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Going, Going, Gone? Assessing Iran's Possible Grounds for Withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons

Christopher P. Evans*

Abstract

The recent targeted strike resulting in the death of Qassem Soleimani has received extensive attention for its violations of international law by the US. However, one area that has not been considered following the 3 January 2020 attack is the possible consequences this may have for Iran's nuclear non-proliferation legal obligations. Iranian officials have previously alluded to the possibility of Iran withdrawing from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) 1968 following the US withdrawal from the Joint Comprehensive Plan of Action in May 2018 and re-imposition of targeted economic sanctions against Iran. This article considers whether Iran can withdraw from the NPT, thus freeing Iran from its legal commitments not to develop nuclear weapons. It revisits the withdrawal provisions found in Article X of the NPT and examines the invocation of the 'extraordinary events' clause by other states in relation to other instruments too. In light of this, the discussion considers whether Iran can legally withdraw from the NPT, before concluding with some thoughts as to whether it should in fact pursue this option.

Introduction

The 3 January 2020 US targeted airstrike near Baghdad International Airport resulting in the death of Qassem Soleimani, the commander of Iran's Quds force, represented the latest escalation in tensions between the United States (US) and Iran. The strike followed a tumultuous deterioration of US–Iranian relations, particularly since the inauguration of President Trump and his decision in May 2018 to withdraw from the Joint Comprehensive Plan of Action

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(JCPOA).¹ While both the US and Iran have reportedly disabled each other's unmanned aerial vehicles in increasingly belligerent actions throughout 2019,² the targeted killing of Soleimani—a leading figure within Iran's military organisational structure—undoubtedly raised the level of hostilities significantly between both states. Unsurprisingly, there has been much discussion of the legality of the strike from commentators within international law, principally from the perspectives of *jus ad bellum*,³ International Humanitarian Law⁴ and International Human Rights Law.⁵

However, a relatively unexplored issue is what effect the targeted attack, and broader hostilities between the US and Iran, may have in relation to Iran's nuclear weapons legally-binding non-proliferation obligation never to receive, manufacture, or otherwise acquire nuclear weapons under Article II of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1968.⁶ This question bares particular relevance given that Iran has repeatedly indicated that withdrawal from the NPT represents one potential course of action that it may take in response to the re-imposition of unilateral economic sanctions by the US after its withdrawal from the JCPOA,⁷ which Iran has since regularly threatened over the past months.⁸ In response to the Soleimani attack,

¹ DH Joyner, 'The United States' "Withdrawal" from the Iran Nuclear Deal' (*E-International Relations*, 21 August 2018) <www.e-ir.info/2018/08/21/the-united-states-withdrawal-from-the-iran-nuclear-deal/> accessed 7 July 2020.

² Section 5.

³ See in particular, Special Rapporteur A Callamard, 'Extrajudicial, Summary or Arbitrary Executions, UN Doc A/HRC/44/38, 29 June 2020; M Milanovic, 'The Soleimani Strike and Self-Defence Against an Imminent Armed Attack' (*EJIL: Talk!* 7 January 2020) <www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/> accessed 7 July 2020; A Haque, 'U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment' (*Just Security*, 10 January 2020) <www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/> accessed 7 July 2020.

⁴ E Schmid, 'Iran Plan Downing: Likely a Violation of International Humanitarian Law (But Not a War Crime)' (*Just Security*, 14 January 2020) <www.justsecurity.org/68043/iran-plane-downing-likely-a-violation-of-international-humanitarian-law-but-not-a-war-crime/> accessed 7 July 2020.

⁵ A Callamard, 'The Targeted Killing of General Soleimani: its Lawfulness and Why it Matters' (*Just Security*, 8 January 2020) <www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/> accessed 7 July 2020.

⁶ Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

⁷ M Peel, A Barker and N Bozorgmehr, 'Iran threatens to withdraw from nuclear non-proliferation treaty' (*The Financial Times*, 25 May 2018) <www.ft.com/content/6dda41ac-6020-11e8-9334-2218e7146b04> accessed 7 July 2020.

