

Note on The United States' Claim to Activate the Snapback Mechanism Under Security Council Resolution 2231

2 September 2020

(With additional signatures as of 4 September 2020)

1. On 20 August 2020, the United States attempted to launch the mechanism often referred to as the 'snapback' mechanism provided for by the Iran nuclear agreement, the Joint Comprehensive Plan of Action (JCPOA) of 2015.¹ The United States has done so through a 'notification' addressed to the United Nations Security Council, of the 'significant non-performance' by Iran 'of its commitments under the JCPOA',² based on paragraph 11 of United Nations Security Council Resolution 2231 (hereinafter '**UNSCR 2231**'). In its 'notification', the United States claims that

'[p]ursuant to this notification, which the United States makes as one of the JCPOA participants identified in paragraph 10 of resolution 2231, the process set forth in paragraphs 11 and 12 of that resolution leading to the re-imposition of specified measures terminated under paragraph 7(a) has been initiated'.³

2. The present note aims at examining the validity of the United States' claim to initiate the 'snapback' mechanism, from the viewpoint of international law. This question in turn rests on the issue of whether the United States qualifies as 'one of the JCPOA participants identified in paragraph 10 of resolution 2231', as it claims to be.⁴

3. The first, basic fact to be stressed is that the United States evidently cannot be considered a 'participant' to the JCPOA, since it divested itself of that status at the time when it withdrew from the JCPOA. This is perhaps self-evident, but the United States itself has officially asserted and enacted that it does no longer 'participate' in the JCPOA. On 8 May 2018, the US President stated "[...] I am today making good on my pledge to *end the participation* of the United States in the JCPOA".⁵

4. Therefore, the United States has no standing to invoke its past status as a 'JCPOA Participant' anymore, and this of course applies independently from, and irrespective of, Iran's behaviour or any assessment made by the United States of Iran's behaviour. This point flows in the first place from the textual meaning of 'JCPOA Participant' in UNSCR 2231.

¹ The JCPOA is appended as Annex A to the UNSC Resolution 2231 (2015).

² Letter dated 20 August 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council? (UN Doc. S/2020/815).

³ *Ibid.*

⁴ *Ibid.*

⁵ Presidential Memorandum, 'Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon', 8 May 2018, at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/> (emphasis added).

5. It is not UNSCR 2231 that has constituted the United States (or any other State) as a party (or a 'participant') to the JCPOA. Rather, the status of the United States as a 'JCPOA participant' or 'JCPOA participant State' was merely a consequence of the United States' voluntary decision to become a party to the JCPOA. In other words, UNSCR 2231 has not created any other discrete status as participant, but has only attached legal consequences (and certain rights) to the participation in the JCPOA.

6. This appears clearly from a simple textual reading of the relevant provisions of UNSCR 2231. See, in particular, paragraph 11 of UNSCR 2231 where the Council "[d]ecides, acting under Article 41 of the Charter of the United Nations, that, within 30 days of receiving a notification by a *JCPOA participant State* of an issue that the JCPOA participant State believes constitutes significant non-performance of commitments under the JCPOA, [...]" (emphasis added). In the meaning of that provision (and of any other provisions of UNSCR 2231 referring to the term 'JCPOA participant' or 'JCPOA participant State', including paragraph 10 to which the United States refers in its attempted 'notification' of 20 August 2020), it is evident, crystal clear, that for a State to be eligible to initiate the procedure contemplated in that paragraph 11, such State has to be 'participant' to the JCPOA at the time of initiation of that procedure. Logically, it is impossible to escape the conclusion that a State that has 'ended its participation' in the JCPOA has obviously renounced its status as a 'participant', and is therefore not eligible to set in motion a procedure that UNSCR 2231 has conceived for 'JCPOA participants'. This is a matter of simple, plain meaning of the terms. This is a matter of logic, of non-contradiction.

