



What if Iran Withdraws from the Nuclear Nonproliferation Treaty? Part I: Can They Do That?

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In a two-part set of Reflections, I will be considering the legal meaning and application of Article X(1) of the 1968 Nuclear Non-proliferation Treaty (NPT), which provides for the right of any NPT state party to withdraw unilaterally from the treaty. I will do so using Iran's dispute with the West regarding Iran's nuclear program as a case study.

Here in Part I, the question on which I will be reflecting is whether Iran can indeed unilaterally withdraw from the NPT under current circumstances, and what the legal framework governing such a withdrawal would be. In Part II, I will be reflecting on the legal implications of such a withdrawal.

Introduction

Iranian officials are increasingly of the view that Iran is being unjustly denied the benefits of the bargain it made upon accession to the NPT as a Non-nuclear Weapon State (NNWS) party in 1970.¹ In essence, Iran has argued that Western powers, led by the U.S., have denied Iran its right to enjoyment of peaceful uses of nuclear energy under the NPT, and have not lived up to their own NPT obligations to assist Iran in this pursuit. Iran further argues that the economic sanctions that have been imposed upon Iran by the U.N. Security Council, and unilaterally by the U.S. and the E.U., on the basis of the allegation that Iran is in breach of its NPT and IAEA safeguards obligations, are both unfair and unlawful. Iran has further claimed that the U.S. and Israel have colluded in sophisticated cyber attacks against Iran's nuclear facilities, and in unlawful targeted

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¹ For comprehensive consideration of the NPT "Grand Bargain" and the role of the IAEA, see Daniel H. Joyner, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION*, Chapter 1 (2009); Daniel H. Joyner, *INTERPRETING THE NUCLEAR NONPROLIFERATION TREATY* (2011).

killings of Iran's civilian nuclear scientists, as further efforts to disrupt Iran's nuclear program.²

Iran has argued that the IAEA has essentially become a vehicle for the achievement of Western aims regarding Iran's nuclear program, through politicized and unlawful investigation and assessment of Iran's nuclear program, and through engagement in espionage and sabotage activities inside Iran in collusion with Western powers.³

Iran thus argues that not only is it being unlawfully denied its NPT rights, but additionally that its NPT membership is being used as a basis for unlawful and prejudicial actions against it by the West - and even further that the institutions of the NPT, in particular the IAEA, have been usurped by the West to serve in this effort.

This increasingly negative view of the cost/benefit analysis of Iran's membership in the NPT, has prompted some Iranian officials to openly question whether remaining a party to the NPT is in Iran's national interest. As Sadeqh Kharrazi, Iran's former Deputy Foreign Minister, recently wrote:

Iran has said time and again that its NPT membership should bring with it all privileges associated with the treaty, including the right to enrichment. If, due to any reason . . . the West continues to not acknowledge Iran's rights under the NPT, Iran has no choice but to reconsider its membership in that treaty.⁴

At the moment, there seem to be no signs of an imminent declaration of withdrawal from the NPT by Iran.⁵ However, in some ways, the appeal to Iran of such a withdrawal is easy to see. It would remove the primary legal basis for arguments that Iran's continuing nuclear program is in any way illegal. This in turn would deprive Western governments politically antithetical to Iran, of the language and power of legal discourse when making their case for efforts by the international community to pressure Iran to give up its nuclear program. It would essentially put Iran on the same legal footing as Israel, India, Pakistan and North Korea, whose nuclear programs cannot be substantively legally questioned by other states or by the IAEA. And if Iran sees very few if any benefits flowing from its current membership in the NPT regime, and thus little potential cost from giving them up, the potential benefits of withdrawal may appear quite compelling.

² See Dickey, Schneiderman & Dehghanpisheh, "The Shadow War," *Newsweek*, 13 December 2010. (<http://www.thedailybeast.com/newsweek/2010/12/13/the-covert-war-against-iran-s-nuclear-program.html>)

³ See "Iran Lawmaker Accuses IAEA of Passing Nuclear Secrets to Israel," *Reuters*, 23 September, 2012. (<http://www.reuters.com/article/2012/09/23/us-iran-nuclear-idUSBRE88M04T20120923>); David Blair, "Iran's Newest Nuclear Facility Struck by 'Saboteurs'," *The Telegraph*, 17 September, 2012. (<http://www.telegraph.co.uk/news/worldnews/middleeast/iran/9549098/Irans-newest-nuclear-facility-struck-by-saboteurs.html>)

⁴ "Baghdad Talks: Lessons for All" Editorial on www.irdiplomacy.com, 25 May, 2012. (<http://www.irdiplomacy.ir/en/page/1901880/Baghdad+Talks%3A+Lessons+for+All.html>)

⁵ Though it has been discussed in the issue community. See Reza Sanati, "What if Iran Leaves the NPT?" *The National Interest*, 21 September, 2012. (<http://nationalinterest.org/print/commentary/what-if-iran-leaves-the-npt-7497>)

This brings me to my question for reflection. Can Iran unilaterally withdraw from the NPT under current circumstances?

