nuclear weapons caches, international law cannot effectively control renegades of the NPT system like North Korea. Therefore, the best way of restricting the development of nuclear weapons is to change the current two-tier system underlying the international law of nuclear weapons control.

The second ground is the joint statement from the Six-Party Talks released on September 19, 2005.¹¹³ The statement provides: “The DPRK committed to abandoning all nuclear weapons and existing nuclear programs.”¹¹⁴ Is a unilateral declara-

112. S.C. Res. 1718, *supra* note 61, ¶ 7.

113. Joint Statement of the Fourth Round of the Six-Party Talks, Sept. 19, 2005, available at <http://www.pircenter.org/data/resources/JointStat190905.pdf>.

114. *Id.*

tion like the joint statement binding on North Korea.¹¹⁵ As mentioned above, the ICJ in the *French Nuclear Tests Cases* adjudicated that under certain circumstances, a state's unilateral declaration could establish an international legal obligation to abide by the terms of the declaration.¹¹⁵ The Court emphasized the importance of the intentions of the State making the declaration. According to the Court, the two prerequisites for the creation of a binding international obligation are that the declaration: (1) be given publicly; and (2) be made with the intention of being bound thereby.¹¹⁶

Analyzing the joint statement, however, it is recognized that North Korea made it neither as a public statement, nor in such a way as to indicate an intention to be bound regardless of the action of other states.¹¹⁷ This declaration was made in the course of negotiations in which North Korea was expected to give up its nuclear weapons programs in exchange for recognition, an end to international isolation, and accompanying benefits to be provided by the Six-Party Talks.¹¹⁸ Thus, it is difficult to argue that this commitment unconditionally constitutes a legal obligation of North Korea. Unfortunately, neither codified rules nor customary international law has indicated evident grounds to completely prohibit sovereign States from possessing nuclear weapons. A global commitment is needed for a multilateral treaty universally outlawing nuclear weapons.

115. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); see also Christopher J. Le Mon, *International Law and North Korean Nuclear Testing*, ASIL INSIGHT, Oct. 19, 2006, <http://www.asil.org/insights/2006/10/insights061020.html>.

116. See *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472 (Dec. 20) ("It is well recognized that declarations made by way of unilateral acts . . . may have the effect of creating legal obligations When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with the intent to be bound . . . is binding."); see also Le Mon, *supra* note 115.

117. See *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472-73 (Dec. 20) ("[T]he intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.")

118. See Le Mon, *supra* note 115.

III. THE TWO SECURITY COUNCIL RESOLUTIONS AND CHAPTER VII OF THE UNITED NATIONS CHARTER

A. *The Security Council Resolutions and Chapter VII of the U.N. Charter*

Resolutions 1695 and 1718 condemned North Korea's missile and nuclear tests. They declared that such incidents should be prohibited mainly because such actions are threats to global peace. Through its resolutions, the Security Council imposes a certain degree of obligation by which U.N. Member States must abide. When a targeted country intentionally fails to comply with the obligations of a resolution, the Council may execute coercive measures necessary to maintain international peace and security. A primary legal basis of these coercive measures is Chapter VII of the Charter. Chapter VII (Articles 39-51) sets out the Security Council's powers to maintain peace and security.¹¹⁹ It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security."¹²⁰ Chapter VII is the most controversial part of the Charter, since some provisions in it used to be inconsistent with the basic principle of the Charter, such as comprehensive prohibition of the use of force provided by Article 2(4).¹²¹ Nevertheless, Chapter VII gives the Security Council the legitimate power to assure collective security and to attain peace and security within the international community, which is what the United Nations aims for.

The current collective security system has been re-modeled in order to prevent the repetition of mistakes that had been made by the League of Nations (the "League").¹²² Rules set by

119. U.N. Charter arts. 39-51; see PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 387-90 (7th rev. ed. 1997).

120. U.N. Charter arts. 39-42; see MALANCZUK, *supra* note 119, at 388; see also DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 3 (1999).

121. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4.