7. Since the present note focuses on interpretation of a term found in a UNSCR resolution, an enquiry into the practice of interpretation of Security Council Resolutions in the jurisprudence of international courts and tribunals is warranted. First of all, it has been affirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY) that resolutions of the Security Council must be interpreted both literally and logically.⁶

8. According to the International Court of Justice in its 2010 *Kosovo* Advisory Opinion:

'The Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account'.⁷

Similarly, the International Tribunal for the Law of the Sea (ITLOS), has clearly expressed that in order to interpret instruments that are not treaties, the Chamber is required to consider the rules of the 1969 Vienna Convention on the Law of Treaties:

'The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to

⁶ ICTY, Appeals Chamber Decisions, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 71-72, 83, 87.

⁷ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para 94.

consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation'.⁸

9. Therefore, the rules and methods of interpretation provided by the 1969 Vienna Convention could be applicable *mutatis mutandis* to the case of UNSCR 2231.⁹ In addition to a mere textual approach, the UN International Law Commission (ILC) is of the opinion that the general rule of treaty interpretation enshrined in Article 31 of the 1969 Vienna Convention is based on two other principles as well:

- (1) Good faith which flows directly from the rule *pacta sunt servanda*; and,
- (2) Ordinary meaning that is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.¹⁰

Having the aforementioned in mind, mention should be made to the *dictum* of the International Court of Justice in the 1971 *Namibia* Advisory Opinion where it is stated that:

'The language of a resolution of the Security Council should be carefully analysed [...] having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council'.¹¹

A similar approach had been previously followed by the Appeals Chamber of the ICTY, which found that the resolution of the Security Council at issue 'should be interpreted in light of its object and purpose'.¹²

Lastly, it has been noted by the ICJ in the *Kosovo* Advisory Opinion that resolutions of the Security Council 'must be read in conjunction with the general principles set out in annexes' and 'the purpose of the legal régime established under resolution'.¹³

10. In light of the foregoing, in order to correctly interpret UNSCR 2231, not only the text but also the context and purpose of the resolution shall be taken into consideration. In other words, one should take into account the resolution as a whole, in its entirety, including its preambular paragraphs and its annexes, as well as the statements and the subsequent practice of the members of the UN Security Council and of the States which are subject to the resolution.

11. In that context, it should be noted that preliminary provisions of UNSCR 2231 enunciate the scope, object and purpose of the resolution. According to the preamble of UNSCR 2231, 'the JCPOA is conducive to promoting and facilitating the development of normal economic and trade contacts and

⁸ International Tribunal for the Law of the Sea, Seabed Disputes Chamber, Reports of Judgments, Advisory Opinions and Orders, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, paras 59-60.

⁹ See A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008) 489-490; M. Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73-95.

¹⁰ International Law Commission, *Reports of the Commission to the General Assembly, Draft Articles on the Law of Treaties with commentaries*, 1966, p. 221, para 12.

¹¹ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para 114.

¹² ICTY, *Prosecutor v. Vojislav Seselj*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para 12.

¹³ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, paras 95 and 98.

cooperation with Iran'.¹⁴ Hence, the Security Council urges 'its full implementation on the timetable established in the JCPOA'.¹⁵ More interestingly, UNSCR 2231 – using the same obligatory language it has used to require Iran not to undertake any activity related to ballistic missiles¹⁶ – calls upon all Member States 'to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA'.¹⁷ Therefore, according to UNSCR 2231, a 'JCPOA participant State' must practically and effectively adhere to the commitments embodied in the accord which is endorsed by UNSCR 2231, and is bound by the obligations arising from the JCPOA.

12. Regarding the subsequent practice of the United States, it should be underlined that the U.S. had imposed 129 sanctions against Iran by 14 May 2020.¹⁸ In doing so, the Trump Administration obviously failed to honour its commitments under the JCPOA. Moreover, it should be pointed out that on 30 June 2020 the Coordinator of the Joint Commission¹⁹ – an organ established to monitor the implementation of the JCPOA and to address issues arising from the implementation of the accord – recalled that 'the United States has participated in no meetings or activities within the framework of the agreement since it announced in May 2018 that it was ending its participation'.²⁰ Taking all the facts into account will lead to the conclusion that the United States neither *de facto* nor *de jure* can be considered a JCPOA participant, in the plain meaning of the term as per paragraph 10 of UNSCR 2231.

