



## **What if Iran Withdraws from the Nuclear Nonproliferation Treaty? Part II: What Would the Legal Implications Be?**

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In [Part I](#) of this two-part set of Reflections on the legal meaning and application of Article X(1) of the 1968 Nuclear Non-proliferation Treaty (NPT), I considered the question of whether Iran can unilaterally withdraw from the NPT under current circumstances, and what the legal framework governing such a withdrawal would be. Here in Part II, I will proceed to reflect upon the question of what the legal implications of such a hypothetical withdrawal by Iran would be - including NPT specific legal implications, legal implications for Iran's safeguards agreement with the International Atomic Energy Agency (IAEA), and legal implications for the role and authority of the U.N. Security Council.

### I. NPT Specific Legal Implications

There has been a general consensus reached by NPT member states, in agreed Final Documents at NPT Review Conferences, and by the U.N. Security Council, that a state which has withdrawn from the NPT remains legally responsible for any violations of the NPT committed prior to withdrawal.<sup>1</sup> Many states have been at pains to repeat this principle in their diplomatic statements regarding NPT withdrawal, however this is really not a new or exceptional principle, but rather a simple application of well established principles expressed in the Vienna Convention on the Law of Treaties (VCLT) in Article 70.

The more interesting question, is what this principle would mean in practice if Iran, or any other state for that matter, withdrew from the NPT. The first question arising in the

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<sup>1</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), paras. 118-19; UNSC Resolution 1887 (2009), para. 17.

application of this principle to a state that has effectively withdrawn from the NPT, would be whether in fact the now withdrawn state had in fact breached the NPT's provisions prior to withdrawal. The question of NPT breach is a highly controversial, and often misunderstood question. Even in the case of North Korea, which is widely believed to have breached the NPT prior to its withdrawal in 2003, the activities in which North Korea actually engaged prior to 2003 were arguably only instances of continued noncompliance with their safeguards agreement with the IAEA, and not NPT violations *per se*. And in the case of Iran, if it should choose to withdraw under current circumstances, this conclusion would even more certainly be correct.<sup>2</sup> Thus, there have been no clear cases of a state withdrawing from the NPT after having violated its terms, and under current conditions, a withdrawal by Iran would also not present such a case.

However, even if *arguendo* it did, it is unclear what Iran's state responsibility for such a violation would require it to do in order to remedy the violation. It is unlikely that this remedy would have much if anything to do with the IAEA, as the IAEA has no mandate to police states' compliance with the NPT itself; rather, only states' compliance with their safeguards agreements with the IAEA.

The International Law Commission's Draft Articles on State Responsibility provides for two essential obligations of remedy for a breach of international legal obligations. To paraphrase, these obligations are first an obligation to stop the breaching actions if they are continuing and not repeat them, and second an obligation to "make full reparation for the injury caused by the internationally wrongful act."<sup>3</sup> In the context of a past violation of the NPT by a now withdrawn state, identifying precisely who the injured states are, and what means of reparation to those states would discharge the withdrawn state's obligation of reparation, would be quite difficult. More to the point, perhaps, it is difficult to see how such reparation could be effectively and meaningfully made, and of what utility such reparation would overall be. This would of course depend on the precise nature of the prior violation.

On these questions I would endorse the comprehensive analysis of state responsibility in the context of nonproliferation treaty breach provided by Matthew Happold, and his conclusion that:

Although the law of state responsibility is well adapted to fit the peculiarities of non-proliferation agreements, it does not provide an adequate means either to prevent or to cure their breach. As a consequence, although applicable in theory, in practice it has little relevance.<sup>4</sup>

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<sup>2</sup> See generally Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Pg. 50-55 (2009); *INTERPRETING THE NUCLEAR NONPROLIFERATION TREATY*, Pgs. 87-94 (2011).

<sup>3</sup> Article 31

<sup>4</sup> "The 'Injured State' in the Case of Breach of a Non-Proliferation Treaty and the Legal Consequences of Such a Breach," in Daniel H. Joyner & Marco Roscini, eds., *NONPROLIFERATION LAW AS A SPECIAL REGIME: A CONTRIBUTION TO FRAGMENTATION THEORY IN INTERNATIONAL LAW*, Pgs. 175-195, Pg. 195 (2012).

## II. Legal Implications for Iran's Safeguards Agreement with the IAEA

Article 26 of the standard INFCIRC/153 comprehensive safeguards agreement (CSA) which the IAEA concludes with NNWS parties to the NPT, including Iran, provides that the CSA shall remain in force as long as the NNWS state party to the CSA remains a party to the NPT.<sup>5</sup> This means that upon effective withdrawal from the NPT, the CSA obligations of the withdrawing party also end. Some commentators have argued, notwithstanding this quite clear treaty language in the CSA, that at least some CSA obligations would survive withdrawal from the NPT, and still be binding upon the now non-party to the NPT, entailing the state's international legal responsibility.<sup>6</sup> However, these arguments do not survive scrutiny.