122. See Jost Delbrück, *Collective Security*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 104, 108-109 (Rudolph Bernhardt ed., 1982) (discussing the collective security system of the League of Nations); Jochen Abr. Frowein, *Article 41*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 623-24 (Bruno Simma ed., 1994).

the Covenant of the League indicated that any war or threat of war was declared a matter of concern to the entire League and the League should take any action to safeguard the peace of nations.¹²³ In particular, military action should be imposed on Member States that directly resort to war. Article 16 of the Covenant provides:

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.¹²⁴

While the collective security policy of the League seemed well developed in the Covenant, it proved to be weak in practice because Article 16 provided for only a partial prohibition of war, which hampered the effective functioning of the League. Moreover, the League's collective security system proved to be impracticable because of its lack of a central decision-making procedure for applying sanctions and deciding whether or not an act of aggression had occurred. Additionally, since individual Member States were to decide for themselves the extent that they participated in economic, financial, and other measures taken against an aggressor nation, it was unlikely that any act of aggression could be met by a coordinated, collective response.¹²⁵

The lessons to be drawn from the League's experience are as follows. First, this experience taught the international community that without a centralized authoritative determination as to whether an act of aggression has occurred and how to respond to that action, the concept of a collective security policy may not be effective. Second, it is necessary to completely outlaw the use of force, except for the purpose of self-defense, so that no state may legally assume an aggressive policy. Lastly, the introduction of operational machinery for the peaceful settlement of disputes is of primary importance. Keeping these findings in mind, the founders of the U.N. drew up a new collective

123. League of Nations Covenant art. 11.

124. *Id.* art. 16.

125. See Delbrück, *supra* note 122, at 108-09.

security system in the Charter.¹²⁶

The collective security measures of the United Nations are discharged in four different stages.¹²⁷ First, the Security Council independently determines the existence of “any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations . . . to maintain or restore international peace and security.”¹²⁸ Second, “[i]n order to prevent an aggravation of the situation, the Security Council may . . . call upon the parties concerned to comply with provisional measures,” such as the withdrawal of armed forces.¹²⁹ Third, using measures “not involving the use of armed force,” the Council may call upon Member States to institute “complete or partial interruption of economic relations, . . . communication, and the severance of diplomatic relations.”¹³⁰ Fourth, the Security Council “may take [military] action by air, sea, or land forces . . . to maintain or restore international peace and security.”¹³¹ The scope of such measures depends on the magnitude and nature of the crisis. As for substantive decisions, they are made by an affirmative vote of nine members of the Council, including the concurring votes of the five permanent members.¹³² Once decided, the measure is legally binding on all Member States and the Council relies upon Member States to perform their parts in the implementation of U.N. objectives.¹³³

B. *Resolution 1695 Without Chapter VII Of The Charter*

Generally, a Security Council resolution may authorize the imposition of sanctions against a targeted party through Chapter VII, providing substantive grounds for performing the duty of preserving collective security. The inclusion of Chapter VII of the Charter in the text of Resolution 1695 was naturally the most

126. *See id.* at 108-09.

127. *See id.* at 109-11 (detailing the collective security measures of the United Nations).

128. U.N. Charter art. 39.

129. *Id.* art. 40.

130. *Id.* art. 41; *see* CHRISTINA GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 154-58 (2000) (critical interpretation of Article 41).

131. U.N. Charter art. 42.

132. *Id.* art. 27, para. 3; *see also* SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 226-27 (3d ed. 1998) (detailing Article 27).

133. *See* Frowein, *supra* note 122, at 626-27.

controversial issue in the drafting process.¹³⁴ Resolution 1695 was eventually passed without explicitly referring to Chapter VII. Undoubtedly, the Council could have carried out strong measures against North Korea if Chapter VII was mentioned in the resolution. Because Chapter VII is not mentioned, however, there emerged a dispute between the United States and Japan, on one side, and China and Russia, over whether the Council can enforce collective security measures toward North Korea under the current resolution. What if North Korea does not comply with the requirements of the resolution and launches another missile? Would it be possible, in this case, for the Council to take non-military or military measures solely through Resolution 1695? On these questions, the two sides maintained opposing views. John Bolton, the United States' permanent representative to the U.N., asserted that it is mandatory that all Security Council resolutions be followed, regardless of whether the language includes a reference to Chapter VII.¹³⁵ He also claimed that the phrase, "acting under special responsibility for the maintenance of international peace and security," in Resolution 1695 made possible an interpretation that the Resolution indirectly refers to Chapter VII.¹³⁶ Japan agreed with the United States, insisting that Resolution 1695 had definite legally binding force, even if Chapter VII was not explicitly mentioned.¹³⁷ On the contrary, China and Russia emphasized that Chapter VII was not referred to in the resolution text, and therefore it does not authorize economic and military sanctions against North Korea. Wang Guangya, China's permanent representative to the United Nations, opposed taking coercive measures under Chapter VII because it might only serve to aggravate and complicate the situation.¹³⁸ Vitaly Churkin, Russia's permanent representative, also regarded Resolution 1695 as an appropriate warning rather than

