PAPERS

NPT Withdrawal

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I want to say a few words today about a prominent proposal to strengthen the non-proliferation regime, a proposal that is, in my judgment, creative, forward-looking, simple, elegant and unwise.

On January 10, 2003, faced with charges that it had violated the Non-Proliferation Treaty (NPT), North Korea announced an "automatic and immediate effectuation"[1] of its withdrawal from the NPT, an action that requires three months' notice under the Treaty.[2] More recently, Iran has faced charges that it, too, has violated the NPT[3] and threatened that it, too, may withdraw from that Treaty.[4] So the question arises: what can be done to prevent states from reneging on their non-proliferation obligations simply by withdrawing from the treaty that imposes those obligations?

The Iranian and North Korean actions remind us again of a long-standing but disquieting weakness in the non-proliferation regime: a party to the NPT with nuclear weapons aspirations need not actually breach the Treaty's terms to escape its commitments, for a party confronting unwanted NPT limits on its right to develop nuclear weapons can easily escape those

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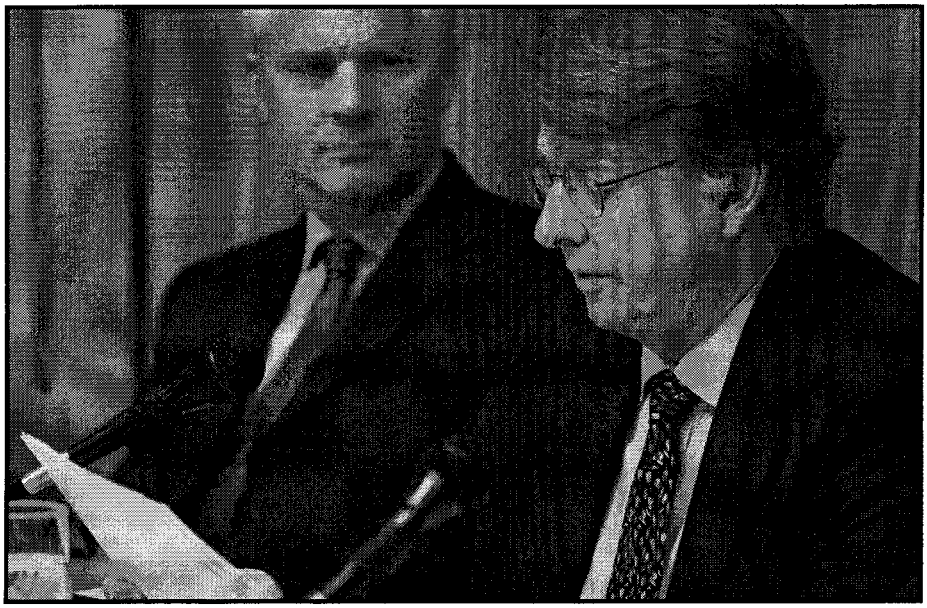

restrictions simply by giving three months' notice and withdrawing from the Treaty. The state, of course, continues to be responsible for its breaches that occurred while it was a party. But after the Treaty is terminated, the state has no further obligations to meet the Treaty's requirements.

Faced with what would appear to be this gaping hole in the Treaty, the Director General of the International Atomic Energy Agency (IAEA) has proposed what might seem an obvious solution: simply eliminate the right to withdraw from the Treaty. "[N]o country should be allowed to withdraw from the treaty," Mohamed ElBaradei has suggested.[5] The advantages of this straightforward idea seem self-evident. States such as North Korea and Iran would no longer have the option of moving clandestinely right up to the brink of the Treaty's limits and then surprising the international community with a "break-out" in which they proceed, entirely legally, to join the ranks of nuclear powers.

I hesitate to disagree with a friend, particularly one whom I respect as much as I do Mohamed, but I believe that his proposal to entrench the NPT is ill-advised. Entrenchment would create constitutional problems for the United States that would ripple through the international order, and it would, moreover, represent bad policy—for the United States as well as the international community.

Entrenchment would, in short, be an illusory solution to the wrong problem. The problem is not that states can withdraw their consent to be bound by the treaty; the option not to be bound by a given rule is woven into the international legal order, which is grounded upon state consent. The

problem is that consent cannot work in dealing with a state that wants nuclear weapons more than it wants anything else. The solution is that coercion may be required in dealing with such states, and the problem is that the consent-based international system is ill-equipped to undertake effective coercion. I'll elaborate, but, first, a word on what I mean by entrenchment.

