

Anthony D'Amato, **Pyongyang and Proliferation: The UN North Korea Resolution**, Jurist Forum, October 17, 2006 <http://jurist.law.pitt.edu/forumy/2006/10/pyongyang-and-proliferation-un-north.php>

JURIST Guest Columnist [Anthony D'Amato](#) of Northwestern University School of Law says that the recent UN Security Council resolution on North Korea passed in the wake of its nuclear test is a precedent-setting instance of aggressive collective action against would-be nuclear proliferation that could impact Iran, Israel, and other potential nuclear weapons states...

The UN Security Council's resolution on North Korea's nuclear weapon test is a magnificent achievement. The US State Department deserves much of the credit not only for the text of the resolution but also for the skillful diplomacy, headed by Secretary Condoleezza Rice and Ambassador John Bolton, that has resulted in the fifteen-nation Security Council's unanimous vote.

A. The Global Question

Before we get into specifics, a broad question that can be asked of this resolution is how can North Korea be legally forbidden to attain nuclear weapon capability when seven or eight states have already arrived there? (The members of the "have" nations are the United States, Great Britain, France, China, the Russian Federation, India, and Pakistan; Israel probably has nuclear capability but denies it.)

The Resolution in its Preamble provides two answers to this question, the first of which is spurious but the second substantial. The spurious answer is that North Korea's underground nuclear test of 9 October 2006 constitutes a "challenge" to the Treaty on the Non-Proliferation of Nuclear Weapons. However, North Korea has withdrawn from the Treaty. What is the point of calling a withdrawal from a treaty a "challenge" to the treaty? Under international law, a state party to a treaty has a right of withdrawal except for those few treaties that by their terms bar withdrawal: for example, treaties of peace do not permit withdrawal. As for the Non-Proliferation Treaty itself, it specifically provides for withdrawal in Article X.

The Resolution redeems itself by its second answer. North Korea's decision to move from a have-not nuclear weapon nation to a have, poses a danger "to peace and stability in the region and beyond." The Security Council therefore determines that "there is a clear threat to international peace and stability." This "clear threat" phrase brings the Resolution under Chapter VII of the United Nations Charter, legally authorizing the Security Council to take "measures" against North Korea. The "measures" are of two kinds, to which I will refer in a moment.

We have here a most interesting theoretical situation: does international law follow "precedent" the way common law does, or is it possible for international law to draw a line after 7 or 8 precedents and then say "no more." What kind of strange "law" would it be to say that a tort case involving a Cadillac in 1990 is not a precedent for a similar tort

case involving a Mercedes in 2000?

I take credit or blame, as the case may be, for introducing this peculiar problem of precedents in international law in an article I wrote way back in 1967 on the legality of French nuclear tests in the South Pacific. I argued then that even though the United States had conducted nuclear tests in the same region, the US tests were not a precedent for allowing the French tests because the radioactive damage to the environment would be cumulative. In other words, the first test can do major but biologically recoverable damage; the second test could destroy ocean life in its entirety. In cases of environmental damage where there may be a sustainable threshold of survival, I argued that strict legal “precedent” may be inapplicable.

I contend that it would be irrational for international law to say that if we are given seven or eight precedents of “have” nations, then the number must be legally extendable by operation of precedent to 190 nations. At the moment we have stability, but would we have stability if 190 nations could each destroy the others? Sometimes when astronomers report a supernova in the sky, I wonder if the explosion isn’t the result of a planet whose inhabitants have reached roughly our own level of civilization and development, and among whom a hydrogen-bomb war broke out destroying their entire world. I often wonder whether these celestial explosions are indeed frequent, and whether our Earth may soon join the series. If it happens, we won’t feel a thing.

International law should not be a recipe for planetary destruction. It follows, I would suggest, that the Resolution on North Korea is a milestone that is connected to our own self-preservation — including the self-preservation of North Korea!

It is a milestone because its implications extend beyond the case of North Korea. The Security Council has now committed itself to take similar aggressive action against Iran if and when Iran tests a nuclear weapon. Had the Iranian case preceded that of North Korea — as it looked like it might a few months ago — it would have been highly unlikely for the Security Council to have acted as boldly as it has now done. The new Resolution will also impact Israel. If Israel should decide to test its nuclear weapons, or even declare that it has them, it would be hard for its few friends on the Security Council to distinguish the Israeli case from the North Korean case. Instead they would be under strong legal pressure to decide that Israel’s nuclear weapon is, in the language of Preamble to the North Korean Resolution, “a clear threat to international peace and security.” This decision, in turn, would invoke the full powers of the Security Council against Israel, including the power to use force.