134. See Warren Hoge, *U.N. Council, in Weakened Resolution, Demands End to North Korean Missile Program*, N.Y. TIMES, July 16, 2006, at 8.

135. See *id.*; Lee Ki-chang, *A Dispute on Whether the Security Council Resolution Carries Legally Binding Force*, YONHAP NEWS (S. Korea), July 16, 2006, <http://www.yonhapnews.co.kr> (available only in Korean).

136. See Lee, *supra* note 135.

137. See *id.*

138. See *U.N. Demands End to N. Korea Missile Program, Pyongyang Says No*, TURKISH PRESS, July 15, 2006, available at <http://www.turkishpress.com/news.asp?id=133780>; Security Council Condemns, *supra* note 18.

a commitment with a strong legal effect.¹³⁹ He maintained that the resolution only urged North Korea to observe the moratorium of missile launching and to return to the Six-Party Talks.¹⁴⁰

Regarding the legal obligations that Resolution 1695 would impose upon North Korea and other U.N. Member States, China and Russia share the same position. They recognize that Resolution 1695, without Chapter VII, does not institute compulsory measures, but implies that the United Nations simply “demands,” “requires,” and “urges” North Korea to reinstitute the moratorium on missile launching.¹⁴¹ On the other hand, the United States and Japan agree that Resolution 1695 should have undeniable legally binding force, allowing the Security Council to take all available measures, including the recommendation of military action, by this resolution.¹⁴²

Although Chapter VII is not explicitly referred to within its text, Resolution 1695 is basically in accordance with the spirits of Chapter VII in so far as it is a decision of the Security Council for the maintenance of international peace and security. Nonetheless, the very action of passing the bill without sufficient authoritative terms like “decides” shows that the legal effect of the resolution is limited. Hence, it is difficult to take non-military or military action directly, as Chapter VII can allow, through Resolution 1695.

Chapter VII provides the most coercive measures available in the U.N. Charter. The Security Council carries out its primary role, maintaining international peace and security, through those provisions. Due to the serious repercussions that compulsory action would create, however, military measures provided for in Article 42 of Chapter VII have rarely been called for in controversial international disputes. During the Korean War,¹⁴³

139. See Security Council Condemns, *supra* note 18.

140. See Lee, *supra* note 135.

141. See *id.*

142. See *id.*

143. The Soviet Union insisted that resolutions were “null and void,” violating Art. 27, para. 3 of the Charter, which requires the affirmative votes of all permanent members. Leo Gross maintains that the wording of Art. 27, para. 3 is unambiguous and mere practice in the Security Council cannot alter the strict requirement of the Charter’s words. See Leo Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 YALE L.J. 209, 247-51 (1951). On the other hand, Myres S. McDougal and Richard N. Gardner claim that it should not be denied that the users of the U.N. Charter are confronted with the necessity of interpreting it through the perspective of

for example, the Security Council had to gradually escalate the level of compulsory measures it demanded regarding North Korea's aggressions; first it called for the immediate cessation of hostilities,¹⁴⁴ and later recommended military action.¹⁴⁵ Moreover, calls for military action have often been defeated in the past by a veto from one of the five permanent members of the Security Council.¹⁴⁶ Taking this into account, the compulsory measures in Resolution 1695 do not seem to demand military action as provided by Article 42 of the Charter. If North Korea were to resume missile discharge, however, the Council must upgrade the resolution with a reference to Chapter VII, so as to constrain North Korea with stronger authority.

