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## **SHOULD THE RIGHT TO WITHDRAW FROM THE NPT BE WITHDRAWN?**

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### ***Executive summary***

The unilateral denunciation of the NPT by North Korea has demonstrated the destructive potential of the withdrawal clause included in Article 10 of the treaty. The reasons given for this arbitrary act were unconvincing. They were not even related to the subject matter of the NPT. The reaction of other parties, though condemnatory, proved ineffective. The resolutions calling for the cancellation of the denunciation were ignored. To avoid further abuses of this kind, the right to withdraw should be removed from the relevant provision of the NPT in compliance with the universally accepted principle of *pacta sunt servanda*. If such a radical amendment proves impossible to achieve, the parties should adopt a common understanding or an agreed interpretation of the withdrawal procedure, leaving the original language unchanged. Under the new procedure, the task of assessing whether withdrawal is justified would be given to a conference of the parties adopting its decisions by a majority vote.

Actual sanctions against the defaulting state would be taken by the IAEA. They could affect, in the first place, supplies of nuclear material and equipment and impose a return of these and other nuclear items made available earlier. The involvement of the UN Security Council in the withdrawal procedure ought to be limited to threats to international peace and security, as envisaged in its Charter. The measures suggested in this paper may not be enough to prevent new withdrawals, but they could, at least, to some extent, restrain recourse to withdrawals.

### ***Introduction***

In 2002, the United States withdrew from the Anti-Ballistic Missile (ABM) Treaty concluded with the Soviet Union in 1972. This was the first time in the post-Second World War period that an arms limitation agreement was unilaterally denounced. Less than one year later, North Korea stated that it would withdraw from the 1968 Non-Proliferation Treaty (NPT). In both cases, the withdrawing state referred to the escape clause of the relevant treaty.

The above events revived the controversies over the impact the withdrawal from a treaty may have on the stability of legally binding arms control obligations. In this paper, only the NPT withdrawal clause is examined in detail, but the conclusion

drawn from this examination applies to other multilateral treaties as well. Withdrawal by a party from a bilateral agreement results automatically in the termination of the agreement.

Article X of the NPT contains the following stipulation:

*Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.*

### ***Legal aspects***

The examination of the issue of withdrawal starts with a reference to the 1969 Vienna Convention on the Law of Treaties (VCLT). Having no retroactive effect (it entered into force only in 1980), and having among its parties neither the United States nor North Korea, the VCLT cannot directly apply to the cases of withdrawal mentioned above. It is, nevertheless, generally considered as a codification of the existing customary international law. Hence its importance.

The VCLT proclaims, as a rule, that withdrawal may take place exclusively as a result of the application of the provisions of the treaty or of the VCLT (Art. 42.2). Otherwise, it would be regarded as an infringement on the *pacta sunt servanda* (treaties must be observed) principle. In the absence of a relevant provision, the treaty is subject to withdrawal only if it is established that the parties intended to admit the possibility of withdrawal, or that the right of withdrawal is implied in the nature of the treaty (Art. 56). However, the intentions and implications are difficult, if not impossible, to establish.

A fundamental change of circumstances (*rebus sic stantibus*) which has occurred with regard to circumstances existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for withdrawal from the treaty “unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty” (Art. 62). War between nations may support a claim of changed circumstances, as does the accession to independence by a colony, whereas internal political transformations do not support such a claim.

While a notice of withdrawal from the NPT must be accompanied by the withdrawing party’s statement that some extraordinary events related to the subject matter of the agreement have jeopardised the supreme interests of its country, there is no requirement for other parties or for some international authority to grant or deny approval of such a statement. It stands to reason that an assessment of what event is “extraordinary”, how it is related to the subject matter of the treaty, and to what degree the interests of the country in question have been affected, must not be left entirely to the judgement of the withdrawing party. According to international law, a

state that has withdrawn from a treaty is accountable for violations committed while still a party. And by declaring its withdrawal, a non-nuclear-weapon party to the NPT does not acquire a licence to act contrary to the objectives of that treaty.

Vague, unconvincing and equivocal assertions regarding the right to withdraw lend themselves to abuse. Thus, in withdrawing from the NPT, North Korea referred to US-South Korean military exercises, which it considered a threat to its security—even though these manoeuvres were not an extraordinary event; they had been conducted routinely for several years in South Korea prior to North Korea's withdrawal and did not relate to nuclear non-proliferation. In addition, North Korea accused the International Atomic Energy Agency (IAEA) of lacking impartiality, because the Agency wanted to conduct a special inspection and check whether North Korea had covertly engaged in the separation of significant quantities of weapon-grade plutonium from irradiated nuclear fuel. A proposal to use force against North Korea was considered in the United States, but was eventually abandoned. In a joint statement, the depositaries of the NPT (Russia, the United Kingdom and the United States) questioned whether the reasons cited by North Korea justified its withdrawal, but took no other action.