⁸ See progressively, 'Iran says leaving nuclear NPT one of many choice after U.S. sanctions move' (*Japan Times*, 28 April 2019) <www.japantimes.co.jp/news/2019/04/28/world/politics-diplomacy-world/iran-says-leaving-nuclear-npt-one-many-choices-u-s-sanctions-move/#.XicW0hf7S8p> accessed 7 July 2020; L Norman, 'Iran Threatens to Pull Out of Nuclear Treaty, Like North Korea' (*The Wall Street Journal*, 27 June 2019) <www.wsj.com/articles/iran-hasnt-breached-limits-of-nuclear-deal-yet-11561631344> accessed 7 July 2020; P Wintour, 'Growing calls in

Iran took additional measures to end all restrictions imposed under the JCPOA whilst remaining subject to International Atomic Energy Agency (IAEA) inspections,⁹ and later reaffirmed its threat to withdraw from the NPT in January 2020 should the remaining members of the JCPOA proceed to invoke the dispute resolution mechanism of the agreement and refer the matter to the United Nations Security Council (UNSC).¹⁰

This article explores the requirements under the Article X(1) NPT withdrawal clause, before turning to discuss whether Iran can, and should, exercise its legal right to withdraw from the NPT in light of the hostile sequence of events since May 2018. Section 2 will briefly restate Iran's legal non-proliferation obligations under the NPT and note whether Iran is currently in violation of its non-proliferation obligations under the treaty. Section 3 will then revisit the 'extraordinary events' withdrawal provisions contained under Article X(1) of the NPT, outlining the relatively weak requirements that it establishes. Section 4 will then compare other invocations of the 'extraordinary events' clause, specifically the NPT withdrawal by the Democratic People's Republic of Korea (DPRK) in 2003, the US withdrawal from the Anti-Ballistic Missile Treaty in 2002, and the more recent US withdrawal from Intermediate-Range Nuclear Forces Treaty in August 2019. In particular, this Section will note the stated grounds for withdrawal by each state, and discuss whether the UNSC, or the international community generally challenged the legality of the subjective exercise of the 'extraordinary events' clause as formulated under each respective instrument.

In light of this preceding discussion, Section 5 will turn to consider whether Iran has sufficient grounds to satisfy the requirements under Article X(1) and withdraw from the NPT in light of rising US–Iranian tensions since May 2018. In particular, this Section will draw from prior invocations discussed in Section 4 to demonstrate that Iran's grounds are arguably more defensible and justified in comparison to earlier case studies. Finally, Section 6 will conclude by offering some brief thoughts as to whether NPT withdrawal would actually be a desirable option for Iran, or whether instead this may simply result in further unwanted military conflict, sanctions and isolation from the international community.

2 Iran's nuclear non-proliferation obligations

Before proceeding to analyse the withdrawal provisions of the NPT, it is first worth recalling the extent of Iran's non-proliferation obligations under the

Iran to abandon nuclear treaty, ambassador warns' (*The Guardian*, 7 November 2019) <www.theguardian.com/world/2019/nov/07/growing-calls-in-iran-to-abandon-nuclear-treaty-ambassador-warns> accessed 7 July 2020.

⁹ K Davenport, 'Iran Abandons Uranium Limits' (2020) 50(1) *Arms Control Today* 22.

¹⁰ B Dehghanpisheh, 'Iran says it will quit global nuclear treaty if case goes to U.N' (*Reuters*, 20 January 2020) <<https://uk.reuters.com/article/uk-iran-nuclear/iran-says-it-will-quit-global-nuclear-treaty-if-case-goes-to-u-n-idUKKBN1ZJ0L5>> accessed 7 July 2020.

treaty.¹¹ The NPT is considered the ‘cornerstone’ instrument of the nuclear non-proliferation framework under international law,¹² and one of the most important non-proliferation treaties of all time.¹³ The treaty first recognises five nuclear-weapon states (NWS) which had ‘manufactured and exploded a nuclear weapons or other nuclear explosive device prior to 1 January 1967’.¹⁴ All other states, including Iran, are considered to be non-nuclear weapon states (NNWS).