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"Entrenchment" is a term employed in American constitutional jurisprudence to describe a legislative measure of indefinite duration that is not repealable. The concept is also useful in international law, and it seems applicable to the Director General's proposal. I use the term "entrenched treaty" to describe a treaty that has four characteristics. First, it is intended to remain in force indefinitely. Second, it is not subject to withdrawal. Third, entrenchment does not include a treaty that is essential to establishing the territorial integrity of a state, where entrenchment is unavoidable. Finally, it embraces only treaties for which the prohibition against withdrawal is self-executing. This means that that prohibition would be effective domestically in the United States as law of the land without the enactment of implementing legislation.

The United States has been criticized in recent years for making key treaties non-self-executing; let us assume *arguendo* that the United States wants to be what the critics regard as a good citizen, and that it makes the non-withdrawal provision self-executing.[6] The effect of such a treaty would be to prevent the operation of last-in-time principles domestically, with the result that the United States would be prevented under its own law from making a subsequent treaty that is inconsistent with NPT.

With the preliminaries out of the way, let's turn to the merits of the idea, beginning with its legality. In international law there is no problem: an entrenched treaty is clearly permissible. The weight of authority has it that there is no legal problem with a "perpetual" treaty that prohibits withdrawal. Moreover, there is precedent in international law for entrenching a treaty.[7] Hungary was found by the International Court of Justice in 1997 to have entered into a treaty with Slovakia concerning the construction of flood control and hydroelectric power works on the Danube River from which withdrawal was not permitted.[8] The 1957 Treaty of Rome establishing the European Economic Community did not provide for withdrawal.[9] The United Nations Charter contains no provision specifically permitting or prohibiting withdrawal; opinion on the issue is not unanimous, but it would appear that withdrawal under exceptional circumstances was contemplated and is permitted.[10] Indonesia purported to withdraw from the UN in 1965 (but returned in 1966).

There remains, nonetheless, a problem with entrenched treaties, at least for the United States, and perhaps for some other states governed internally by the principle of parliamentary supremacy:[11] while entrenched treaties are permitted under international law, they pose serious potential problems under the United States Constitution.

The reason lies in the familiar rule of American constitutional jurisprudence that one Congress cannot bind a future Congress.[12] The underlying principle is ancient. It was Blackstone who articulated the axiom that "the legislature, being in truth the sovereign power, is always of equal, always of absolute authority. . . . It acknowledges no superior upon earth, which the prior legislature must have been if it's [sic] ordinances could bind a subsequent parliament."[13] The Supreme Court has been steadfast in underscoring that proposition in connection with legislation.

So far as I can determine, the question has not arisen in connection with a treaty, but the same limits should seemingly apply. All know that the Constitution gives the President and the Senate the "treaty-makers" authority to make treaties. The President is empowered to make treaties, by and with the advice of two-thirds of the Senate.[14] In the United States, self-executing treaty provisions (such as those that might preclude withdrawal) have domestic legislative effect as the "supreme law of the land."[15] This legislative dimension of entrenched treaties is significant in three respects.

First, because its non-withdrawal provisions are effective as domestic law, an entrenched treaty would deny to the treaty-makers, some of whom are also legislators, the power to make to "legislate" a new treaty that is inconsistent with the earlier treaty. An entrenched treaty would in effect carve out an exception within which no new treaty can be made. If it were possible constitutionally to exclude subjects from the treaty-makers' competence, one set of treaty-makers, distrustful of future sets of treaty-makers, would no doubt successively exclude subjects from their control,[16] with the treaty power gradually reaching a narrower and narrower scope of subjects and with the United States less and less able to respond flexibly to changed times and circumstances. The Treaty Clause does not permit the treaty-makers to place the United States in this diplomatic straitjacket.

Second, if specified subjects are to be placed off-limits to the treaty-makers, the Constitution provides the exclusive procedure for doing so: the amendment process set out in Article V. An amendment to the Constitution could in principle provide that a certain treaty or treaty provision partakes of the status of a constitutional provision, by stipulating that a statute or another treaty at odds with the privileged treaty would be invalid. The constitutions of some other countries in fact accord quasi-

constitutional status to certain treaties.[17] But to do so in the United States would require subjecting the measure in question to the lengthy and cumbersome process for amending the Constitution. A semantic substitute ought not work: it should not be possible to call a constitutional amendment a treaty and thereby dispense with the cumbersome constitutional requirements for approving an amendment.

