

19. Withdrawal from arms control treaties

CHRISTER AHLSTRÖM

I. Introduction

The role of legally binding agreements to achieve arms control objectives has been the subject of discussion in recent years. This chapter examines one specific aspect, namely, the circumstances in which a state may unilaterally withdraw from its legal obligations.¹

A legally binding agreement under international law—a treaty—is generally seen as a robust tool for the recording of agreements between states.² The conclusion, maintenance and termination of such agreements are governed by a branch of international law known as ‘the law of treaties’. The performance of obligations owed under a treaty is safeguarded by the principle expressed in the Latin maxim *pacta sunt servanda*—agreements are to be honoured in good faith.³ A central element in the notion of a legally binding agreement is that its termination is subject to the application of legal rules, rather than the discretionary interests of single parties.⁴ To subject the termination of a treaty to legal rules and principles serves the interest of maintaining stability and predictability in international relations. In the words of one international lawyer: ‘a state cannot release itself from its treaty obligations whenever it feels like it; if it could, legal relations would become hopelessly insecure’.⁵

There is, however, one category of international legal instruments that would appear to fit uneasily into the description given above—namely, those pertaining to international arms control.⁶ On 10 January 2003, the Democratic

¹ For the signatories and parties to the arms control and disarmament agreements cited in this chapter see annex A in this volume.

² According to Art. 2, para. 1 of the 1969 Vienna Convention on the Law of Treaties (VCLT), a treaty is defined as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. Typically, a multilateral transaction is designated a ‘convention’, ‘charter’ or ‘covenant’, while bilateral transactions are typically designated as ‘treaties’ or ‘agreements’. 1969 Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, vol. 1155 (1980), p. 331.

³ Some would add to the meaning of *pacta sunt servanda* that not only should treaties be observed in good faith, but also ‘that treaty obligations are binding and cannot be unilaterally waived’. See ‘Treaties and Other International Agreements: The Role of the United States Senate’, Study prepared for the Committee on Foreign Relations, United States Senate by the Congressional Research Service, Library of Congress (S.PRT 106–71) (US Government Printing Office: Washington, DC, 2001), p. 192.

⁴ In the words of the International Court of Justice (ICJ): ‘[a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties’. See *Gabcikovo–Nagyymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7 at p. 35 (para. 47).

⁵ Akehurst, M. B., *A Modern Introduction to International Law*, 6th edn (Allen & Unwin: London, 1987), p. 136.

⁶ The term ‘arms control’ is used in this chapter to denote rules in international instruments that are intended to lay down quantitative or qualitative limitations for conventional as well as non-conventional weapons and their means of delivery as well as restrictions on their transfer. For a discussion on the

People's Republic of Korea (DPRK, North Korea) revoked a 10-year 'moratorium' on its 1993 unilateral withdrawal from the multilateral 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT).⁷ In 1993 it had invoked a special clause in the NPT that allows a party, in exercising its national sovereignty, to withdraw from the treaty if it decides that 'extraordinary events' have jeopardized its supreme interests. The North Korean withdrawal from the NPT in 2003 was the first instance when such a clause was effectuated in relation to a modern multilateral arms control agreement. It was, however, not the first instance when a state used a similar clause to denounce obligations owed under an arms control treaty. In 2002 the United States withdrew from the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty),⁸ a bilateral agreement between the USA and the Soviet Union/Russia, by invoking a similar clause on unilateral withdrawal.

The actions taken by the North Korean and US governments are unprecedented in the modern history of international arms control and raise several fundamental and important questions in relation to the role usually attached to the legally binding agreement as a robust tool for arms control. *Prima facie*, a unilateral withdrawal would seem to run counter to the notion that the termination of a legally binding international agreement should not be at the discretionary interest of a single party. On the other hand, their actions can hardly be seen as contrary to the principle of *pacta sunt servanda*, as both the USA and North Korea invoked provisions that were part of the *pactum* in question. However, it should also be emphasized that the context is markedly different in each case. The USA resorted to a withdrawal from the ABM Treaty because its plans for the development of national ballistic missile defences would have violated it.⁹ North Korea, however, invoked the withdrawal clause after having violated its obligations under the NPT.

This chapter discusses, from the vantage point of the law of treaties, these recent examples in state practice of invoking withdrawal clauses in arms control agreements. It initially describes the position of the law of treaties on withdrawal. It then analyses the two recent examples of the North Korean withdrawal from the NPT and the US withdrawal from the ABM Treaty. The chapter concludes with some observations on the implications of the use of withdrawal clauses for the stability of arms control treaties and possible implications for future use by states parties in a 'break-out' situation.

definition of the term see Goldblat, J., SIPRI and PRIO, *Arms Control: The New Guide to Negotiations and Agreements* (SAGE Publications: London, 2002), Part I (Analytical survey), p. 1.

⁷ Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), *United Nations Treaty Series*, vol. 729 (1970), p. 161.

⁸ Treaty Between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), *United Nations Treaty Series*, vol. 944 (1974), no. 13446.

⁹ See Kile, S. N., 'Nuclear arms control, non-proliferation and ballistic missile defence', *SIPRI Yearbook 2003: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2003), pp. 603–608.