The NPT encapsulates a Grand Bargain between the NWS and NNWS, reflecting the three ‘pillars’ of the NPT: non-proliferation, peaceful use of nuclear energy, and nuclear disarmament. Under Article II, the NNWS commit to neither receive the transfer, ‘manufacture or otherwise acquire’ nuclear weapons.¹⁵ Moreover, NNWS are obliged to conclude safeguards agreements with the IAEA under Article III(4), specifically in order to monitor that nuclear materials under the jurisdiction, territory or control of the NNWS are used exclusively for peaceful purposes, with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.¹⁶ In exchange for

¹¹ For a relatively recent in-depth discussion of Iran’s nuclear non-proliferation obligations, see generally DH Joyner, *Iran’s Nuclear Programme and International Law: From Confrontation to Accord* (Oxford University Press 2016).

¹² DH Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press 2009) 8; M Asada, ‘The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol’ (2011) 16(1) *J C & S L* 3, 3.

¹³ For a selection of excellent analyses of the NPT, see Joyner (n 12) 3–76; MI Shaker, *The Nuclear Nonproliferation Treaty: Origin and Implementation, 1959-1979, Volumes I-III* (Oceana Publications 1980). A useful summary is also provided by G Nystuen and TG Hugo, ‘The Nuclear Non-Proliferation Treaty’ in G Nystuen, S Casey-Maslen and AG Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge University Press 2014).

¹⁴ Article IX(3), NPT.

¹⁵ A separate, though equally interesting question is whether the non-proliferation obligation set out in Article II is now also reflected in customary international law. While this article does not intend to contribute to this debate, but it has been convincingly argued by Green that it is probably the case that a customary obligation not to proliferate does not currently exist, see JA Green, ‘India’s Status as a Nuclear Weapons Power under Customary International Law’ (2012) 24(1) *NLSIR* 125, 130–38, a conclusion this author shares. Kittrie is similarly undecided in reaching a conclusion on this point, see OF Kittrie, ‘Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It’ (2007) 28(2) *Mich J Int’l L* 337, 340–41, and 348–50. It has recently been argued that nuclear non-proliferation obligations constitute a *jus cogens* norm of international law, see generally G Normile, ‘The Non-Proliferation of Nuclear Weapons as Jus Cogens’ (2019) 124(1) *Penn St L Rev* 277, though the present author finds the conclusions reached unpersuasive.

¹⁶ For a useful analysis of Article III and safeguard obligations, see Joyner (n 12) 18–27; P-E Dupont, ‘Compliance with Treaties in the Context of Nuclear Non-Proliferation: Assessing Claims in the Case of Iran’ (2014) 19(2) *J C & S L* 161, 172–78; M Spies, ‘Iran and the Limits of the Nuclear Non-Proliferation Regime’ (2007) 22(3) *Am U Int’l L Rev* 401, 410–24.

relinquishing the right to acquire nuclear weapons, Article IV reaffirms the 'inalienable right' of all states parties to develop peaceful uses of nuclear energy.

The NWS agreed to reciprocal non-proliferation obligations under Article I not to transfer 'to any recipient whatsoever, nuclear weapons or other nuclear explosive devices', and not to assist or encourage other NNWS to manufacture or acquire nuclear weapons. The NWS also commit to a vague undertaking to move towards the cessation of the nuclear arms race at an early date, and to pursue effective measures relating to nuclear disarmament.¹⁷ As a result, the NPT has often been considered a *traite-contrat*, or *quid pro quo* arrangement which discriminates between the nuclear 'haves' and 'have nots'.¹⁸

Given that Iran is considered a 'non-nuclear-weapon state' under Article IX(3), the most significant obligation accepted by Iran is that of Article II, which essentially establishes a legally-binding obligation upon Iran not to manufacture or acquire nuclear weapons for so long as it remains a party to the treaty.¹⁹ It is obvious that the receipt of transfer or any other acquisition of a fully completed nuclear weapon by Iran from another state or actor would constitute a clear violation of Article II.²⁰ However, precisely what forms of nuclear-related activities would amount to a violation of Article II remains contested, largely due to conflicting interpretations of what the term 'manufacture' means in the present context.²¹ For the purposes of the present discussion, it suffices to note there currently seems to be widespread, though by no means universal support, that the term 'manufacture' should be interpreted narrowly, covering only the 'physical manufacture' of a completed nuclear explosive device,²² or 'at