Third, an entrenched treaty would undermine constitutional limitations on presidential and senatorial terms of office by effectively extending terms beyond those prescribed in the Constitution.[18] The "new" treaty-makers would effectively be denied the right to exercise the full prerogatives of their office; the prerogative to vitiate the privileged treaty would continue to be arrogated by a president and senators who are no longer in office.

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So it is doubtful that an entrenched NPT would square with the requirements of the Constitution. Beyond domestic legal invalidity, however, an entrenched treaty would represent bad public policy for two reasons.

First, the notion of democratic accountability implies the possibility of electing public officials who are responsive to voters' views and who are able to implement those views to the extent that the Constitution permits. An entrenched treaty would deny voters the right to insist that the treaty-makers effect their views; it would be inconsistent with democratic accountability.

Second, as I mentioned before, times change. States' interests change. What may in earlier times have been an effective way of pursuing certain interests may in later times prove to be an ineffective or harmful way of pursuing those interests. What is a good bargain one year can become a bad bargain in later years. An entrenched treaty presupposes that the benefits of certainty and predictability will always necessarily outweigh the benefits of flexibility and adjustment. Entrenchment locks in diplomatic tradeoffs, the comparative costs and benefits of which depend upon geopolitical context, which is constantly changing.

These are policy reasons why it would not be in the United States' interest to become party to an entrenched NPT. They are also policy reasons why the international community should not encourage the entrenchment of treaties, with respect to the NPT or elsewhere. Democratic accountability and reasonable flexibility in commitments promote a sound foundation of stability in the international legal order. Entrenchment paradoxically injects an element of volatility into a treaty regime; states that are unable to withdraw from the NPT are encouraged

to abrogate the treaty, in violation of its terms, in situations where orderly withdrawal or compliance might otherwise occur. Furthermore, because the United States would not enter into an entrenched NPT, a two-tiered treaty regime would necessarily result, with one set of states able to withdraw from the NPT at will and another set of states permanently committed to the NPT's terms, leaving the latter set at the mercy of the former and with diminished compliance incentives.

In fact, the force of these concerns is not lost on international law, which recognizes that all parties to a given treaty can at any time consent to its termination by one or more of the parties.[19] International law recognizes the primacy of state consent because it has no alternative: state consent has been the foundation of the international legal order since the 1648 Treaty of Westphalia. The international legal order is profoundly different from the domestic legal systems of its member states. Individual actors within domestic legal systems cannot choose not to be subject to their rules, cannot choose whether to accept their courts' jurisdiction, and cannot choose to opt out of enforcement.

But states in a consent-based system are in different position. The international legal system cannot compel a state to subscribe to a rule unless it consents to do so. It cannot adjudicate the application of a rule to a state unless the state has accepted the jurisdiction of the tribunal to apply the rule. It cannot enforce a rule against a state unless the state has consented to the rule's enforcement. This, in the end, is the hurdle that confronts states in dealing with the Irans and North Koreas of the world. There is no way, in a consent-based system, that any state can lawfully be made to do or not do anything to which it does not consent. This includes the acquisition of nuclear weapons.

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Entrenching the NPT would therefore be an illusory solution to the wrong problem. The problem is not that states can escape the obligations of the treaty. In a consent-based system, states can escape the obligations of any treaty by withdrawing from it or by declining to ratify it at the outset. The solution is not to make the NPT non-withdrawable. The core problem is that, within the existing international legal system, the non-proliferation goals of the international community may not be achievable by relying upon state consent, even when all reasonable incentives are offered to encourage that consent. Those goals may then be achievable only through the exercise of coercion.

It may be that the international community is now moving toward an

extra-legal, coercive non-proliferation regime, at least with respect to Iran. Gary Sick, a former National Security Council adviser on Iran, noted recently that the United States and the European Union may, without explicitly saying so, be attempting to "enforce a different set of rules" for Iran rules that are different than those specified in the NPT. [20] Where would the international community derive the authority to impose such rules?