II. The law of treaties and withdrawal clauses in arms control treaties

The 1969 Vienna Convention on the Law of Treaties (VCLT) is the starting point for any assessment of the position of the law of treaties on a particular matter.¹⁰ The convention was opened for signature on 23 May 1969 and entered into force on 27 January 1980. The VCLT has no retroactive effect and does not formally apply to treaties concluded prior to its entry into force. Furthermore, while the USA is a signatory to the VCLT, neither North Korea nor the USA is party to the convention. In other words, the VCLT does not formally apply to either case discussed here. However, this does not end the convention's relevance to the discussion, as certain provisions of the VCLT are codifications of existing customary international law and would apply to the present cases irrespective of the convention. It should be noted that the International Court of Justice (ICJ) has generally viewed the VCLT as an authoritative point of departure for the assessment of customary international law on the termination of treaties.¹¹

Part V of the VCLT lays down provisions on invalidity, termination and suspension of the operation of treaties. It is a detailed enumeration of the different grounds for withdrawing from or terminating a treaty.¹² The general rule declares that '[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention' (Article 42, paragraph 2). In other words, the principle of *pacta sunt servanda* would not be infringed if the withdrawal is in accordance with the provisions of the treaty in question or in accordance with the law of treaties. The legal effect of a withdrawal varies with the nature of the treaty in question—the withdrawal of one of the parties to a bilateral agreement results in the termination of the treaty. The same does not hold true for a multilateral agreement. The specific provision on withdrawal mirrors the general rule by declaring that a withdrawal may take place in two circumstances: (a) in conformity with the provisions of the treaty in question, or (b) at any time by the consent of all the parties after consultation with the other contracting states (Article 54). The primacy accorded to the provisions of the specific treaty in question signifies that the provisions of the law of treaties are of a residuary character. This is rational, as most treaties contain provisions on their duration and termination. It would also imply that the law of treaties does not *ipso facto* limit the capacity of the parties to decide

¹⁰ For more on the law of treaties and the VCLT see Sinclair, I. M., *The Vienna Convention on the Law of Treaties*, 2nd edn, Melland Schill Monographs in International Law (Manchester University Press: Manchester, 1984); and Aust, A., *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 2000).

¹¹ See, e.g., *Gabcikovo–Nagyymaros Project* (note 4), p. 35 (para. 46).

¹² A note on nomenclature is in place here. A provision on the right to 'denounce' a treaty is commonly found in (bilateral) treaties that are concluded for a finite period, but that may be extended for fixed periods. Treaties with unlimited duration usually contain a provision on the right of 'withdrawal'. Sometimes the terms denunciation, abrogation and withdrawal are used in an interchangeable manner. 'Termination' is mostly used as a generic term to cover both denunciation and withdrawal. However, state practice reveals no consistent pattern as to the use of these terms. See Sinclair (note 10), p. 181.

on the contents of those withdrawal clauses they wish to include in a particular treaty. The VCLT would, rather, provide guidance if the treaty in question lacked such provisions.¹³

To unilaterally invoke a withdrawal clause would clearly identify the party that is initiating the process, and such an act could involve a risk of generating political disapproval from other states. In the light of this it might be tempting to invoke other, less conspicuous, grounds to terminate a legally binding relationship. The VCLT recognizes that acts or omissions by *other* parties as well as causes outside the control of the parties may also serve as grounds for termination or withdrawal. For example, a party may invoke a 'material breach' as grounds for terminating the treaty or suspending its operation in whole or in part. Such a breach is defined in Article 60 as 'the violation of a provision essential to the accomplishment of the object and purpose of the treaty'.¹⁴ Furthermore, a party may invoke 'supervening impossibility of performance' of a treaty as grounds for terminating or withdrawing from a treaty if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty (*ad impossibilia nemo tenetur*).¹⁵ Finally, a 'fundamental change of circumstances' may also serve as grounds for terminating or withdrawing from a treaty (*rebus sic stantibus*).¹⁶ If there is an unforeseen and fundamental change in the circumstances which existed at the time of the conclusion of the agreement, a party may invoke this as grounds for terminating the agreement if: (a) the existence of the circumstances constitutes an essential basis of the consent of the parties to be bound by the treaty, and (b) the effect of the change is to radically transform the extent of the obligations still to be fulfilled under the treaty.

It is important to bear in mind that 'material breach', 'supervening impossibility of performance' and 'fundamental change of circumstances' may be invoked as *grounds* for terminating or suspending a treaty. They do not *ipso facto* terminate the treaty. The VCLT lays down procedural safeguards to be applied when a party invokes these grounds in order to terminate a legally binding relationship (Articles 65–68).

Withdrawal clauses in arms control treaties

Early treaties on arms control show a varied practice on the inclusion of withdrawal clauses. Some agreements include no information on either their duration or the possibility of unilateral withdrawal from them.¹⁷ Other agreements

¹³ According to Art. 56, such a treaty is not subject to withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal, or a right of denunciation or withdrawal may be implied by the nature of the treaty. The VCLT stipulates that there must be 12 months' notice of the intention to denounce or withdraw from such a treaty.

¹⁴ See Brownlie, I., *Principles of Public International Law*, 4th edn (Clarendon Press: Oxford, 1990), p. 618.

¹⁵ Art. 61, VCLT.

¹⁶ Art. 62, VCLT.