¹⁷ Article VI, NPT. Although Article VI is directed towards 'each of the Parties' to the NPT, arguably the NWS have a special responsibility in relation to this obligation, as it is largely directed at the nuclear weapons stockpiles of the NWS themselves. For a discussion of the extent of the obligation imposed by Article VI, see CA Ford, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' (2007) 14 *Non-Proliferation Rev* 401; PM Kiernan, 'Disarmament' Under the NPT: Article VI in the 21st Century' (2012) 20 *Mich J Int'l L* 381; DH Joyner, 'The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty' in G Nystuen, S Casey-Maslen and A Golden Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge University Press 2014); D Rietiker, 'The Meaning of Article VI Treaty on the Non-proliferation of Nuclear Weapons' in JL Black-Branch and D Fleck (eds), *Nuclear Non-Proliferation in International Law* (Asser Press 2014).

¹⁸ As suggested by Joyner (n 12) 9–10; though conversely, see Green (n 15) 137.

¹⁹ In full, Article II, NPT reads: 'Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.'

²⁰ Spies (n 16) 405–06.

²¹ See usefully in this regard, DS Jonas, 'Ambiguity Defines the NPT: What Does 'Manufacture' Mean?' (2014) 36(2) *Loy L A Int'l Comp Law Rev* 263.

²² *ibid* 266–67, who notes that a broader approach would entail the need to construct or determine a state's 'intention' behind certain dual-purpose activities; Spies (n 16) 407;

its broadest' the physical construction or assembly of key component parts of a nuclear weapon.²³ Indeed, as Liles suggests

the time when a state is actually in violation of Article II is some time between acquiring fissile material and detonating a bomb. Though the NPT is intended to curtail proliferation, the plain language of the agreement does not allow the international community to step in until a state is *a long way towards making actual weapons*.²⁴

Consequently, the concept of manufacture goes beyond a question of merely acquiring fissile material, constructing an empty warhead shell, or attempting to determine the intent of the possible proliferating state in question. Instead, what is needed is clear facts which indicate that 'any activity the purpose of which *could reasonably be none other than to contribute to the construction of a nuclear explosive device* would run afoul of the prohibition on manufacturing in NPT Article II'.²⁵ This narrow interpretation is supported through reference to the *travaux préparatoires* of the treaty,²⁶ where an additional prohibition on 'preparing to manufacture' nuclear weapons—alluding to an earlier stage in the developmental process—was proposed by the Soviet Union during the NPT negotiations, but was ultimately rejected by the US delegation.²⁷

Moreover, there is a clear distinction between the terms 'manufacture' and 'develop', the latter of which is included within regional nuclear-weapon-free zones,²⁸ the Chemical Weapons Convention,²⁹ and the recently negotiated Treaty

DH. Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (*JURIST*, 9 November 2011) <www.jurist.org/commentary/2011/11/dan-joyner-iaea-report/> accessed 7 July 2020. For an opposing view, see A Persbo, 'A reflection on the current state of nuclear non-proliferation and safeguards', *EU Non-Proliferation Consortium: Non-Proliferation Papers* 8, February 2012, 4–5.

²³ Joyner (n 11) 79–86.

²⁴ M Liles, 'Did Kim Jong-Il Break the Law – A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime' (2007) 33(1) *N C J Int'l Law Com Reg* 103, 114 (emphasis added).

²⁵ Joyner (n 12) 16–17 (emphasis added) endorsing an approach advanced by US Representative William Foster in 1968.

²⁶ Art 32, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331.

²⁷ Discussed in greater depth by Jonas (n 21) 268–73.

²⁸ See eg Article 3(a), Treaty on the Nuclear-Weapon-Free Zone in Africa (adopted 11 April 1996, entered into force 15 July 2009) 35 ILM 698; Article 3(1)(a), Treaty on a Nuclear-Weapon-Free Zone in Central Asia (adopted 8 September 2006, entered into force 21 March 2009) 2970 UNTS; Article 3(1)(a), Treaty on the Southeast Asia Nuclear Weapon Free Zone (adopted 15 December 1995, entered into force 28 March 1997) 1981 UNTS 129.