B. Measures

The full range of measures [1] short of armed force are available to the Security Council under Article 41 of the Charter. (Article 42, providing for armed force, is left for further decision by Paragraph 16 of the North Korea Resolution.) The Resolution imposes on all Member States of the UN to prevent the direct or indirect supply of weapons and spare parts to North Korea. Included are tanks, armored combat vehicles, large calibre auxiliary

systems, combat aircraft, attack helicopters, warships, missiles, and missile systems. Additionally banned are any items or materials that could contribute to North Korea's nuclear-related or WMD-related programs. All technical training, advice or services pertaining to the banned items are also prohibited.

Not only does the Resolution ban the above-mentioned items from going in to North Korea, but it also prohibits them from coming out — in other words, an embargo on North Korean exports. This may seem peculiar: why should the United Nations care if North Korea exports missiles when doing so would simply leave North Korea with fewer missiles? My guess is that this is a very shrewd and realistic provision. Suppose North Korea builds a factory to produce a new long-distance missile. Once built, the factory can turn out many additional missiles at marginal cost. If these extra missiles could be sold abroad, the factory could recoup its capital expenditures. (North Korea has indeed been selling missiles on the world market.) By placing an embargo on armaments exports, the United Nations has made it perhaps prohibitively expensive for North Korea to set up a factory to produce just the limited number of weapons it can use itself.

Another shrewd and realistic provision of the Resolution is the ban on Member Nations' exporting luxury goods to North Korea. With most of its people at the sustenance level, one may wonder whether North Korea imports any luxury goods at all. The answer is that Kim Jong-il uses luxury goods as gifts to his close advisers and officials. He rewards them with Mercedes and BMWs, fine cognac, and Cuban cigars—items that money can't buy in North Korea. The Resolution's ban on luxury goods (even though that term is not defined) indicates a seriousness of purpose in putting the squeeze on the leaders of North Korea.

The Resolution does not call upon Member States to inspect all goods destined for North Korea. Inspections are up to the Member States; the Resolution obliges them just to "prevent" exportation of the banned items to North Korea. Similarly restrictive is the Resolution's failure to require nations to prevent banned items from being shipped to North Korea on the high seas in vessels other than their own flag vessels. (The Security Council clearly has jurisdiction to infringe upon North Korea's right to freedom of the seas if there is a threat to the peace.) China, one of the last holdouts on the various drafts of the Resolution, in particular seems reluctant to press North Korea. It has announced that it will not make inspections on the high seas.

More critical to the international community is the 800-mile border that China shares with North Korea. An hour after joining in the Council vote for the Resolution on Saturday, October 14th, the Chinese ambassador, Wang Guangya, said China would not participate in the inspection regime because it would create "conflict that could have serious implications for the region." However (thanks to the instant reporting of world news these days) China has begun inspecting all trucks and other vehicles crossing the border into North Korea. "Watch what we do and not what we say," Attorney General Mitchell once advised the American public during the Nixon Administration. This same admonition might also apply to China today.

C. What Will North Korea Do?

The question whether the Resolution will force North Korea to quickly give up its nuclear weapon program is the issue that preoccupies the media. To my mind it's less important than the precedents set, and the coming-together of the Members of the Security Council, that I have discussed above. North Korea's nuclearization program has been an economic disaster; the new Resolution will make it even worse. North Korea knows that if it ever actually uses any of its nuclear weapons on China, Japan, or Alaska, it will immediately be reduced to radioactive rubble by American nuclear missiles.

Thus I submit that the new Resolution is not really about North Korea, it's about non-proliferation. And the latter, I think, is the most important issue facing the human race.

Notes

1. I'm glad the UN uses the word "measures" instead of the word "sanctions" which one sees in every other editorial in the *New York Times*. "To sanction something" means either to approve it or prohibit it. How could such an internally inconsistent word ever have entered into serious discourse? Maybe the *Times*'s neutrality-striving editorial writers like it because it simultaneously allows them to approve and prohibit whatever they are talking about.

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