

Can Article X be strengthened to prevent withdrawal by States that misuse the provisions of the Treaty ?

(by H.E. Mr. François Rivasseau, Annecy, 19 March 2005)

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Article X 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 announcement by North Korea on 10 January 2003 of its intention to withdraw from the NPT has launched a debate on withdrawal from the Treaty, on the consequences of withdrawal and on how to interpret the modalities provided for in Article X of the NPT.

This experience has highlighted a potential loophole in the NPT which theoretically could be closed through three different approaches :

- a) Changing Article X, but is it desirable ?
- b) Adding to Article X a common understanding about the consequences of a withdrawal from the NPT but is it possible as it is unlikely that we could find a consensual view on this sensitive issue which would be meaningful ?
- c) Or, conversely should not we try to find in article X itself, together with the general principles of international law, a key to our problem ?

Without ruling completely beforehand the second option, I suggest that the third option offers the most promising avenue.

It should be borne in mind that withdrawal from the NPT entails the termination of NPT Comprehensive Safeguards Agreements with the IAEA. Article 26 of INFCIRC/153, which is a standard comprehensive safeguards agreement, provides that *"The Agreement [shall] remain in force as long as the State is party to the Treaty on the Non-Proliferation of Nuclear Weapons."*

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I – The right to withdraw cannot be abolished

A – The right cannot be denied

- a) Several commentators, including IAEA Director-General, have suggested that the right of withdrawal be abolished, or at least that such a procedure should entail systematic examination by the UNSC.
- b) But, it would be both unrealistic and dangerous to reopen the Treaty in order to abolish Article X or any other provision. We are not sure that at the end of this process, we would have a text as good as the present one.
- c) Moreover, the principle of the right to withdrawal is closely linked to that of State's sovereignty. It should not be called into question in the case of the NPT, in particular given that provisions similar to those of Article X are found in most other disarmament and non-proliferation treaties (CTBT, CWC, BTWC, etc.) and that in these cases we are committed to their being maintained. In addition, Article X provides for fairly precise conditions of substance and form and for notification of the UNSC. There is nothing to prevent the UNSC from reacting, as was the case in 1993 (the announcement of the 2003 withdrawal was not followed up within the UNSC).

B – No special supplementary interpretation would be generally acceptable

- a) I see interest if discussions on withdrawal from the NPT could focus on the interpretation of the modalities provided for in Article X : everybody is committed to respect the right of withdrawal as an element of treaty law ; but consensus would not be easily reached at the Review Conference about including a special interpretation of Article X in the Final Document. And Article X is in any case sufficiently detailed on both substance and form.
- b) However, the role of the United Nations Security Council in maintaining international peace and security and in combating the "threat" that proliferation now constitutes (cf. UNSC Presidential Statement of 31 January 1992 and Resolution 1540 of 28 April 2004) should be emphasized. We could have it

acknowledged that, in some cases, withdrawal from the Treaty falls within the scope of those threats. In other words, it is less the reality and the conditions of withdrawal from the NPT on which the UNSC should have to state a position, but rather on the consequences of such a withdrawal.

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II – But withdrawal bears consequences which should be more clearly spelled out.

A- Let's the focus on the consequences of a withdrawal and looks more closely to the full range of them, on the basis of Article X, complemented by general principles of international law. Generally speaking, the legal situations created through the execution of a multilateral treaty are not affected by the withdrawal of a State Party. That State may only be rendered internationally liable for violations/illegalities committed prior to withdrawal from the Treaty but this principle applies (whatever the date on which it was established that these violations/illegalities were committed). Otherwise said, to withdraw from the NPT does not make you immune or irresponsible from previous violations all the contrary, it raises legitimate new suspicions about the nature and importance of those violations and puts globally the situation of the concerned country under the most unfavorable light.

Article 70 of the Vienna Convention on the Law of Treaties thus provides that *"Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty... (a) releases the parties from any obligations 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."* The rule consolidated in this article can be deemed to rank as customary law. It reaffirms a principle whereby the effects of denunciation are not retroactive.

In the specific case of NPT, there is a risk of State withdrawing from the Treaty, after benefiting from civilian nuclear cooperation developed with other bona fide countries, so as to be able to pursue activities for military purposes and better cover them. This concern has been raised in the final report of the High-level Panel on Threats, Challenges and Change addressed to the Secretary General of the UN on 1st December 2004. Such a situation should not go unchecked : even without violating the letter of Article II of the NPT (*"Each non-nuclear-weapon State undertakes... not to manufacture or otherwise acquire nuclear weapons..."*), it would show a premeditated decision to withdraw and the

clandestine preparation thereof, including by deceiving those countries that conduct civilian cooperation.

It makes therefore much more likely that such a withdrawal will indeed constitute a real threat to peace and security. The UNSC's role in addressing cases of withdrawal from the NPT preceded by violations of the Treaty is to be therefore strengthened, so that lack of reaction from the UNSC in such a case would not be likely to happen.

B – At least, the logic of the situation as well as principles of international law suggests also that two concrete measures could be put forward.

1/ "Without prejudice to any other measure likely to be decided by the United Nations Security Council", a State withdrawing from the Treaty should no longer be entitled to use nuclear materials, facilities, equipment and technologies acquired from a third country prior to its withdrawal. Such nuclear facilities, equipment and materials should be "returned to the supplier State, frozen or dismantled under international control." Indeed, a treaty withdrawal has to be considered as a withdrawal not only from the duties, but also from the benefits of the Treaty. A decision to withdraw = cannot be a pick and choose decision = where you refuse the constraints while you still enjoy the benefits.

2/ A clause prohibiting the use of nuclear materials, facilities, equipment and technologies transferred in the event of withdrawal should be included in intergovernmental agreements defining the modalities for transfers of sensitive nuclear goods or for large-scale transfers. It should also be used systematically in the suppliers groups context.

That being said, it should be borne in mind that a possible withdrawal from the NPT would occur amid great international tension liable to render these measures less effective. They are chiefly aimed at clarifying consequences of a withdrawal, making crystal clear to potential violators that they have nothing to gain, but many extra things to lose by trying to escape their commitments through Treaty withdrawal.

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We could discuss a range of issues connected to this approach either in a main committee context or, better, through an appropriate specific framework

with the view of producing some conclusions which would help to reinforce the Treaty. But, even without agreed conclusion, the main purpose of such an approach would be to highlight the various legal possibilities offered nationally or collectively to States parties for we have to prevent everybody to withdraw from NPT while in violations of Treaty commitments.