¹⁷ See, e.g., Declaration on Renouncing the Use, in Times of War, of Explosive Projectiles under 400 Grammes Weight, adopted in 1868 in St Petersburg, in Schindler, D. and Toman, J. (eds), *The Laws*

include a general provision on 'denunciation', declaring that a party can withdraw from the agreement after giving one year's notice.¹⁸ Some agreements extend the period of notice to two years.¹⁹ Early agreements that included a provision on withdrawal often did not require the withdrawing party to provide any explanation for its action.

Post-1945 arms control agreements show a more consistent practice of including explicit provisions on withdrawal. The first instance of a withdrawal clause of the type included in both the ABM Treaty and the NPT is found in the 1963 Partial Test Ban Treaty (PTBT), which prohibits nuclear tests in the atmosphere, outer space and under water.²⁰ According to Article IV, paragraph 1, the treaty shall be of unlimited duration. Paragraph 2 declares 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 three months in advance'.

The PTBT was negotiated by the Soviet Union, the United Kingdom and the USA. According to Schwelb, the inclusion of this provision came about as a result of a request from the US delegation to include a withdrawal provision explicitly referring to 'extraordinary events' (in addition to the recognized grounds of 'material breach', 'supervening impossibility of performance' and 'fundamental change of circumstances').²¹ The Soviet Union initially took the position that such a provision was unnecessary, as the right to denounce a treaty was held to be inherent in the notion of national sovereignty.²² This position was not acceptable to the UK and the USA because of its implications for the 'sanctity' of treaties. It was eventually agreed that a specific provision on extraordinary events as a basis for unilateral withdrawal should be included in the treaty. Perhaps in a spirit of compromise, this ad hoc withdrawal clause alluded to national sovereignty, rather than the specific provision itself, as the basis for this right. During the domestic procedure for ratification of the PTBT, US officials mentioned the example of a non-party conducting a nuclear test explosion as a case that could constitute an extraordinary event. However, it was also emphasized that such a test would not be the only

of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents, 3rd edn (Martinus Nijhoff: Dordrecht, 1988), p. 101; and Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare (1925 Geneva Protocol), *League of Nations Treaty Series*, vol. 94 (1929), p. 65.

¹⁸ E.g., Declaration (IV, 2) Concerning Asphyxiating Gases, The Hague, 29 July 1899, reproduced in Schindler and Toman (note 17), p. 105.

¹⁹ See, e.g., Treaty between the United States of America, the British Empire, France, Italy, and Japan, Limiting Naval Armament, Washington, DC, 6 Feb. 1922, Art. XXIII in Goldman, E. O., *Sunken Treaties: Naval Arms Control Between the Wars* (Pennsylvania State University Press: University Park, Pa., 1994), p. 273.

²⁰ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty, PTBT), *United Nations Treaty Series*, vol. 480 (1963), p. 43.

²¹ Schwelb, E., 'The Nuclear Test Ban Treaty and international law', *American Journal of International Law*, vol. 58 (1964), pp. 660-63.

²² Goldblat (note 6), p. 50.

Table 19.1. Withdrawal clauses of multilateral and bilateral arms control agreements based on the 'extraordinary events' formula

Treaty	Provision	Duration of treaty	Period of notice	Explanation
1963 PTBT	Article IV	Unlimited	3 months	Not required
1968 NPT	Article X	Unlimited ^a	3 months	Required
1971 Seabed	Article VIII	Not specified	3 months	Required
1972 BTWC	Article XIII	Unlimited	3 months	Required
1972 ABM	Article XV	Unlimited	6 months	Required
1972 SALT I	Article VIII	Defined	6 months	Required
1974 TTBT	Article V	Defined	6 months	Required
1979 SALT II ^b	Article XIX	Defined	6 months	Required
1985 Rarotonga	Articles 5, 6, 5 ^c	Unlimited	3 months	Required
1987 INF	Article XV	Unlimited	6 months	Required
1990 CFE	Article XIX	Unlimited	150 days	Required
1991 START I	Article XVII	Defined	6 months	Required
1993 START II ^b	Article VI	Defined	6 months	Required
1993 CWC	Article XVI	Unlimited	90 days	Required
1996 Pelindaba ^b	Article 20	Unlimited	12 months	Required
1996 CTBT ^b	Article IX	Unlimited	6 months	Required

^a Originally for 25 years, extended indefinitely in 1995.

^b Not in force.

^c I.e., Article 5 in Protocol I, Article 6 in Protocol II and Article 5 in Protocol III.

Source: Compiled by the author.

PTBT: Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.

NPT: Treaty on the Non-Proliferation of Nuclear Weapons.

Seabed: Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.

BTWC: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

ABM: Treaty between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems.

SALT I: Interim Agreement between the USA and the USSR on Certain Measures with Respect to the Limitation of Strategic Offensive Arms.

TTBT: Treaty between the USA and the USSR on the Limitation of Underground Nuclear Weapon Tests.

SALT II: Treaty between the USA and the USSR on the Limitation of Strategic Offensive Arms.

Rarotonga: South Pacific Nuclear Free Zone Treaty.

INF: Treaty between the USA and the USSR on the Elimination of Intermediate-Range and Shorter-Range Missiles.

CFE: Treaty on Conventional Armed Forces in Europe.

START I: Treaty between the USA and the USSR on the Reduction and Limitation of Strategic Offensive Arms.

START II: Treaty between the USA and the USSR on Further Reduction and Limitation of Strategic Offensive Arms.