²⁹ Article I(1)(a), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45.

on the Prohibition of Nuclear Weapons (TPNW) in 2017.³⁰ The term 'develop' is ordinarily understood as 'to create or produce especially by deliberate effort over time',³¹ or 'to invent something or bring something into existence'.³² This suggests that a broad scope of activities are encompassed by development, covering 'acts that amount to, or are directed towards, development of the weapon or its integral parts and components are prohibited'.³³ Such activities would likely include research and design activities which contribute towards nuclear weapons development,³⁴ whereas the 'manufacture' stage would seem to suggest the final assembly of the completed nuclear explosive device that has been under development. The effect of this interpretation of Article II means that while Iran cannot ever acquire or receive the transfer of a constructed nuclear weapon, it may arguably undertake some early research and design steps in the overall development process prior to the manufacturing of a nuclear weapons capability.

Consequently, given this narrow interpretation of the obligation under Article II, it is unlikely that Iran has at any point violated its obligations under Article II.³⁵ Although Iran has certainly undertaken various clandestine enrichment activities—often in violation of UNSC decisions³⁶—and has likely engaged in undeclared research and development activities in violation of its comprehensive safeguards agreement with the IAEA,³⁷ such activities have not been followed by the physical construction of a completed nuclear explosive device.³⁸

³⁰ Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8, 7 July 2017.

³¹ 'Develop', Definition 2(b) (*Merriam-Webster Online Dictionary*) <www.merriam-webster.com/dictionary/develop> accessed 7 July 2020.

³² 'Develop (start)' (*Cambridge Online Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/develop>> accessed 7 July 2020.

³³ S Casey-Maslen and T Vestner, *A Guide to International Disarmament Law* (Routledge 2019) 93.

³⁴ *ibid* 91 ('Research forms an integral part of the international legal concept of development'.)

³⁵ This conclusion is shared Joyner (n 12) 86–94. Indeed, while the Security Council has often demanded that Iran must stop certain nuclear related activities in response to violations of IAEA safeguard agreements, it has not directly determined that Iran is in violation of Article II of the NPT, see PK Kerr, 'Iran's Nuclear Program: Tehran's Compliance with International Obligations', Congressional Research Service R40094, 23 September 2020, 15.

³⁶ See eg United Nations Security Council Resolution 1696, UN Doc S/RES/1696, 31 July 2006, [2] which '[d]emands, in this context, that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA'.

³⁷ See eg IAEA, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General, IAEA Doc GOV/2003/40, 6 June 2003, 7 ('Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear materials, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed'). See for a useful discussion of Iran and its IAEA safeguard commitments, DH Joyner, 'Iran's Nuclear Program and International Law' (2013) 2(2) *Penn St J Law Int'l Aff* 237.

³⁸ Joyner (n 11) 86–94.

This conclusion is shared by former IAEA Director General Mohamed ElBaradei, who stated in 2011 that there is no ‘shred of evidence that Iran is weaponizing’ nor ever developed the primary components of a nuclear weapon.³⁹ Moreover, an IAEA report released in December 2015 addressing outstanding concerns relating to Iran’s nuclear programme prior to the implementation of the JCPOA determined that Iran’s previous military nuclear-related activities did ‘not advance beyond feasibility and scientific studies’ stage, and subsequently found ‘no credible indications of the diversion of nuclear materials in connection with possible military dimensions to Iran’s nuclear programme’.⁴⁰

As such, it is clear that *currently* at least, Iran’s nuclear activities do not violate its non-proliferation obligations under Article II of the NPT.⁴¹ This is in spite of its recent scaling back on restrictions on certain nuclear-related activities imposed by the JCPOA relating to its civilian nuclear energy programme, all of which remain monitored by the IAEA.