In principle, there is nothing to preclude the Security Council from finding that proliferation represents a threat to international peace and security and, in effect, enacting the restrictions of the NPT in a Security Council resolution. But the reality is that it is not satisfactory to look to the United Nations for that authority. The resoluteness of the Security Council on nuclear proliferation issues is open to question. It is unlikely that a consensus exists on the Council to take sufficiently forceful action under Chapter VII to stop a state from obtaining nuclear weapons. No one need be reminded that the Council can be paralyzed by divisions among the P5.[21] This week Russian leaders told Secretary of State Condoleezza Rice that the Iranians "have this right" to enrich uranium under the NPT and refused to support sending the issue to the Security Council.[22]

This is not to suggest that the existing non-proliferation regime be abandoned; to the contrary, to the maximum extent possible we should try to make that regime work. But we should not delude ourselves into believing that the United Nations Charter and NPT together provide an adequate solution to the problem of a state that wants nuclear weapons more than anything else. They do not. These instruments work only when adequate compliance incentives exist, but not otherwise.

States intent upon countering the risk of nuclear proliferation are therefore faced with the question of whether they wish to continue with the consent-based order that has prevailed since the Treaty of Westphalia or whether it is necessary to move, at least in the realm of non-proliferation, to an authentic coercion-based order more comparable to the domestic legal systems of its constituent states. All domestic legal systems are grounded ultimately upon compacts that were forged initially by subsets of a community, often using force. Those systems are grounded upon the establishment of a Leviathan of centralized coercive authority aimed at making life *less* "solitary, poor, nasty, brutish, and short." That is how the world could look if nuclear proliferation proceeds unchecked, generating multiple regional arms races and multiple, mini–Cold Wars.

A move in the direction of a coercion-based international order obviously would not be without cost. The mix of states that controls the levers of coercion can change. Abuse is possible. Moving to a coercive regime

would not guarantee an end to proliferation. Coercive inspections would be difficult and costly to carry out. In some situations the process may be bloody. Regime change may be required. Nation-building may be unavoidable. At this point the United States could not likely undertake those tasks alone: its word on all-important intelligence matters would be suspect, military resources would be scarce, allies would be few, and the American people would be reluctant. And the United States should, of course, pursue all appropriate peaceful remedies before considering use of force.

But weighing against these risks is another set of risks the risk that rogue states armed with nuclear weapons will run roughshod over the planet, threatening peaceful states with a deadly coercion of their own, passing along the means of mass annihilation to others, breaking the tenuous check that the forces of modernism have maintained on the forces of medievalism. No one can be certain whether the moment of truth has arrived, the moment at which the decision must be made whether to move to a truly coercive counter-proliferation regime or to run the risk of a downward spiral into nuclear blackmail and global chaos. The danger is that, if and when that moment does arrive, it may be here only once. ■

ENDNOTES

1 Statement of the DPRK Government on Withdrawal from NPT, Pyongyang, January 10, 2003; available from <www.nautilus.org/DPRKBriefingBook/agreements/CanKor_VTK_2003_01_10_dprk_statement_on_withdrawal_from_npt.pdf> (accessed October 11, 2005). On March 12, 1993, faced with charges that it had violated the Non-Proliferation Treaty (NPT), North Korea announced that it was withdrawing from the Treaty in accordance with its terms. In the North Korean-U.S. Joint Statement on June 11, 1993, North Korea Government announced that it had decided "unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons." The crisis was resolved, at least temporarily, in 1994 when the United States and North Korea signed the Agreed Framework, under which Pyongyang committed to freezing its illicit plutonium weapons program in exchange for two proliferation-resistant nuclear reactors and additional aid.

2 Art. X of the NPT provides as follows:

> 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 depositaries are in disagreement whether North Korea has correctly withdrawn; the IAEA maintains the view that until all three indicate that North Korea is no longer a party, it remains a party and hence bound by the safeguards agreement. The United States Department of State web site still lists North Korea as a party.

3 On September 24, 2005, the IAEA Board of Governors concluded that Iran is in violation of its safeguards and non-proliferation obligations. GOV/2005/77.

4 BBC News, *Iran 'may refuse nuclear checks'*, Sept. 20, 2005, UK edition, available at <http://news.bbc.co.uk/1/hi/world/europe/4264520.stm> (accessed Octobert 12, 2005). On September 27, 2005, Iranian Foreign Ministry Spokesman Hamid-Reza Assefi is reported to have said "If the IAEA and the Europeans however continue to adopt a harsh stance against Iran, we would have no other option than to retaliate," in response to a question on possible withdrawal from the NPT. *Iran criticizes India for IAEA vote,* KERALANEXT.com, available at <www.keralanext.com/news/index.asp?id=386518> (accessed October 11, 2005).