CWC: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

Pelindaba: Treaty on the African Nuclear Weapon-Free Zone.

CTBT: Comprehensive Nuclear Test-Ban Treaty.

instance of an extraordinary event and that the USA interpreted this provision as giving it some flexibility regarding the categorization of events.

The formula used in Article IV of the PTBT became almost a template for future arms control agreements. One addition introduced in the NPT was the requirement that the notice given by a withdrawing state ‘shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests’. Table 19.1 lists multilateral and bilateral arms control agreements which contain a withdrawal clause modelled on the extraordinary events clause used in the PTBT. The nature and specifics of the clauses in the various agreements appear to be similar regardless of whether or not the agreements relate to disarmament or non-proliferation.²³

It should, however, be stressed that not all arms control agreements follow the example set in the PTBT. In fact, while nearly all arms control treaties provide for withdrawal, some treaties contain clauses that simply note that the parties have the right to withdraw from the treaty without having to provide any explanation for their actions.²⁴ State practice also provides some examples of bilateral arms control agreements of unlimited duration that do not contain any explicit provisions on withdrawal.²⁵

The most recent formulation of a unilateral withdrawal clause is contained in Article IV, paragraph 3, of the 2002 US–Russian Treaty on Strategic Offensive Reductions (SORT). The provision declares that ‘Each Party, in exercising its national sovereignty, may withdraw from this Treaty upon three months written notice to the other Party’.²⁶ There would not be a need for any extraordinary event related to the subject matter of the treaty and jeopardizing a supreme interest to allow this clause to be invoked.

Assessment of the ‘extraordinary events’ formula

The clause declares that each of the parties has a right—attributed to national sovereignty—to withdraw if it decides that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests. It should give advance notice of its intention to withdraw; the period demanded varies between 3 and 12 months. This advance notice should be communicated to the other parties to the treaty, to the depositary, and, in the case of certain multilateral agreements, to the United Nations Security Council. Apart from setting

²³ For a criticism of the almost mechanical inclusion of such clauses in disarmament treaties see Sims, N. A., ‘Withdrawal clauses in disarmament treaties: a questionable logic?’ *Disarmament Diplomacy*, no. 42 (Dec. 1999), URL <<http://www.acronym.org.uk/dd/dd42/42clause.htm>>.

²⁴ See, e.g., Art. XVI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), *United Nations Treaty Series*, vol. 610 (1967), no. 8843.

²⁵ See Agreement between the USA and the USSR on Measures to Reduce the Risk of Outbreak of Nuclear War (US–Soviet Nuclear Accidents Agreement), *United Nations Treaty Series*, vol. 807 (1972), no. 11509; and Agreement between the USA and the USSR on the Prevention of Nuclear War, *United Nations Treaty Series*, vol. 917 (1974), no. 13089.

²⁶ SORT was signed on 24 May 2002 and entered into force on 1 June 2003. For the text of the treaty see URL <<http://www.whitehouse.gov/news/releases/2002/05/20020524-3.html>>.

out a requirement to state the extraordinary events, the clause does not provide for any procedural safeguards.

The important element in the application of this type of clause is the meaning of an extraordinary event. As noted above, the PTBT does not define what would constitute such an event. The subsequent agreements also do not provide any definition.²⁷ As formulated, the clause is clear in that the assessment and subsequent decision on whether an extraordinary event exists rests exclusively with the state that invokes the provision.²⁸ The individual right to invoke the provision, combined with the lack of a definition for what would constitute an extraordinary event, clearly gives the clause a distinct ‘subjective’ character. However, two elements are to be fulfilled: the extraordinary event should be related to the *subject matter* of the treaty and it should jeopardize a *supreme interest* of the state concerned. It is in relation to the fulfillment of these elements that an outside party could assess whether the withdrawal had been carried out in a *bona fide* manner. As long as this were the case, it would be difficult to argue that the action did not conform to the principle of *pacta sunt servanda*.

III. Recent examples in state practice

The North Korean withdrawal from the NPT

North Korea acceded to the NPT on 12 December 1985 as a non-nuclear weapon state. It had concluded a facility-specific safeguards agreement with the International Atomic Energy Agency (IAEA) in 1977.²⁹ In 1992 North Korea and the IAEA concluded a full-scope safeguards agreement under Article III of the NPT,³⁰ and agreed to suspend the operation of the 1977 agreement.³¹ The full-scope safeguards agreement entered into force on 10 April 1992. In May 1992 North Korea submitted its initial report to the IAEA under the agreement. Inconsistencies—indicating the existence of undeclared pluto-

²⁷ It should be noted that there have been occasions when governments have given their interpretation of what would constitute an extraordinary event. The US Government issued a statement in relation to the conclusion of the ABM Treaty: ‘If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, US supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty.’ Statement by Ambassador Smith, 9 May 1972, cited in Goldblat (note 6), Part II (Agreements and treaties), p. 155. Furthermore, in relation to domestic procedures to ratify the START I and START II treaties, the Soviet/Russian legislature has, as a matter of domestic constitutional law, defined circumstances that would qualify as ‘extraordinary events’ that would oblige the executive to invoke unilateral withdrawal clauses. One such event would be a US abrogation of the ABM Treaty; see Goldblat (note 6), pp. 90 and 94.