3 Withdrawal clause in the NPT

Having determined the extent of Iran’s non-proliferation obligation under Article II, and assessing that Iran remains in compliance with this obligation at present, the following Section intends to explore the withdrawal provisions of the NPT under Article X(1). The area of treaty withdrawal has been underexplored by international lawyers until relatively recently,⁴² despite the frequent inclusion of such clauses within a wide variety of multilateral and bilateral arrangements.⁴³ Although general provisions relating to treaty withdrawal termination and suspension have been established within the Vienna Convention on the Law of Treaties (VCLT), Article 54 confirms that ‘the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty’. This has the effect of prioritising the *lex specialis*

³⁹ Quoted in SM Hersh, ‘Iran and the Bomb’ (*The New Yorker*, 30 May 2011) <www.newyorker.com/magazine/2011/06/06/iran-and-the-bomb-seymour-m-hersh> accessed 7 July 2020.

⁴⁰ ‘Final Assessment on Past and Present Outstanding Issues Regarding Iran’s Nuclear Programme’ (IAEA Board of Governors, 2 December 2015) <www.iaea.org/sites/default/files/gov-2015-68.pdf> accessed 7 July 2020, [85] and [88] respectively.

⁴¹ A conclusion this author has reached elsewhere, see generally C Evans, ‘Mythbusting Iran’s Nuclear Weapons Ambitions’ (2019) 6 *Quest Essays Art Human* 86.

⁴² For discussion on the phenomenon of treaty withdrawal generally, see LR Helfer, ‘Terminating Treaties’ in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2020); C McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’ (2019) 68(3) *Int’l Comp L Q* 499; B Koremenos and A Nau, ‘Exit, No Exit’ (2010) 21(1) *Duke J Comp Int’l L* 81.

⁴³ Helfer suggests this absence exists because commentators are generally reluctant to ‘talk about divorce before a wedding’, see LR Helfer, ‘Taking Stock of Three Generations of Research on Treaty Exit: Masterclass European Society of International Law (ESIL) Research Forum’ (2019) 52(1) *Isr L Rev* 103, 104.

provisions of express treaty withdrawal clauses over the VCLT provisions relating to treaty suspension, termination or withdrawal under Articles 60-2.⁴⁴

Nuclear non-proliferation and disarmament treaties generally include similar provisions relating to both duration and withdrawal.⁴⁵ The majority are of unlimited duration,⁴⁶ but provide a mechanism allowing state parties to withdraw under what has since been referred to as the 'extraordinary events clause'.⁴⁷ This form of clause was first included within the Partial Test-Ban Treaty 1963,⁴⁸ and formed the basis of Article X(1) of the NPT, which reads

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.

A Substantive requirements

Article X(1) first imposes substantive requirements as to what circumstances would justify a state's decision to withdraw from the NPT. This requires a three-fold test: first, there must be 'extraordinary events'; second, such events must

⁴⁴ As noted by G den Dekker and T Copen, 'Termination and Suspension of, and withdrawal From WMD Arms Control Agreements in light of the General Law of Treaties' (2012) 17(1) *J C & S L* 25, 37–39. However, Joyner and Roscini argue that if the NPT withdrawal provisions do not contradict the general rules of the VCLT under Articles 60-2, the general rules 'are still applicable to the relations between the treaty parties as rules of VCLT treaty law and customary international law', DH Joyner and M Roscini, 'Withdrawal from Non-proliferation Treaties' in DH Joyner and M Roscini (eds), *Non-Proliferation Law as a Special Regime, A Contribution to Fragmentation Theory in International Law* (Cambridge University Press 2012) 154.

⁴⁵ Daniel Rietiker on behalf of the International Association of Lawyers Against Nuclear Arms, 'Withdrawal Clauses in Arms Control Treaties: Some Reflections about a Future Treaty Prohibiting Nuclear Weapons', United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination, UN Doc. A/CONF.229/2017/NGO/WP.13, 31 March 2017, 1.

⁴⁶ The NPT was in fact concluded for an initial period of 25 years under Article X(2), but was extended indefinitely at the 1995 Review Conference, see 1995 Review and Extension Conference of the Parties to the Treaty on the Prohibition of Nuclear Weapons, Final Document, Part I, NPT/CONF.1995/32, New York, 1995, Annex, Decision 3: Extension of the Treaty on the Non-Proliferation of Nuclear Weapons.