I. Can Iran Withdraw from the NPT?

Article X(1) of the NPT provides that:

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.

The NPT is thus among those treaties that contain explicit, agreed provisions in their text specifying that parties to the treaty may unilaterally terminate their obligations arising under the treaty, pursuant to specified terms.⁶ At first glance, therefore, the answer to the question heading this section seems obvious.

A. Substantive Auto-interpretation

However, the questions that arise on this subject are questions of the proper interpretation of the terms of Article X(1), and what this interpretation means for application of Article X(1). The most fundamental of these questions is whether the criteria that must be satisfied, and the determinations that must be made, according to the terms of Article X(1), are essentially auto-interpretive by the withdrawing state; or alternatively whether the Article X(1) criteria contain objectively determinable aspects that can constitute limitations or conditions upon the right of unilateral withdrawal, potentially imposed through the interpretation of other states or organizations.

Applying the rules on treaty interpretation, the first observation arising from a review of the ordinary meaning of the text of Article X(1) is that it creates a “right” held by “each party,” thus communicating the individual, unilateral character of the right of withdrawal. The second observation is that the text of Article X(1) contains multiple instances of words explicitly conveying the subjective nature of the determinations that are to be made by the withdrawing state, which in turn constitute the criteria that must be satisfied for lawful withdrawal.

Thus the first sentence of Article X(1) provides that a state may withdraw “if it decides” that extraordinary events, etc. Placing this phrase at the beginning of the list of criteria that are to be substantively satisfied in order for a state to validly withdraw from the treaty, serves to clearly express that the determination of *each one of those criteria* is within the subjective discretion of the withdrawing state. The same meaning is conveyed when, in the third sentence, the content of the “statement” to be noticed to all

⁶ See Article 54 of the 1969 Vienna Convention on the Law of Treaties.

treaty parties and to the U.N. Security Council as a procedural requirement for withdrawal, is to include only those extraordinary events which “[the withdrawing state] regards as having jeopardized its supreme interests.”

These specifications of the subjective nature of the determinations, both substantive and procedural, that a withdrawing state must make according to the terms of Article X(1), and the specification that these determinations are to be made exclusively by the withdrawing state, are striking in their explicit clarity and multiple appearances.

Neither the context of Article X(1) within the NPT, nor the overall object and purpose of the NPT, which is expressed in the preamble to the treaty, appear to bear significantly on this question of the auto-interpretive nature of Article X(1). Furthermore, a review of the negotiating history of Article X(1) similarly reveals no evidence contradicting this textual assessment, and indeed appears overall to confirm it.⁷

The only limitation upon the essentially auto-interpretive nature of the criteria and determinations required by Article X(1) for unilateral withdrawal, would appear to be the universal obligation to perform all treaty obligations in good faith.⁸ In the context of a withdrawing state’s declaration of withdrawal pursuant to the terms of Article X(1), this obligation can be expressed as an obligation of sincerity and absence of pretext or subterfuge.

This overall assessment of the auto-interpretive nature of Article X, subject only to the obligation of good faith, is in harmony with the assessments of other scholars who have written on the interpretation of NPT Article X(1).⁹

It is also worth noting that NPT Article X(1) is essentially identical to the withdrawal clauses of many other arms control treaties, including Article XV of the 1972 U.S.-

⁷ See Mohamed Shaker, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979*, Volume II, Pgs. 883-899 (1980) (“In view of the above background and considerations, the existence of the extraordinary events is left completely to the decision of the withdrawing party.” Pg. 889); Jenny Nielsen & John Simpson, *The NPT Withdrawal Clause and its Negotiating History*, Mountbatten Centre for International Studies, NPT Issue Review (July 2004).

⁸ See Vienna Convention on the Law of Treaties, Article 26.