²⁸ Lysén, G., *The International Regulation of Armaments: The Law of Disarmament*, Skrifter från Juridiska Fakulteten i Uppsala 35/Uppsala Studies in Law 35 (Iustus: Uppsala, 1990), p. 178.

²⁹ International Atomic Energy Agency (IAEA), ‘Agreement of 20 July 1977 between the Agency and the Democratic People’s Republic of Korea for the Application of Safeguards in Respect of a Research Reactor Facility’, document INFCIRC/252, 14 Nov. 1977.

³⁰ IAEA, ‘Agreement of 30 January 1992 between the Government of the Democratic People’s Republic of Korea and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons’, document INFCIRC/403, May 1992, URL <<http://www.iaea.org/Publications/Documents/Infcircs/Inf403.shtml>>.

³¹ IAEA, ‘Suspension of the application of safeguards’, document INFCIRC/252/Mod.1, Dec. 1992.

nium—soon emerged between the initial report and the findings of the IAEA. The IAEA requested access to additional information and to two sites in order to determine the completeness and correctness of the initial report. However, the Agency was denied access to the sites. On 9 February 1993 the Director General of the IAEA invoked the special inspection procedure. The request for special inspections was, however, refused by North Korea, and on 12 March the North Korean Government issued a statement announcing its intention to withdraw from the treaty under Article X.³² While this is not made explicitly clear in the statement, it would seem that there were two events that the North Korean Government viewed as ‘extraordinary’: (a) the decision of South Korea and the USA to carry out a ‘Team Spirit’ military exercise in 1993 and (b) the IAEA’s decision to request a special inspection.

The three depositary governments of the NPT—Russia, the UK and the USA—issued a statement on 1 April in which they questioned ‘whether the DPRK’s stated reasons for withdrawing from the Treaty constitute extraordinary events relating to the subject matter of the Treaty’.³³ They furthermore urged North Korea to ‘retract its announcement and to comply fully with its Treaty commitments and its safeguards obligations, which remain in force’. The statement issued by these three governments in their capacity as NPT depositaries is unique and not in line with the long-recognized duty of a depositary to act impartially.³⁴ On 11 May, the UN Security Council adopted a resolution on the decision of the North Korean Government to withdraw from the NPT.³⁵ The Security Council expressed concern over North Korea’s intention to withdraw from the NPT, and took note of the statement by the depositary governments.³⁶ The resolution also called on North Korea ‘to reconsider

³² ‘Statement of the Government of the Democratic People’s Republic of Korea, Pyongyang, 12 March 1993’, Annex 7 in IAEA, ‘Report by the Director General of the International Atomic Energy Agency on behalf of the Board of Governors to all members of the Agency on the non-compliance of the Democratic People’s Republic of Korea with the agreement between the IAEA and the Democratic People’s Republic of Korea for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/403) and on the Agency’s inability to verify the non-division of material required to be safeguarded’, document INFCIRC/419, 8 Apr. 1993, URL <<http://www.iaea.org/Publications/Documents/Infocircs/Others/inf419.shtml>>. For more on the events leading to North Korea’s decision to withdraw from the NPT see Kile (note 9), pp. 577–609; Mazarr, M. J., *North Korea and the Bomb: A Case Study in Nonproliferation* (Macmillan: London, 1995); and Sigal, L. V., *Disarming Strangers: Nuclear Diplomacy with North Korea* (Princeton University Press: Princeton, N.J., 1998).

³³ Conference on Disarmament, ‘Letter dated 2 April 1993 addressed to the Secretary-General of the Conference on Disarmament by the representatives of the Depositary Governments of the Treaty on the Non-Proliferation of Nuclear Weapons transmitting a statement issued by the three Governments on 1 April 1993’, document CD/1195, 2 Apr. 1993.

³⁴ This duty is included, e.g., in Art. 76, para. 2, of the VCLT: ‘The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.’ The depositaries should have circulated the communication from North Korea without passing judgment on its validity—they could have done the latter, if they wished, in their national capacity. Cf. Aust (note 10), p. 265.

³⁵ United Nations Security Council Resolution 825, 11 May 1993, URL <<http://www.un.org/Docs/scres/1993/scres93.htm>>.

³⁶ For the text of the depositaries’ statement see United Nations, ‘Letter dated 93/04/01 from the Permanent Representatives of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America addressed to the President of the Security Council’, UN document S/25515, 2 Apr. 1993.

the announcement contained in the letter of 12 March 1993 and thus to reaffirm its commitment to the treaty’.

The three-month period of notice was due to expire on 12 June 1993. In early June, bilateral talks were held between North Korea and the USA in New York. On 11 June, a statement was issued in which it was declared that the Government of North Korea had ‘decided unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal from the [NPT]’.³⁷ The bilateral talks culminated with the Agreed Framework of 21 October 1994. In this document, the intent of the North Korean Government to remain a party to the NPT and to allow implementation of the safeguards agreement was reiterated. However, it was also agreed between the USA and North Korea that the latter would come into full compliance with the safeguards agreement only when ‘a significant portion of the LWR [Light Water Reactor] project is completed, but before delivery of key nuclear components’.³⁸ The resulting situation was interpreted differently: to the USA and other parties to the NPT, the suspension signified in effect that North Korea remained a party to the NPT. This was most likely deemed of critical importance in the light of the upcoming 1995 NPT Review and Extension Conference. To North Korea, however, the Agreed Framework gave it a ‘unique status’ under the treaty—while remaining a party, it considered itself not to be under any obligation to fully implement the safeguards agreement. This interpretation is problematic in the light of the fact that the Agreed Framework, which is not legally binding, could not alter the legal situation under the multilateral NPT and associated safeguards agreements without the consent of the parties.³⁹