In providing justification for its withdrawal from the ABM Treaty, the United States contended that several states and non-state entities had acquired, or were seeking to acquire, weapons of mass destruction, and that this posed a threat to US security. It did not, however, specify who these threatening actors were.

### *Evolution of the right to withdraw*

The essential components of the withdrawal clause were agreed in 1963 during the negotiations for the Partial Test Ban Treaty (PTBT). The accepted text was a compromise between those arguing that a provision allowing withdrawal was not necessary, because the right to withdraw was—in their opinion—implicit in the notion of state sovereignty, and those insisting that the right to withdraw should be explicitly referred to.

Over the years, the 1963 formula has changed. Unlike in the case of the PTBT, a party withdrawing from a multilateral arms control treaty must list the reasons motivating its withdrawal. The time required for withdrawal to take effect has increased from three months for the PTBT, the 1967 Treaty of Tlatelolco on the denuclearisation of Latin America and the Caribbean, the 1968 NPT, the 1971 Seabed Treaty on the denuclearisation of the seabed and ocean floor, the 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC) to 150 days for the 1990 Treaty on Conventional Armed Forces in Europe (CFE Treaty); to six months for the 1992 Open Skies Treaty on the conduct of observation flights, the 1997 Land Mine Ban Convention and the 1996 Comprehensive Test Ban Treaty (CTBT); and finally to 12 months for the Outer Space Treaty, the 1985 Treaty of Rarotonga on the denuclearisation of the South Pacific, the 1995 Treaty of Bangkok on the denuclearisation of Southeast Asia, the 1996 Treaty of Pelindaba on the denuclearisation of Africa and the 2006 Semipalatinsk Treaty on a nuclear-weapon-free zone in Central Asia.

Also the number of institutions that are to be notified by the withdrawing party has increased. In addition to the governments of the other parties, this number may now include the UN Security Council (In the case of the CWC and the CTBT it also includes the Executive Council of the respective implementation organisations, but no such organization exists for the NPT).

In spite of the above improvements, the possibility remains to repeal commitments contained in arms control agreements without breaking law.

### ***Possible UN action***

Making the UN Security Council a recipient of the decision to withdraw appears to carry some weight as a deterrent, but the Council is not empowered to pass a formal judgement on the validity of the reasons allegedly justifying withdrawal. Nor can it permit or prohibit withdrawals. Should it find that an act performed by a state (be it withdrawal from a treaty or any other act) constitutes a “threat to the peace”, it may, in accordance with the UN Charter (Articles 41 and 42), call on UN members to interrupt, completely or partially, economic relations and means of communication with the guilty country. It can also recommend to the UN General Assembly the suspension of the rights and privileges of UN membership or expulsion from the United Nations. It may even decide that military sanctions should be applied. It thus possesses the means necessary to restore international peace broken as a result of withdrawal from an arms control treaty, such as the NPT.

In practice, however, it is difficult to reach agreement on the application of drastic measures against states. Even with the requisite two-thirds majority, the Security Council may prove unable to act when any of its permanent members exercises the right of veto—as allowed by the UN Charter—to protect its own interests or the interests of its allies. This is what happened when the Council considered the withdrawal of North Korea. Nor is it likely that the United Nations would use coercive measures against a treaty-abiding non-nuclear weapon state which had decided to withdraw in order to demonstrate dissatisfaction with the non-fulfilment of the basic obligations by other parties. The Council is not authorized to check the implementation of arms control agreements; its formal involvement in the withdrawal procedure is limited.

The General Assembly is another principal organ of the United Nations, which could help restrain withdrawal. Its actions are not subject to veto. Only a two-thirds majority is required for a recommendation concerning international peace and security. However, even when it is duly adopted, a resolution of the Assembly—unlike a decision of the Security Council—is not binding on UN members.