⁹ Natalino Ronzitti, “Problems of Arms Control Treaty Interpretation,” in Julie Dahlitz and Detlev Dicke (eds.), *THE INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT, PROCEEDINGS OF THE SYMPOSIUM, GENEVA 28 FEBRUARY-2 MARCH 1991*, PG. 120 (1991); Masahiko Asada, *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, *JOURNAL OF CONFLICT AND SECURITY LAW*, Vol. 9, No. 3, Pgs. 331-355, Pg. 349 (2004); Rein Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law*, 50 *INTERNATIONAL & COMPARATIVE LAW QUARTERLY*, Pgs. 509-539, Pg. 531 (2001); Laurence Helfer, *Exiting Treaties*, 91 *VIRGINIA LAW REVIEW* 1579, Pg. 1598 (2005); Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 *HARVARD LAW REVIEW* 905, 957-58 (1972). Even the United States government has conceded that “[t]he NPT conveys no power to stop withdrawal from taking effect if the reasons given are in the judgment of the international community frivolous or improper.” See “Article X of the Treaty on the Non-Proliferation of Nuclear Weapons: Detering and Responding to Withdrawal by Treaty Violators” (Working paper submitted by the United States of America to the PrepCom for the 2010 Review Conference of the Parties to the NPT, first session, Vienna, 30 April–11 May 2007, NPT/CONF.2010/PC.I/WP.22 (3 May 2007)).

Russia Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM).¹⁰ In one particularly relevant instance of state practice concerning withdrawal from arms control treaties, the U.S. unilaterally withdrew from the ABM treaty in 2002. It did so for reasons expressed by U.S. President Bush as follows:

I have concluded the ABM Treaty hinders our government's ability to develop ways to protect our people from future terrorist or rogue state missile attacks. The 1972 ABM Treaty was signed by the United States and the Soviet Union at a much different time, in a vastly different world. . . Defending the American people is my highest priority as Commander-in-Chief, and I cannot and will not allow the United States to remain in a treaty that prevents us from developing effective defenses . . .¹¹

After the U.S. communication of its declaration of withdrawal, no state, including Russia, questioned the objective validity of the reasons stated in the U.S. declaration. This is so even though the stated reasons did not cite to any specific “extraordinary events” clearly “related to the subject matter” of the treaty itself, that “jeopardized the supreme interests” of the U.S. The reasons for withdrawal stated by the U.S focused, rather, on the overall changed circumstances of geopolitics and security that had developed since the treaty was signed almost 30 years before, and how the now circumstantially outdated ABM treaty did not allow the U.S. to develop weapons systems it considered essential to its security. Nor did any state, including Russia, make any legal assertions that the U.S. could not withdraw from the treaty on an auto-interpretive, unilateral basis.

B. Procedural Provisions

Other questions regarding interpretation of NPT Article X(1) include the question of the meaning and function of the second and third sentences of Article X, which stipulate the notice and content requirements for lawful unilateral termination of NPT membership. The core question in this context is whether noncompliance by the withdrawing state with these procedural requirements constitutes a legal impediment to the effectiveness of the withdrawal – or in other words, whether complete satisfaction of the procedural requirements in the second and third sentences of Article X(1) is a condition of lawful unilateral termination.

This question has been persuasively answered by Masahiko Asada, who has written:

Under article 10 of the NPT, each Party has the ‘right to withdraw’ from the Treaty in exercising its ‘national sovereignty’. In that sense, the fact that some of the other parties to the Treaty did not receive the notice of

¹⁰ Article XV: 1. This Treaty shall be of unlimited duration. 2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

¹¹ <http://www.acronym.org.uk/dd/dd62/62nr02.htm>

withdrawal or that 'the extraordinary events' were not fully spelled out in the notice, should not be treated as something that would completely invalidate a party's notice of withdrawal. . . In other words, the notice requirements should not be treated as conditions to be met for a withdrawal notice to be valid, but rather as procedural obligations a violation of which would only give rise to some form of reparation, though in theory.¹²

Using Article 51 of the U.N Charter as a persuasive analog, Asada further reasons:

There is arguably a parallel procedural requirement provided for in article 51 of the UN Charter regarding the right of self-defence. And the requirement to report to the Security Council the measures taken in the exercise of the right of self-defence is usually not respected by states exercising that right. Would an act of self-defence cease to be as such if the measures taken were not reported to the Security Council as required by article 51 of the Charter? Or is it just a matter of procedural non-compliance of the obligation that would not deprive the act of the nature of self-defence? Similar arguments based on the principle of *de minimis non curat praetor* or *de minimis non curat lex* seem to apply here, too.¹³

C. North Korea's NPT Withdrawal

The only actual case of withdrawal from the NPT in state practice is the case of North Korea, which withdrew from the NPT in 2003. There has been some controversy regarding the legal effectiveness of North Korea's withdrawal. This controversy has centered on arguments regarding the substantive sufficiency of North Korea's declaration of withdrawal, and on procedural questions regarding the chronology of North Korea's various statements on the matter, together with questions concerning the content and communication of those statements.¹⁴