During 2002 the Agreed Framework came under additional stress as the North Korean and US governments exchanged allegations of violations of the Agreed Framework. On 16 October 2002 the USA declared its belief that North Korea had admitted to having a clandestine programme for uranium enrichment. The dispute escalated during the autumn of 2002, and culminated on 10 January 2003 when North Korea declared an ‘automatic and immediate effectuation of its withdrawal from the NPT, on which it “unilaterally announced a moratorium as long as it deemed necessary” according to the June 11, 1993, DPRK–US joint statement’.⁴⁰ As a consequence of the withdrawal, North Korea also concluded that it was ‘totally free from the binding

³⁷ Joint Statement of the DPRK and the USA, New York, 11 June 1993, excerpt reproduced in Sigal (note 32), p. 260.

³⁸ IAEA, ‘Agreed Framework of 21 October 1994 between the United States of America and the Democratic People’s Republic of Korea’, document INFCIRC/457, 2 Nov. 1994, URL <<http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc457.pdf>>.

³⁹ To hold otherwise would be difficult to reconcile with the principle *pacta tertiis nec nocent nec prosunt*—i.e., a transaction between 2 states cannot produce legal effects for third states without their consent. See Art. 34 of the VCLT; and Jennings, R. and Watts, A. (eds.), *Oppenheim’s International Law, Volume I: Peace*, 9th edn. (Longman: London, 1996), p. 1260.

⁴⁰ Korean Central News Agency (KCNA), ‘Statement of DPRK Government on its withdrawal from NPT’, 10 Jan. 2003, URL <<http://www.kcna.co.jp/item/2003/200301/news01/11.htm#1>>. According to Art. XX of the safeguards agreement, the agreement will remain in force for as long as the NPT is in force.

force of the safeguards accord with the IAEA'.⁴¹ Several states and international organizations expressed regrets and urged North Korea to reconsider its decision—but the arguments presented in support of the action were not openly challenged in any similar manner as was the case 10 years earlier.⁴² There was neither a statement from the depositaries nor a resolution adopted by the Security Council.

The position of the North Korean Government that it could revoke a moratorium with no, or even a one-day, period of notice is problematic from a legal point of view. As noted above, Article X does not provide for a moratorium on a notice of withdrawal. Hence, the 10 January 2003 statement should be seen as a new notification requiring a three-month period of notice. In other words, the NPT ceased to be binding on North Korea on 10 April 2003. The statement by the North Korean Government is rather long and the tone is hostile and bombastic. The extraordinary events invoked in support of the withdrawal are not explicitly stated, but it would seem that the alleged efforts of the USA to 'stifle the DPRK' and the idea that the 'IAEA is used as a tool for executing US hostile policy towards the DPRK' are the events that influenced North Korea's decision to withdraw from the treaty.

The policy of the USA *vis-à-vis* North Korea may genuinely be perceived by the latter as hostile and jeopardizing its supreme interests. It should be borne in mind, however, that the US position towards North Korea stems, at least partly, from the fact that the latter has not fully implemented its obligations under the NPT. The record of North Korean non-compliance is even clearer in relation to the actions taken by the IAEA, which constitute the exercise of duties incumbent on the IAEA under the NPT and the safeguards agreement.⁴³ The reason why the IAEA invoked the special inspection procedure in 1993 and adopted a resolution calling into question North Korea's compliance with its obligations under the NPT was the latter's failure to honour its legal obligations. Invoking the right to unilateral withdrawal in the face of one's own violation of a treaty is difficult to reconcile with the principle that 'a breach of an obligation cannot produce legal results beneficial to the law-breaker'.⁴⁴ On this line of reasoning it may be concluded that the argu-

⁴¹ KCNA (note 40).

⁴² See, e.g., Annex II, 'Chairman's factual summary', in Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 'Report of the Preparatory Committee on its second session', NPT/CONF.2005/PC.II/50, 13 May 2003, p. 21, URL <<http://cns.miis.edu/research/npt/pdf/prepcom.pdf>>.

⁴³ The IAEA concluded that it has 'never been able to verify the completeness and correctness of the initial report of the DPRK under the NPT Safeguards Agreement. Since 1993 it has drawn the conclusion that the DPRK is in non-compliance with its obligations under the Agreement'. IAEA, 'Fact sheet on DPRK nuclear safeguards (May 2003)', URL <http://www.iaea.org/NewsCenter/Focus/IaeaDprk/fact_sheet_may2003.shtml>.

⁴⁴ Jennings and Watts (note 39), p. 1212. There are other examples of formulations of principles of international law that may not be invoked by a state if the situation arises out of actions of that same state. See, e.g., chapter V, 'Circumstances precluding wrongfulness', of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001)*. Extract from the Report of the International Law Commission on the work of its fifty-third session, Official Records of the General Assembly, 56th session, Supplement no. 10 (A/56/10), ch. IV.E.I. Nov. 2001, URL <[http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)>. The chapter notes that grounds such as Art. 23

ments presented by North Korea in support of its withdrawal from the NPT are difficult to reconcile with a *bona fide* application of the extraordinary events clause contained in Article X. However, the lack of a recognized complaints procedure in such clauses renders it futile to challenge the withdrawal as such.

