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Maritime Interdiction of North Korean WMD Trade: Toward a Second Korean War?

By Mark J. Valencia

In this article Mark J. Valencia, a maritime policy analyst based in Hawaii writes, "such interdictions, without the permission of the flag state, on or over the high seas, could be considered an act of war. Some thought North Korea was bluffing when it said it would launch ballistic missiles. They thought it was bluffing when it said it had a nuclear weapon. They also thought it was bluffing when it said it would test a nuclear weapon. Now it has threatened war if its vessels or aircraft are interdicted. Given this history of miscalculation on both sides, the United States and its friends in the region need to carefully consider if they want to contribute to the cause of a possible Second Korean War."

As the United States and some of its allies prepare to send warships to help enforce UNSC Resolution 1718 against North Korea, it would do well to take a hard look at the politics of the situation, particularly regarding at (or over) sea interdictions. Frankly China, Japan, South Korea and Russia are unlikely to be directly involved in such interdictions, albeit for different reasons. And all but Japan would not welcome such interdictions by outsiders especially in waters under their jurisdiction. Indeed it is not clear who can or will do what to enforce the Resolution at or over the sea.

What the United States Wanted and What it Got

US Ambassador to the United Nations John Bolton hailed the US drafted United Nations Security Resolution (UNSC) 1718 as a great success. Among others, it prohibits the transfer to and from North Korea of nuclear chemical or biological weapons, their means of delivery (ballistic missiles) and related materials, language very similar to that used in the Principles guiding the US originated and led Proliferation Security Initiative (PSI).

Clearly the United States wanted to conflate the PSI with UNSC Resolution 1718 and thereby legitimize it. Moreover it wanted to send a stern warning to Iran that it faced similar sanctions if it persisted in its defiant behavior. The Resolution does require all UN member states to prevent the transfer of such material to the DPRK using their flag vessels or aircraft. But regarding compliance with these requirements it only "calls upon" states, i.e. merely requests them to take cooperative action to prevent illicit trafficking in such materials. It does not require them to do so. Moreover UNSC 1718 clearly states that measures must be taken under its Article 41 which specifically does not authorize the use of armed force. Such use of armed force would probably be necessary if a country operating under the PSI tried to interdict and board a vessel that refused to stop. In this situation such use of force could be interpreted as an act of war.

US Secretary of Defense Donald Rumsfeld has conceded that the PSI "has holes in it" including the lack of a legal basis for interdiction of vessels and aircraft and confiscation of their cargo on the high seas. He even acknowledged that preventing North Korea from selling its nuclear technology - the United States' next 'red line' is "practically impossible," particularly without the ardent co-operation of China and Russia.

US Secretary of State Condoleeza Rice rushed to Northeast Asia to try to co-ordinate an agreement on action to be taken, including interdiction. But her mission was unsuccessful. She was compelled to acknowledge that each country had their own views and approaches to implementing the Resolution. She also soft-sold and even back-pedaled on interdiction of ships and aircraft. She hinted that most searches would take place in ports and assured nervous Northeast Asians that any US-led interdictions would be undertaken carefully and selectively based on sound intelligence. Given the recent history of US intelligence, that may not have been particularly reassuring. And given that most North Korean freighters use the high seas and that China may not be particularly strict in its implementation of the provisions in its ports, the Resolution is not very robust. Iran - rather than be intimidated by this precedent - and the recent US-led PSI exercises off its shores - may even be emboldened by the United States' failure to unite North Korea's neighbors in a forceful embargo against it.

South Korea's Position

South Korea, a US ally, is being pressured by the United States to join the PSI and help interdict North Korean ships. Not only did it initially decline entreaties by Secretaries Rice and Rumsfeld but it apparently discouraged even a visit by PSI architect Ambassador John Bolton. South Korea maintains that the PSI and UNSC Resolution 1718 are separate issues.

South Korea is concerned that if a North Korean cargo ship escorted by North Korean naval vessels is confronted by South Korean naval vessels, a clash is almost certain. Furthermore, South Korea is concerned that if it interdicted a North Korean vessel - or if it allows the

United States to do so in its waters - North Korea may attack Seoul. North Korea has indicated it would consider such an interdiction a violation of the Armistice ending the Korean War and do just that. South Korea does not want to call North Korea's bluff in this situation since it is the most vulnerable to attack.

North Korean ship

However, to assuage US pressure Seoul has said it would put its priority on a 2005 inter-Korean maritime agreement which allows North Korean vessels to transit its Cheju Strait and territorial waters but also allows South Korea to inspect North Korean vessels it suspects of carrying WMD. But it has not yet inspected a single ship - and is unlikely to do so. Moreover the Resolution includes "related materials" whereas the inter-Korean agreement only specifies "weapons" of mass destruction. Nevertheless South Korea maintains that this agreement satisfies the Resolution.