5 Mohamed ElBaradei, "Saving Ourselves from Self-Destruction," *The New York Times,* February 12, 2004, at 27. Dr. ElBaradei did not address the procedural issue, but presumably this would require amendment of the NPT.

6 Dr. ElBaradei's proposal did not address this issue. I assume *arguendo* that his entrenchment proposal would be self-executing.

7 International Law Commission, Commentary, [1966] II Yb. I.L.C. 169, 250-252; Sinclair, *Vienna Convention* 102.

8 4 I.L.M. 364 (1965), Livingstone, *Withdrawal from the United Nations – Indonesia*, 14 I.C.L.Q. 637 (1965); Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 A.J.I.L. 661 (1967).

9 *See* Joseph Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the EED,* 20 Israel Law Review 282 (1985).

10 United Nations Conference on International Organization Commission I: Commentary on Withdrawal. San Francisco, 1945. 1 U.N.C.I.O. docs. 616–617 " The Committee deems that the highest duty of the nations which will become Members is to continue their cooperation within the Organization, . . . If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that member to continue its cooperation in the Organization...it is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal." *See also* Hans Kelsen, The Law of United Nations 127 (1950); Feinberg, *Unilateral Withdrawal from an International Organization*, 39 Brit. Y.B.I.L. 189 (1963).

11 Under the doctrine of parliamentary supremacy, a state's legislative branch has absolute sovereignty, meaning that it is superior to all other governmental institutions and may alter legislation enacted by any earlier legislature. *See generally* A.V. Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1965); Stanley de Smith & Rodney Brazier, Constitutional and Administrative Law 67 (8th ed. 1998).

12 For an insightful approach to statutory entrenchment that informs the approach taken here *see* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule,* 91 Calif. L. Rev. 1773 (Dec. 2003). For a contrary view *see* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal,* 111 YALE L.J. 1665, 1666 (2002).

13 William Blackstone, Commentaries on the Laws of England 90 (1765).

14 U.S. Cons't, Art. II, sec. 2, cl. 2.

15 U.S. Cons't, Art. VI, sec. 2; Foster v. Neilson, 2 Pet. 253 (U.S. 1829).

16 *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483, 506-07 (1995).

17 *See, e.g.*Chapter VI, Sec. 75 (22) of the Constitution of Argentina, incorporates ten human rights-related treaties, giving them a higher status than domestic law.

18 Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 405.

19 Vienna Convention on the Law of Treaties, Art. 54.

20 Asked by Bernard Gwertzman to explain the areas of disagreement between the United States, the EU, and Iran, Sick responded as follows:

> ". . . I looked up a copy of the U.S.-EU bill of particulars against Iran, which they circulated at the International Atomic Energy Agency (IAEA) meeting in Vienna. It's pretty weak, actually. But, in effect, what the United States is really trying to do with EU cooperation is create a sort of Iranian "exception" to the Non-Proliferation Treaty where basically the rules of the game, as defined in the treaty, are modified. This is because basically, as [Secretary of State] Condoleezza Rice said the other day, nobody trusts Iran.
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> "I think that really is the issue. So, if you have a Non-Proliferation Treaty that says a country is entitled to a full nuclear fuel cycle for instance, if used for peaceful purposes, then that can be modified in the case of a country nobody trusts, and you can then enforce a different set of rules. Now, nobody is actually saying that, of course, but it seems to me that is what is going on and that's why the United States and the EU are running into very severe difficulties with the IAEA board."
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> Council on Foreign Relations, Iran Expert Sick Advocates U.S.-Iran Dialogue on Nuclear Issues, Iraq, <www.cfr.org/publication/8894/iran_expert_sick_advocates_usiran_dialogue_on_nuclear_issues_iraq.html> (accessed October 2, 2005).

21 *See* Michael J. Glennon, "Why the Security Council Failed," *Foreign Affairs* (May/June 2003).

22 Joel Brinkley, "Rice Fails to Persuade Russia to Support U.N. Action on Iran," *The New York Times,* October 16, 2005, at 6.