North Korea's withdrawal from the NPT does not alter the fact that it committed a breach of its international obligations, as the uranium-enrichment programme was launched when the NPT was in force. Its actions still constituted an internationally wrongful act under the law of state responsibility. North Korea apparently took the step of withdrawing from the treaty as a measure to thwart the involvement of the UN Security Council. In this respect, it should be noted that there would have been no formal bar against the Security Council's finding that North Korea's activities in the nuclear field constituted a threat to international peace and security under the UN Charter and even considering means to address this threat.⁴⁵ Furthermore, the internationally wrongful act committed by North Korea could also serve as grounds for other states parties to the NPT to have recourse to countermeasures against it—that is, measures which would otherwise be contrary to international law if they were not taken in response to an internationally wrongful act.⁴⁶

The extraordinary event formula is subjective in that it is the exclusive prerogative of the invoking state to decide whether or not such an event has transpired. What is noteworthy about the international reaction following the 1993 decision of the North Korean Government is that its assessment was challenged by both the depositaries and, indirectly, by the UN Security Council. By contrast, what was noteworthy in 2003 was the lack of response. This lack of response seems to have been followed by a policy of ambiguity towards the resulting situation—while expressing regrets over North Korea's decision to withdraw from the treaty, some Western states have avoided making formal statements indicating that they view North Korea as a non-party to the NPT.⁴⁷

The withdrawal of North Korea from the NPT also raises the question of the present status of the 1977 facility-specific safeguards agreement. Under Article 23 of the 1992 full-scope safeguards agreement, the application of other safeguards agreements in North Korea shall be suspended while the 1992 agreement remains in force. As the withdrawal from the NPT terminated the 1992 agreement, the suspension of application of the previous safeguards agreement no longer holds. Hence, North Korea is still under an obligation to honour the facility-specific safeguards agreement.

on *force majeure*, Art. 24 on 'distress' and Art. 25 on 'necessity' may not be invoked to preclude wrongfulness if the situation is due to the conduct of the state invoking the grounds.

⁴⁵ Kirgis, F. L., 'North Korea's withdrawal from the Nuclear Nonproliferation Treaty', *ASIL Insights*, Jan. 2003, URL <<http://www.asil.org/insights/insigh96.htm>>.

⁴⁶ International Law Commission (note 44), chapter II, 'Attribution of conduct to a state'. See also Crawford, J., *The International Law Commission's Articles on State Responsibility* (Cambridge University Press: Cambridge, 2002), p. 281.

⁴⁷ See, e.g., Group of Eight (G8), 'G8 action plan on nonproliferation', Sea Island Summit 2004, 9 June 2004, p. 3, URL <http://www.g8usa.gov/d_060904d.htm>. The members of the G8 are listed in the glossary in this volume.

The US withdrawal from the ABM Treaty

The North Korean withdrawal from the NPT was not the first instance in which an extraordinary event clause was invoked. In 2001 the USA invoked such a clause to terminate the bilateral ABM Treaty.

On 13 December 2001, the USA sent diplomatic notes to Russia and to the other signatories of the 1997 Memorandum of Understanding on Succession (MOUS) to the ABM Treaty (i.e., Belarus, Kazakhstan, and Ukraine), informing them of its decision to withdraw from the ABM Treaty:⁴⁸ 'Pursuant to Article XV, paragraph 2, the United States has decided that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, paragraph 2, the United States hereby gives notice of its withdrawal from the Treaty.'⁴⁹

In accordance with the provisions of the ABM Treaty, the withdrawal became effective six months from the date of the notice (i.e., on 13 June 2002). The following justifications for invoking the withdrawal clause were given:

Since the Treaty entered into force in 1972, a number of state and non-state entities have acquired or are actively seeking to acquire weapons of mass destruction. It is clear, and has recently been demonstrated, that some entities are prepared to employ these weapons against the United States. Moreover, a number of states are developing ballistic missiles, including long-range ballistic missiles, as a means of delivering weapons of mass destruction. These events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests. As a result, the United States has concluded that it must develop, test, and deploy anti-ballistic missile systems for the defense of its national territory, of its forces outside the United States, and of its friends and allies.⁵⁰

The US statement does not clearly and unequivocally identify those events that it deems extraordinary. It begins with a general assertion that several states and non-state entities have acquired, or are seeking to acquire, weapons of mass destruction (WMD). There is no information as to which states or non-state actors have *succeeded* in acquiring WMD, let alone any assessment on how far those entities that are striving for such a capability have progressed. The recent 'demonstration' of the use of such weapons against the USA is not described. Furthermore, as far as the proliferation of long-range ballistic missiles is concerned, it can hardly be said to have transpired. Indeed, as noted in the US statement, it may be described as a threat that is in the making. To invoke such an emerging threat as a basis for unilateral with-

⁴⁸ See also Goldblat (note 6), p. 79. The text of the MOUS is available at URL <<http://www.fas.org/nuke/control/abmt/text/ad-mou.html>>. It should be noted that the MOUS never entered into force and that the ABM Treaty therefore remained bilateral.