C. Resolution 1718 Under Article 41 Of The Charter

Unlike Resolution 1695, which did not explicitly refer to Chapter VII, Resolution 1718 stipulates that the Security Council is "[a]cting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41."¹⁴⁷ Article 41 of the Charter authorizes the Council to employ measures that do not involve the use of armed forces to give effect to its objectives.¹⁴⁸ Pursuant to Article 41, the U.N. Member States can

today. See Myres S. McDougal & Richard N. Gardner, *The Veto and The Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 264-65 (1951); see also L.B. Sohn, *Modernizing the Structure and Procedure of the Security Council*, in THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING 385-97 (R.J. Dupuy, ed., 1993) (describing the procedure of the Security Council); HANS Kelsen, THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 927-49 (The Lawbook Exchange photo. reprint 2001) (1950) (detailing collective security action during the Korean War).

144. On June 25, 1950, when North Korea attacked South Korea, the Security Council immediately denounced North Korea's action as a breach of peace by Resolution 82, and called upon North Korea to stop hostility and retreat back to the 38th parallel. See S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950).

145. On June 27, 1950, the Security Council recommended that Member States repel North Korea's attack and devise measures to maintain peace and security on the Korean peninsula. On July 7, the United Nation delegated the unified command in the United States of America in order to devise the compulsory measure. See S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950); see also D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 882-86 (4th ed. 1991); CHUNG IN-SEOP, KOREAN QUESTIONS IN THE UNITED NATIONS 251-58 (2002); YOU TAE-WOO, THE KOREAN WAR AND THE UNITED NATIONS (1964) (describing the role of the United Nations in the Korean War).

146. See Gross, *supra* note 143, 227-39.

147. S.C. Res. 1718, *supra* note 61, pmbl.

148. See Frowein, *supra* note 122, 621-28.

sanction North Korea by “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.”¹⁴⁹ Also, the resolution prohibits providing North Korea with large-scale arms, technology related to ballistic missiles or WMD, and certain luxury goods. Resolution 1718 also prohibits North Korea from exporting ballistic missiles or WMD technology. To implement these sanctions under Article 41, the Council prohibited all U.N. Member States from directly or indirectly supplying North Korea with certain armaments, as well as any items or technical assistance that could significantly enhance North Korea’s nuclear, ballistic missile or other WMD programs.¹⁵⁰

Together with the general coercive measures taken under Article 41, Resolution 1718 calls upon Member States to inspect cargo shipped to and from North Korea, as necessary, in order to ensure compliance with the sanctions.¹⁵¹ This is the first time that the Security Council has actively encouraged participation in cooperative inspection initiatives in a concrete case.¹⁵² This clause seems to justify the boarding of foreign vessels on the high seas to inspect for contraband, without prior consent of the flag state. This is a controversial proposition. While the United States sought authorization for cargo inspections, China announced that it had reservations about the provision.¹⁵³

Resolution 1718 may conflict with “the freedom of the high seas”¹⁵⁴ principle, given that it arguably permits inspection of cargo without prior consent of the flag state. The “freedom of the high seas” principle has been firmly established by customary international law and codified in the U.N. Convention on the Law of the Sea (“UNCLOS”).¹⁵⁵ UNCLOS provides that the high seas are open to all states and shall be reserved for peaceful

149. See U.N. Charter art. 41.

150. See S.C. Res. 1718, *supra* note 61, ¶ 8; Le Mon, *supra* note 115.

151. S.C. Res. 1718, *supra* note 61, ¶ 8(f); see Le Mon, *supra* note 115.

152. See Andreas L. Paulus & Jörn Müller, *Security Council Resolution 1718 on North Korea’s Nuclear Test*, ASIL Insight, Nov. 3, 2006, <http://www.asil.org/insights/2006/11/insights061103.html>; see also U.N. SCOR, 61st Sess., 5551st mtg. at 4, U.N. Doc. S/PV.5551 (Oct. 14, 2006) [hereinafter Oct. 14 Meeting].

153. See Oct. 14 Meeting, *supra* note 152, at 4; Paulus, *supra* note 152.

154. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 205-08 (3d ed. 1999).

155. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

purposes.¹⁵⁶ Every State has the right to sail ships flying its flag on the high seas.¹⁵⁷ Only the flag State can exercise control over their ships.¹⁵⁸ Even warships have complete immunity from the jurisdiction of any state other than the flag state on the high seas.¹⁵⁹ Piracy is an exception from the immunity principle. When a ship is considered to be committing piracy, other states can capture that ship, arrest persons and seize the property on board.¹⁶⁰ In addition to piracy, another exemption is that a warship can stop a foreign ship and board to inspect cargo on the high seas if there are reasonable grounds for suspecting that the ship is engaged in the slave trade, unauthorized broadcasting, without nationality, flying a foreign flag, or refusing to show its flag.¹⁶¹ Even in those cases, a state making a seizure without adequate grounds, and causing any loss or damage, is liable to the flag state.¹⁶² As long as a North Korean ship is not committing one of the actions mentioned above, the inspection of cargo to and from North Korea may not be harmonized with the "freedom of the high seas," which is an accepted principle of international law. Reviewing the regulations of UNCLOS, thus, the inspection under Resolution 1718 should not be permitted universally, but in a limited time, space and situation as a sanction of the Security Council against North Korea's WMD development. Reasonable grounds for inspection are prerequisite even in that case.

CONCLUSION

In this paper, the author has tried to analyze the legal disputes arising from the recently adopted Security Council resolutions against North Korea's WMD development. Between July and October of 2006, North Korea conducted missile and nuclear tests that had serious impacts on the global community. The missile firing on July 5, 2006 indicated the end of the moratorium on missile launching that had been set up between the United States and North Korea in 1999. The nuclear test is no

156. *Id.* arts. 87-88.

157. *Id.* art. 90.

158. *Id.* art. 94, ¶ 1.

159. *Id.* art. 95.

160. *Id.* art. 105.

161. *Id.* art. 110; see CHURCHILL, *supra* note 154, at 209-14.

162. *Id.* art. 106.

less serious because it signified the failure of painstaking efforts to sustain a non-nuclear Korean peninsula.

Resolutions 1695 and 1718 contain many critical legal questions. Part I arranged the factual bases for these legal questions. It also reviewed the drafting process of the resolutions.

Part II dealt with legal questions concerning the two resolutions. The first question concerns the international legal characteristics of the missile launch. In order to effectively sanction North Korea, it is important to figure out whether the missile discharge was an illegal act, based on international law. Unlike nuclear or biochemical weapons, which are lethal objects of mass destruction, a missile is nothing more than a delivery system of WMD, and can be used as a non-violent device, such as an artificial satellite. The missile discharge had not been effectively regulated by international law before the Security Council's Resolution 1540 was passed in April 2004. At that time, missile discharge was outside international law because it was regarded as a sovereign right of self-defense. Resolution 1540 finally outlawed the missile discharge, prohibiting all States from providing non-State actors with any materials or technology to develop WMD and their delivery systems. Yet, Resolution 1540 is limited to prohibiting missile discharge only when used in terrorism, or in support of those foregoing activities. Hence, it must be proved whether North Korea's missiles are supporting terrorism. If not, North Korea's missile firing could be legitimate according to Article 2(7)¹⁶³ or Article 51¹⁶⁴ of the U.N. Charter. Resolution 1540 is also a monumental decision to fight against terrorism

163. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

164. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

because it complements the PSI. The PSI, a developing global initiative to prevent international terrorist groups from smuggling WMD and their delivery systems, is quite controversial because it arguably contradicts basic principles of modern international law, including state sovereignty and the "freedom of the high seas." Just a few statements in Resolution 1540 would not override the general practices and norms of international law which have been maintained for centuries. More serious considerations should be given to the conditions that allow cargo inspection without prior consent of the flag state.