In addition to running contrary to the plain language of Article 26 of the INFCIRC/153 CSA, customary international law on state responsibility clearly limits a state's legal responsibility to breaches of obligations binding upon the state at the time of the commission of the breaching act.<sup>7</sup> Since Article 26 of the CSA makes it clear that the obligations of the CSA cease at the time of effective withdrawal from the NPT, there are no continuing CSA obligations that could be breached so as to entail the responsibility of the withdrawn state.

One commentator has argued that the basis for his argument for the survival of CSA obligations, post NPT withdrawal, is to be found in the law of treaties. As he states:

The Vienna Convention on the Law of Treaties provides that withdrawal from a treaty does not absolve a party from performing any obligations that accrued prior to a valid exercise of its right to withdraw.<sup>8</sup>

However, this is simply an incorrect statement of the law of the VCLT. Article 70 of the VCLT states that the termination of a treaty, including through withdrawal:

- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

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<sup>5</sup> IAEA, *The Structure and Content of Agreements between the Agency and States required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (INFCIRC/153, June 1972), para. 26.

<sup>6</sup> A.F. Perez, 'Survival of Rights Under The Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards', 34 *Virginia Journal of International Law* (Summer 1994), 749-830; J. Carlson, 'Withdrawal from the NPT: Consequences for IAEA Safeguards', Research paper, commissioned by the International Commission on Nuclear Non-proliferation and Disarmament (5 June 2009).

<sup>7</sup> See the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Articles 2 & 13 read together.

<sup>8</sup> J. Carlson, 'Withdrawal from the NPT: Consequences for IAEA Safeguards', Research paper, commissioned by the International Commission on Nuclear Non-proliferation and Disarmament (5 June 2009), pg. 4.

Article 70 thus clearly provides that withdrawal from a treaty does in fact release the withdrawn party from performing the obligations of the treaty. The only caveat the VCLT offers on this point is in Article 70(b), which only provides that rights or obligations *created through the prior execution* of the treaty do survive the treaty's termination. And in fact this provision is relevant to the case of a NNWS withdrawing from the NPT, because it is common for NPT NNWS to receive, both directly from the IAEA as well as bilaterally from other NPT parties, civilian nuclear technology and materials by virtue of their NPT membership.

Article 70(b) provides, therefore, that even after withdrawal from the NPT, any rights to technology and material which the now withdrawn state had acquired through the execution of the NPT, would not be affected. This general principle of treaty law establishes the inaccuracy of arguments which have been made, to the effect that upon withdrawal from the NPT the withdrawn state is under a general international legal obligation to dismantle or return nuclear equipment and materials received from the IAEA or from other NPT parties while it was a party to the NPT.<sup>9</sup>

Notwithstanding there is no general rule of international law requiring the dismantlement or return of nuclear materials and technologies received by a withdrawn state by virtue of its NPT membership, if the state has entered into specific bilateral or regional agreements that independently provide for such an obligation with regard to specifically covered materials, then of course these obligations will continue according to their terms. This proviso is also true in the context of any specific bilateral or regional agreements that provide independently for the continuation of safeguards upon specified materials after termination or withdrawal from the NPT.

In summary, then, should Iran effectively withdraw from the NPT, its obligations under its INFCIRC/153 CSA with the IAEA would coterminously cease, and this would as a general matter of international law comprise a clean break between Iran and the IAEA. No IAEA safeguards obligations would survive the NPT withdrawal, and there would be no general international legal obligation on Iran to dismantle or return to the IAEA or to other states, nuclear materials and technologies Iran received from them by virtue of its prior NPT membership.

### III. Legal Implications for the Role and Authority of the U.N. Security Council

The last point on which I want to reflect herein, is the subject of the legal implications a withdrawal by Iran from the NPT would have for the role and authority of the U.N. Security Council. In this brief format, I can only glancingly consider this complex and important area of law - though for those interested, I have written on the subject of the

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<sup>9</sup> See generally Dieter Fleck, "State Responsibility Consequences of Termination of or Withdrawal from Non-proliferation Treaties," in Daniel H. Joyner & Marco Roscini, eds., *NONPROLIFERATION LAW AS A SPECIAL REGIME: A CONTRIBUTION TO FRAGMENTATION THEORY IN INTERNATIONAL LAW*, Pgs. 250-269, Pg. 265 (2012).