A majority in the ruling party oppose South Korea's participation in the PSI altogether. Nevertheless, it is rumored that South Korea will participate in the PSI by sharing information, observing PSI drills and responding to incidents in its maritime border areas. But it will not interdict North Korean vessels, unless perhaps the suspect ships are far from the Korean mainland. But this distinction is unlikely to make any difference to North Korea.

China and Russia's Position

China was the main obstacle to the US desire for a more robust Resolution. At China and Russia's insistence, the authority to use military force was dropped from the draft Resolution as was the "requirement" to check all cargo bound to or from North Korea.

And although China voted for the Resolution, it immediately ruled out its participation in interdiction of vessels or aircraft on or over the high seas, saying that such is not "required." In addition to refusing to agree to the use of force, China also insisted on insertion of the word "co-operative" regarding any enforcement action to be taken, including the inspection of cargo to and from the DPRK. This was in part because it opposes foreign interdiction of ships or aircraft in or over its waters. Russia's position is similar. Neither wants to legitimate United States policing of Northeast Asian waters. Regarding Iran, Russia argues strongly that the Resolution does not set a precedent.

Japan

Japan's new Prime Minister Abe Shinzo and leading hawks in his administration are gung-ho regarding such interdictions. Indeed there is talk of shifting warships from the Indian Ocean to waters off North Korea. However, there are many inconvenient legal obstacles to Japan's direct involvement in such interdictions. Its recently passed Ship Inspection Operations Law allows such interdictions outside its 12 nm territorial waters only if the government determines that the situation constitutes an emergency affecting the peace and security of Japan. Otherwise it cannot use force including the firing of live warning shots. Defense Agency Director General Fumeo Kyuma has said it would be difficult to define the North Korean nuclear test as such an emergency. But it could perhaps extend logistical support, e.g., fuel and port services - under the law governing Self-Defense Forces operations to assist the United States but only to US military forces during emergencies in areas surrounding Japan. And even if it did so, if a US vessel was attacked by North Korea it could not offer assistance - even if its vessels and aircraft were present - because it would be exercising the prohibited 'right to collective self-dense'. Such an event would be a blow to the credibility of the alliance. It can and probably will provide early warning and surveillance assistance to the United States in the Tsushima Strait and north of Okinawa and it may assign the Coast Guard rather than the Maritime Self-Defense Force to undertake interdiction of DPRK vessels in its territorial waters. But thus may violate the right of transit passage through straits enshrined in the 1982 UN Law of the Sea Convention. Thus it is understandable that Foreign Minister Taro Aso has said that "Japan is not thinking of expanding sanctions to cargo inspection."

So Who Will Do What?

First of all, for what it is worth, North Korea has said it will not transfer its nuclear technology. Moreover it would be very foolish for it to do so since -if used-- it could be traced back by its radioactive signature with disastrous consequences for North Korea.

However this logic is unlikely to assuage the United States and its allies. The initial effort to restrict trade in WMD and related materials will likely be focused on ports. US Secretary of State Rice urged Northeast Asian countries to create a strict system of radiation monitoring and inspections in their ports and airports and at borders on suspicious ships, aircraft, railcars and trucks, and to share intelligence on which ones to check. The search and seizure (for safety violations) of a North Korean vessel in Hong Kong - an action backed up by a US guided missile frigate - is probably the first of many such incidents to come. No banned items were uncovered however, perhaps indicating faulty intelligence, and possibly serving as a caveat for future interdictions.

Regarding at or over sea interdictions of North Korean vessels or aircraft, there are several possibilities. The first, already operative, is to station warships and surveillance aircraft in the Yellow and East Sea (Sea of Japan). These assets could serve as a warning of the possible use force by the United States and others--whether or not it is authorized by UNSC 1718 or really intended. In other words it could be an elaborate bluff that North Korea would be reluctant to call, particularly if it can transfer such materials through Chinese ports. A second possibility is that the United States or Australia as a stalking horse will actually interdict an aircraft or vessel if it can be demonstrated beyond reasonable doubt that it is carrying prohibited materials. Supposedly, it can be determined at a distance of 30 km if a ship or aircraft is carrying nuclear substances. Nevertheless such an interdiction would not be welcomed by China, South Korea and Russia. And third, if there is hard evidence of ongoing trade in such items by sea or air, the United States could go back to the UNSC to seek approval for the use of force under Chapter VII Article 42.

But unless and until that is granted, such interdictions, without the permission of the flag state, on or over the high seas, could be considered an act of war. Some thought North Korea was bluffing when it said it would launch ballistic missiles. They thought it was bluffing when it said it had a nuclear weapon. They also thought it was bluffing when it said it would test a nuclear weapon. Now it has threatened war if its vessels or aircraft are interdicted. Given this history of miscalculation on both sides, the United States and its

friends in the region need to carefully consider if hey want to contribute to the cause of a possible Second Korean War.

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