13. Moreover, all remaining JCPOA participant States have made clear that the United States is not entitled to initiate the 'snapback' mechanism, since it is no longer a JCPOA participant.²¹

14. France, the United Kingdom and Germany jointly stated that they consider that 'the United States is not a JCPOA participant State under UNSCR 2231 (2015) anymore and therefore [we] do not consider that the United States' notification is effective'.²² They set out in a detailed manner the underlying rationale as follows:

'the purported notification under OP 11 of UNSCR 2231 (2015) is incapable of having legal effect and so cannot bring into effect the procedure foreseen under OP 11', i.e. the snapback procedure.²³

¹⁴ UNSCR 2231 (2015), preamble.

¹⁵ UNSCR 2231 (2015), para 1.

¹⁶ UNSCR 2231 (2015), Annex B, para 3.

¹⁷ UNSCR 2231 (2015), para 2.

¹⁸ Letter dated 8 May 2020 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, A/74/850-S/2020/380, 14 May 2020, p. 3.

¹⁹ UNSCR 2231 (2015), Annex A, Preamble, para ix.

²⁰ Letter dated 2 July 2020 from the President of the Security Council addressed to the Secretary-General and the Permanent Representatives of the members of the Security Council, UN Doc. S/2020/644, Annex II, Statement by the Head of the Delegation of the EU to the United Nations, Olof Skoog, p. 8.

²¹ See, as regards Iran, the Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council (S/2020/814), 20 August 2020.

²² See Statement by the Deputy Permanent Representative of France to the United Nations at the Security Council, 25 August 2020, available at <https://onu.delegfrance.org/Iran-we-do-not-consider-that-the-United-States-notification-is-effective>.

²³ *Ibid.*

15. Russia has also stated that it considers the US attempts as 'illegitimate since the US deliberately and officially withdrew from the JCPOA in 2018 and made no secret of its withdrawal and consequently persistently violated the UNSC resolution 2231 and the JCPOA, thus forfeiting any right to make use of the instruments provided for by the UNSC in resolution 2231, including those in OP 11'.²⁴

16. China similarly stated that the 'US requests and attempts are illegitimate since it unilaterally withdrew from the [JCPOA] in May 2018, and is no longer a JCPOA participant. The US has persistently violated the JCPOA and UNSC resolution 2231, by reinstating illegal unilateral sanctions, and forfeited any right to make use of instruments provided for by resolution 2231, including those in OP 11'.²⁵

17. The legal position expressed by the remaining JCPOA participant States, that the United States is not entitled to initiate the 'snapback' mechanism, since it is no longer a JCPOA participant, is legally correct, for the reasons set forth above. In summary, the US' claims rest on an understanding of the term 'JCPOA participant' that is supported neither by textual interpretation, nor by contextual interpretation, nor by the subsequent practice of the remaining JCPOA participant States.

18. It is also to be observed that the US argument would lead to a manifestly absurd and unreasonable result. It would indeed be absurd and unreasonable to assume that the Security Council, which has decided in UNSCR 2231 to attach certain rights to a State's participation in the JCPOA, would have contemplated the maintenance of the same rights in favour of a State which voluntarily ceases to be a participant to the JCPOA.

19. Reference should also be made, in the context of the current US attempts, to the 1971 *Namibia* Advisory Opinion of the ICJ, where the Court stated that 'one of the fundamental principles governing the international relations thus established is that a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship'.²⁶

20. We are of the view that the United States' attempted 'notification' of 20 August 2020 is incapable of having any legal effect under international law, and consequently cannot bring into effect the 'snapback' procedure foreseen under OP 11 of UNSCR 2231. We are confident that such understanding will prevail in the Security Council, thus securing the continued existence and operation of the JCPOA, which is and remains an outstanding achievement of multilateralism that the international community reached after thirteen years of intense negotiations.

²⁴ Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council (S/2020/816), 20 August 2020.

²⁵ Letter from the Permanent Representative of China to the United Nations addressed to the President of the Security Council (S/2020/817), 20 August 2020.

²⁶ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para 91.

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