U.N. Security Council's role and authority in the context of non-proliferation law in more detail elsewhere.<sup>10</sup>

The basic question on this point is, what is the proper role of, and what is the scope of authority enjoyed by, the U.N. Security Council to address the case of state withdrawing from the NPT? Again, there has only been one case to date of a state actually withdrawing from the NPT – North Korea's withdrawal in 2003. During the process of North Korea's withdrawal and afterwards, the Security Council adopted numerous resolutions condemning this withdrawal, and condemning North Korea's two nuclear test explosions in 2006 and 2009 respectively.<sup>11</sup> After the 2009 test explosion, the Security Council adopted Resolution 1874, which went beyond the normal condemnations. In operative paragraphs 5 & 6, acting pursuant to its authority in Article 41 of the U.N. Charter, the Security Council:

Demands that the DPRK immediately retract its announcement of withdrawal from the NPT; Demands further that the DPRK return at an early date to the NPT and International Atomic Energy Agency (IAEA) safeguards . . .”

Following its demand that North Korea rejoin the NPT, the Council proceeds in operative paragraph 8 to 'decide' that North Korea shall abandon its nuclear weapons and related development program, and shall submit itself to the terms of a safeguards agreement administered by the IAEA.

Much could be said here about whether the Security Council acted in its proper legal role in adopting these decisions in Resolution 1874, and whether it exceeded its authority under the U.N. Charter in doing so. After all, one might ask, if the Security Council can order a state to enter into, or at least maintain, both bilateral (IAEA CSA) and multilateral (NPT) treaty obligations, against the will of the state concerned, what indeed can the Security Council not do? Are there no legal limits to its power? If not, what implication does this have for the consensual foundation of the sources of international law?

Furthermore, much could also be said about whether the Security Council's action in Resolution 1874 evidenced special secondary rules of international law applicable to withdrawal from non-proliferation treaties, including limitations not present in general international law. Again, I have written extensively on these subjects elsewhere.<sup>12</sup> Here, I will limit myself to only mentioning these questions, and noting that they deserve considerable reflection and clarification.

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<sup>10</sup> Daniel H. Joyner, *The Security Council as a Legal Hegemon*, 43 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 225 (2012).

<sup>11</sup> See, e.g., Resolution 825 (1993), Resolution 1695 (2006), Resolution 1718 (2006), Resolution 1874 (2009).

<sup>12</sup> Daniel H. Joyner & Marco Roscini, "Withdrawal from Nonproliferation Treaties," in Daniel H. Joyner & Marco Roscini, eds., *NONPROLIFERATION LAW AS A SPECIAL REGIME: A CONTRIBUTION TO FRAGMENTATION THEORY IN INTERNATIONAL LAW*, Pgs. 151-171 (2012).

If Iran were to withdraw from the NPT, could the U.N. Security Council order Iran to rejoin the NPT, and to re-accede to its CSA with the IAEA? My considered opinion is that such an order would be *ultra vires*, or beyond the authority, of the Security Council. And on this point, Jozef Golblat appears to be in substantial agreement with me. As he writes:

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. . . . The Council is not authorized to check the implementation of arms control agreements; its formal involvement in the withdrawal procedure is limited.<sup>13</sup>

### Summary and Importance of Parts I & II

So what lessons can be drawn from the brief consideration of the legal meaning and application of NPT Article X(1) contained in this two-part set of Reflections? I think the chief lesson to be learned is that the NPT is not set in stone. It contains in its text a unilateral withdrawal clause that has been used before, and could be used again, with very little in the way of legal limitations upon its use.

The NPT is at its essence a bargain that was struck between its parties more than 30 years ago. And if states like Iran feel that they are no longer enjoying the benefit of this bargain - or even worse, that the institutions of this bargain are being used against them to their national detriment - withdrawal from the NPT becomes not only a rational option, but quite an attractive one. If Iran were to withdraw from the NPT, all rules of international law currently binding upon Iran concerning development and possession of nuclear weapons would disappear. All cooperation between Iran and the IAEA would cease. And any transparency that the international community now enjoys regarding Iran's nuclear programs would be lost.

I think that this potentiality is something that the West and its allies should reflect long and hard upon, as they apply pressure on Iran regarding its nuclear program, in ways that Iran argues, and many developing states agree, are illegal and politically biased. Because if pushed too far, Iran may simply decide that the benefits of membership in the NPT regime no longer justify the costs.

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<sup>13</sup> J Goldblat, 'Should the Right to Withdraw from the NPT be Withdrawn?', Research Paper, International Commission on Nuclear Non-proliferation and Disarmament (ICNND), January 2009, pg. 4.