⁴⁹ US Department of State, Office of the Spokesman, *Washington File*, 'US diplomatic notes on ABM Treaty', 14 Dec. 2001, URL <<http://www.defenselink.mil/acq/acic/treaties/abm/ABMdipnotes1.htm>>.

⁵⁰ US Department of State (note 49).

drawal would mean that withdrawal could be used as a *preventive* measure against an event that has not yet transpired. It is unclear whether such a use was envisaged when the clause was formulated. Moreover, the proliferation of both WMD and long-range ballistic missiles would not readily fall under the subject matter of the ABM Treaty—the purpose of which was to establish limitations on defences against strategic ballistic missiles. Russia for its part expressed regrets over the USA's action and described the measure as a 'mistake'—but did not openly challenge the arguments presented in support of the unilateral withdrawal.⁵¹

For those who have followed the domestic debate in the USA on the matter of a national missile defence system, the withdrawal by the George W. Bush Administration could hardly have come as a surprise.⁵² There are few international agreements that have generated so much political controversy as the ABM Treaty.⁵³ During his campaign for the presidency in 2000, Bush evinced his opinion that the USA should propose amendments to the ABM Treaty and that, if these amendments were not accepted by Russia, the USA should withdraw from the treaty. On the day of notification President Bush delivered a statement in which he further outlined the reasons why the USA had taken this measure.⁵⁴ He noted that the treaty was concluded at a very different time and in a vastly different world. The USA expressed the view that certain states were seeking the capability to attack it by means of long-range ballistic missiles, and that it had to respond by building a defence against such missiles.

In the light of these explanations, it could be questioned whether the USA should not have invoked an argument based on the principle of 'fundamental change of circumstances' rather than extraordinary events for terminating the treaty.⁵⁵ When the ABM Treaty was negotiated, it was primarily the Soviet Union which possessed long-range ballistic missiles that could threaten the USA. The essence of the ABM Treaty was that each party should defer the development of defensive measures in order to remain vulnerable to the strategic weapons of the other. This logic worked between the Soviet Union and the USA, as they saw themselves in a strategic balance. It is also probable that this bilateral strategic balance was seen as an essential circumstance for the conclusion of the ABM Treaty. That calculus may change if other states also develop the technological capacity to threaten the parties by means of long-

⁵¹ For more information see, e.g., Kile, S. N., 'Ballistic missile defence and nuclear arms control', *SIPRI Yearbook 2002: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2002), pp. 506–11.

⁵² For more detail see McMahon, K. S., *Pursuit of the Shield: The US Quest for Limited Ballistic Missile Defense* (University Press of America: Lanham, Md., 1997); and Graham, B., *Hit to Kill: The New Battle over Shielding America from Missile Attack* (Public Affairs: New York, 2001).

⁵³ See, e.g., the discussion of the ABM Treaty reinterpretation debate of the 1980s in Garthoff, R. L., *Policy Versus the Law: The Reinterpretation of the ABM Treaty* (Brookings Institution: Washington, DC, 1987).

⁵⁴ US Department of State, Office of International Information Programs, 'Bush announces US withdrawal from ABM Treaty', *Washington File*, 13 Dec. 2001, URL <<http://usinfo.state.gov/topical/pol/arms/stories/01121302.htm>>.

⁵⁵ Kirgis, F. L., 'Proposed missile defenses and the ABM Treaty', *ASIL Insights*, May 2001, URL <<http://www.asil.org/insights/insigh70.htm>>.

range ballistic missiles. It is clear that an increase in the number of states that could employ ballistic missiles against the USA could be seen as a change that would radically transform the extent of obligations still to be performed under the treaty. In other words, the conditions for invoking the grounds of a fundamental change of circumstances to terminate the treaty would appear to be present. However, this was probably not seen as a viable alternative by the Bush Administration in the light of the fact that the termination of the treaty on these grounds would have required additional negotiations between Russia and the USA. The USA decided to use the extraordinary events clause because it provided a faster way out of the treaty.

IV. Conclusions

Several authors have commented on the extraordinary events clause used in arms control agreements—in particular the lack of definition of events that could be classified as ‘extraordinary’.⁵⁶ Analysis of the extraordinary events clause has been affected by the lack of any concrete examples in state practice to analyse. Commentators have, however, generally felt that the need to openly defend a unilateral withdrawal would serve as a factor that would influence states not to use it. Lysén, for example, notes that ‘no state has so far used the clause, and it seems not that easy to do so, in spite of its flexible nature’.⁵⁷

Two new precedents in state practice have been created: one in which a party invoked the clause after having violated the treaty, and one in which a party invoked the clause as a preventive measure by referring to events that did not unequivocally fall under the subject matter of the treaty in question.

It remains to be seen what effect, if any, these two events may have on future invocations of the extraordinary events clause. In any event, it cannot be said that the requirement to provide an explanation served as a moderating factor in either of the cases. None of the arguments presented by the states concerned in support of the use of the clause would seem to be persuasive. Neither case resulted in any negative consequences for the withdrawing party. This could set a future standard and may in a sense ‘lower the threshold’ for the invocation of this type of withdrawal clause in order to terminate legally binding relationships. This would in turn run counter to the interest of stability and predictability in international relations.

⁵⁶ See, e.g., Goldblat (note 6), p. 8.

⁵⁷ Lysén (note 28), p. 181.