As I have already considered the interpretations of NPT Article X(1) upon which such arguments are based in the sections above, and concluded them to be incorrect, it will suffice here to note that in his definitive article on the case of North Korea's NPT

¹² *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, JOURNAL OF CONFLICT AND SECURITY LAW, Vol. 9, No. 3, Pgs. 331-355, Pg. 347-348 (2004); See also Frederic Kirgis, *North Korea's Withdrawal from the Nuclear Nonproliferation Treaty*, American Society of International Law Insight, January 2003 (<http://www.asil.org/insigh96.cfm>)

¹³ *id.* at pg. 348.

¹⁴ See George Bunn and Roland Timerbaev, 'The Right to Withdraw from the NPT: The Views of Two NPT Negotiators' (2005) 10 *Yaderny Kontrol (Nuclear Control) Digest* 20 ("North Korea's stated reasons for withdrawal were inadequate to satisfy the standards of the NPT withdrawal clause in 1993 or 2003."); Mohammed Bedjaoui, Presentation at the seminar and roundtable on 'Steps toward a Nuclear Weapons Convention: Exploring and developing legal and political aspects' hosted by the Permanent Mission of Costa Rica to the United Nations Office at Geneva, 13 November 2008 ("Neither the persistent state of war, nor the existence of the U.S. nuclear arsenal, constituted "extraordinary" events that occurred suddenly in the Korean political landscape. These two events preexisted at the accession of North Korea to the NPT on December 12, 1985. Besides South Korea had ratified the NPT over ten years ago, on April 23, 1975.")

withdrawal, Masahiko Asada concludes, after an exhaustive analysis, that the most persuasive conclusion is that North Korea's withdrawal was legally effective in 2003. As he summarizes:

In summing up, if one thinks that the questions raised regarding the procedural requirements under article 10 would not prevent North Korea from withdrawing from the NPT, the DPRK would have actually withdrawn from the Treaty on 10 April 2003. But if not, it would follow that Pyongyang still remains a party to the NPT. Clearly, the former interpretation is more persuasive than the latter as shown above.¹⁵

D. Summary and Application

So to summarize, proper interpretation of NPT Article X(1), supported by state practice and the best scholarly analysis, produces the following conclusions. First, that the criteria that must be satisfied, and the determinations that must be made, according to the terms of Article X(1), are essentially auto-interpretive by the withdrawing state. The withdrawing state's determinations are subject only to the obligation of good faith in performance of treaty obligations, pursuant to VCLT Article 26. These determinations may be questioned or criticized by other states, or by the U.N. Security Council, but not vetoed or overruled.

Second, that the procedural criteria in the second and third sentences of Article X(1) should of course be followed by the withdrawing state, but these procedural steps are not conditions of withdrawal. Rather, they are simply procedural requirements stipulated by the treaty. And if there are procedural inconsistencies or noncompliance in the actions of the withdrawing state, this noncompliance will not comprise a legal impediment to the effectiveness of the withdrawal, although it may give rise to state responsibility for violation of treaty terms, for which the withdrawn state would still be responsible after withdrawal.

So what do these conclusions mean for Iran and its potential interest in withdrawing from the NPT? Basically they mean that if Iran wishes to withdraw from the NPT because of the concerns it has expressed about its membership therein no longer being in its national interest, it can do so upon its own subjective determination of the criteria in Article X(1), and there should be no basis for other states, or for the U.N. Security Council, to determine that such withdrawal is ineffective on either substantive or procedural grounds.

¹⁵ *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, JOURNAL OF CONFLICT AND SECURITY LAW, Vol. 9, No. 3, Pgs. 331-355, Pg. 350 (2004). See also Christian Tomuschat's supporting analysis in 'Obligations Arising for States Without or Against Their Will' (1993/IV) 241 *Recueil des cours* 195, 273 ("[G]iven the existence of the withdrawal clause and its wording, which affirms that the evaluation of the need to leave the control régime is made unilaterally by the State concerned, there is hardly any legal remedy to challenge North Korea's determination.").

And although objective justification of the determinations that Iran must make according to the terms of Article X(1) is not required, the case of the U.S. withdrawal from the ABM treaty in 2002, and its stated reasons for withdrawal in that case, which received acquiescence from Russia, would appear to demonstrate that the reasons Iran could state in its declaration of withdrawal under current circumstances, are at least as compelling and as related to the criteria stipulated in the relevant treaty withdrawal clause, as were those cited by the U.S. in 2002.