### ***Possible IAEA action***

The International Atomic Energy Agency (IAEA) is entitled to apply sanctions in cases concerning non-compliance with nuclear safeguards (Art. XII of the Statute). By analogy, the same sanctions could apply to withdrawal from comprehensive safeguards following the withdrawal from the NPT. The coercive measures that are envisaged if corrective action is not taken by the guilty party within a reasonable time, include curtailment or suspension of assistance provided by the Agency or a member-

state and return of materials and equipment previously made available to the withdrawing states. A withdrawing state would thus be suspended from exercising the privileges and rights of IAEA membership. The same sanctions could apply if withdrawal was not taking place in accordance with the agreed procedure.

However, IAEA provides very little direct assistance to states. Decisions to curtail or suspend the assistance are not as unambiguously mandatory under the IAEA Statute as are the decisions of the UN Security Council. Withdrawal of materials and equipment already supplied would require voluntary co-operation of the state being penalized, which is unlikely. Moreover, if the return of nuclear supplies turns out to be very expensive and dangerous, the supplier may be unwilling to take them back. Suspension of IAEA membership is not an effective measure either. Expulsion from the Agency is not provided for. Nevertheless, taken together, the IAEA measures may have some deterrent effect.

Withdrawal from the NPT involves withdrawal from the agreements concluded by the NPT parties and the IAEA for the application of comprehensive safeguards, those covering all nuclear activities (IAEA document INFCIRC/153). However, after leaving the NPT the withdrawing states would still have to apply safeguards, the contents of which remains to be agreed. For certain countries this would mean return to the pre-NPT safeguards (INFCIRC/66 ) legally suspended after the conclusion of INFCIRC/153 safeguards agreements. Regarding the relationship between INFCIRC/153 and the NPT, it may be interesting to note that in the 1970s, at the request of the United Kingdom, the IAEA Secretariat drew up a comprehensive safeguards agreement that could be concluded with any state not willing to accede to the NPT. Albania, opposed to the NPT, accepted the agreement. Spain, too, was contemplating a comprehensive safeguards arrangements with the IAEA as an alternative to the NPT, but it finally decided to join the treaty.

### ***Conclusions and recommendations***

To reinforce the *pacta sunt servanda* principle, one would have to abolish the withdrawal clause altogether. Such action, which seems to be favoured by the IAEA Director General, would be beneficial for all arms control treaties banning the acquisition, transfer and employment of weapons of mass destruction, in particular the NPT. If however the right to withdraw were to remain intact, efforts would have to be made to restrict this right and thereby dissuade its application. To this end, detailed and unambiguous explanations of the reasons for withdrawal would have to be submitted to an urgently convened conference of the parties. In judging the pertinence of the event justifying withdrawal to the subject-matter of the treaty, the conference could take into account the inalienable right of states to use nuclear energy for peaceful purposes and, *ipso facto*, the right to possess components of the peaceful nuclear fuel cycle. The main task of the conference, possibly preceded by inter-state consultations, would be to address, in a veto-free debate and decision-making, the security concerns of the party having the intention to withdraw, and to maintain the integrity of the treaty. A precedent was set by the 1992 Open Skies Treaty. If a party to this treaty announces its decision to withdraw, the depositaries are to “convene a conference of the States parties, no less than 30 days and no more than 60 days after they have received such notice”(ArticleXV).

Withdrawal by one party or even several parties should not justify a withdrawal by others. The notice of withdrawal would have to be delivered at least one year in advance, as stipulated by the VCLT. The purpose of such a delay would be to allow enough time for the complying states to persuade the state wishing to defect not to do so. Compromise solutions could be sought through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, as well as other peaceful means prescribed by the UN Charter Article 33). Preparations could also be made to deal with the situation that might result from the withdrawal. Following the example of the Land Mine Ban Convention, withdrawal should not be allowed during an armed conflict in which the withdrawing party is engaged. A unilateral decision to withdraw, taken in defiance of the above requirements, would have to be regarded as a material breach of the parties' obligations and treated accordingly.

The suggested modifications could be introduced in the NPT by amending the relevant provision or by means of an additional protocol containing a common understanding or agreed interpretation of the withdrawal procedure. Negotiating such an important issue would be a lengthy process. In the meantime, states might be invited to pledge unilaterally not to resort to the withdrawal clause. The *rebus sic stantibus* rule is valid for certain agreements, but it cannot, in my opinion, apply to multilateral non-proliferation or disarmament obligations. For the abrupt termination of such agreements by one party may directly affect the security of many or all other parties and undermine the authority of the *pacta sunt servanda* rule.

In any event, states cannot be prevented from voluntarily giving up the right to withdraw from treaties, as they cannot be prevented from giving up the right to make reservations to treaties.

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