Part II also examined North Korea's missile test from the perspective of customary international law. First, North Korea failed to give prior notice of its missile test and endangered ships or aircraft that might have been in the missiles' path. This would be a violation of procedural norms of international law. Second, in a broad sense, North Korea infringed the territorial integrity of other nations. Customary international law prohibits a State from the unauthorized use of air space for territorial integrity. Although the North Korean missiles did not trespass Japanese airspace directly, it would be considered a threat to the peace and security of other nations. As such, the missile discharge could be an indirect encroachment of territorial integrity and security. Third, North Korea violated the principle of good faith. There are two accords that North Korea made for the suspension of missile development; one is the moratorium of missile launching with the United States, and the other, the Pyongyang Declaration, with Japan. The missile test-fire abolished these accords. North Korea refuted that those agreements were not treaties but unilateral declarations. In the *French Nuclear Test Cases*, however, the ICJ adjudicated that a unilateral declaration could be regarded as binding if other states might rely on such a declaration. According to the Court, the binding declaration should be given publicly and made with the intention of being bound thereby. It is not clear, however, whether the moratorium or the Pyongyang Declaration would meet all of those conditions.

The second question concerning the resolutions is related to the significance of the terminologies invoked in Resolution 1695. It has been analyzed and compared to previous resolutions that carried binding force. To begin with, Japan insisted on the term "decides," meaning compelling power, while China

proposed terms like “urges,” “demands” or “calls upon,” implying normative coerciveness. The final draft is more similar to China’s proposal than Japan’s. The United States and Japan might have relented in order to pass the resolution unanimously. Analyzing previous Security Council resolutions, statements with the term “decides” had a strong compulsory meaning. Thus, compulsory acts would be required when the targeted nation did not fulfill certain obligations.

The third question involves the implications of national legal authorities and legislation in relation to Resolution 1695. Generally, domestic law is considered a mere fact before an international court. It is, thus, disputable whether national law could be a call to action of a member of the international community. National law may not be a direct source of international law. Neither Article 27 of the Vienna Convention on the Law of Treaties, nor Article 38(1) of the Statute of the ICJ, lays down national law as a source of international rules.

The fourth question concerns a nation’s right to possess nuclear weapons. Neither positive rules nor customary international law have universally prohibited a state from possessing nuclear weapons. The NPT and other international treaties concerning nuclear disarmament do not contain clear grounds to comprehensively ban nuclear weapons of every nation. Unless nuclear weapons are banned universally, it is impossible to completely halt the nuclear weapons development process through contemporary international law. The best way to suspend nuclear weapon development in North Korea will be to overcome the double standard inherent in the NPT. Maybe in the future, when all nations including current nuclear superpowers are the members of a multilateral treaty totally banning nuclear weapons, it will be possible for mankind to convince renegades, like North Korea, not to go nuclear.

Part III examined the legally binding force of the two resolutions. The Security Council adopted Resolution 1695 without referring to Chapter VII of the Charter. A question may arise as to whether the Council could enforce collective security measures toward North Korea directly from Resolution 1695. It is clear that the resolution is based on Chapter VII of the Charter, regardless of whether Chapter VII is omitted or not. Nevertheless, without a clear reference to Chapter VII, there are still uncertainties as to how severe the legally binding force can be. Res-

olution 1695 is closer to the “provisional measure” which recommends other Member States control North Korea’s access to missile-related items, goods, materials, technology, and financial resources. However, military measures should not be taken based directly on the resolution. Military action is the last means to which the Security Council may resort. Once the Council takes military action, there are no measures remaining when it has to face circumstances graver than just a missile test. If military action is sanctioned, North Korea may consider more confrontational plans for justifying their actions based on the “right of self defense,” laid down in Article 51 of the Charter. Currently, international law has not completely forbidden missile discharge. To effectively sanction North Korea’s missile test, the Security Council should seriously consider the conditions from a legal and diplomatic point of view.

Finally, Resolution 1718 stipulates that the Security Council will be taking measures under Article 41 of the Charter. Article 41 authorizes the Council to take measures not involving the use of armed forces to give effect to its decisions. According to Article 41, the U.N. Member States can sanction North Korea by complete or partial interruption of economic and diplomatic relations, and other means of communication. Resolution 1718 authorized the inspection of cargo being shipped to and from North Korea, in order to ensure compliance with the sanctions. This clause is against the “freedom of the high seas” principle. However, the cargo inspection without the prior consent of the flag state will be legitimate if a North Korean ship is suspected of committing one of the illegal acts laid down in Article 110 of UNCLOS. Cargo inspection on the high seas should be allowed only when there is no option but to immediately stop the ship and inspect the cargo on board because negligence might result in a most serious threat to international peace and security.