⁴⁷ See CA Cohn, 'Interpreting the Withdrawal Clause in Arms Control Treaties' (1989) 10(3) *Mich J Int'l L* 849, 851–55; Joyner and Roscini (n 44) 153.

⁴⁸ See Article IV, Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater (adopted 5 August 1963, entered into force 10 October 1963) 480 UNTS 43 (PTBT). Also known as the Limited Test-Ban Treaty.

relate to the subject matter of the treaty; and third, such events must have ‘jeopardized the supreme interests of its country’. Each of these aspects, however, remain undefined under the NPT.

Precisely what form of ‘extraordinary events, related to the subject matter of the treaty’ are envisaged here is certainly vague.⁴⁹ The term ‘extraordinary’ is ordinarily defined as ‘going beyond what is usual, regular, or customary’.⁵⁰ Simply withdrawing and citing normal occurrences will unlikely suffice for the purposes for Article X(1); this much seems obvious. At the same time, Roscini has suggested that an event is to be considered extraordinary if it were either ‘unforeseeable or, though foreseeable, thought by the parties as highly unlikely to occur’,⁵¹ aligning somewhat with the *rebus sic stantibus* doctrine imposed of Article 62 of the VCLT. However, according to Shaker, many states suggested during the NPT negotiations that non-compliance by another party with its treaty obligations—notably the NWS in relation to their nuclear disarmament commitments under Article VI—may constitute grounds for withdrawal.⁵² In other words, even material breaches of obligations under the NPT by another party—which is not an unforeseeable eventuality in *traite-contrat* style agreements—could provide justifiable grounds for withdrawal. Therefore, although the specified event must clearly go beyond the realms of normal everyday international relations, it seems that there is no requirement of unforeseeability comparable to that of *rebus sic stantibus*.⁵³

Furthermore, the *travaux préparatoires* also indicates that no state seemed to clarify, or sought to restrict, the exact contours and boundaries of what precisely would amount to extraordinary events, thereby encouraging its deliberate ambiguity and flexibility.⁵⁴ Coppen further argues that the *travaux préparatoires* clarifies that Article X(1) may be invoked simply if a state feels that the NPT ‘no longer serves their best interests, for example, due to a lack of perceived progress on the implementation of Article VI’.⁵⁵ This again would indicate that Article X(1) establishes an ‘intentionally vague’ and therefore broad range of sufficient grounds for withdrawal,⁵⁶ going beyond material breaches by other parties and unforeseen changes in circumstances envisaged by the VCLT to capture additional events which may jeopardise a state’s supreme interests.⁵⁷

⁴⁹ EK Penney, ‘Is that Legal? The United States’ Unilateral Withdrawal from the Anti-Ballistic Missile Treaty’ (2002) 51(4) *Cath U L Rev* 1287, 1300.

⁵⁰ ‘Extraordinary’, Definition 1(a) (*Merriam-Webster Online Dictionary*) <www.merriam-webster.com/dictionary/extraordinary> accessed 7 July 2020.

⁵¹ G Lysén, *The International Regulation of Armaments: The Law of Disarmament* (Iustus 1990) 176–77.

⁵² Shaker (n 13) Vol II, 889.

⁵³ A conclusion shared by Joyner and Roscini (n 44) 159.

⁵⁴ T Coppen, ‘Good Faith and Withdrawal from the Non-Proliferation Treaty’ (2014) 1 *Quest Int’l L* 21, 26–27.

⁵⁵ *ibid* 27–29.

⁵⁶ M Roscini, ‘Withdrawal Provisions’ (*Geneva Disarmament Platform and the Geneva Centre for Security Policy*, 10 March 2017) <www.disarmament.ch/wp-content/uploads/2017/04/Marco-Roscini_NBT-Discussion-2_Withdrawal.pdf> accessed 7 July 2020, 2.

⁵⁷ Coppen (n 54) 28–29; Joyner and Roscini (n 44) 156.

In addition, the extraordinary event in question must be related to the 'subject matter' of the NPT. It would seem unquestionable that events related to nuclear weapons, be that the issuance of threats to use nuclear weapons, proliferation concerns of other states, the failure to implement or negotiate in good faith towards nuclear disarmament under Article VI would all be related to the subject matter of the NPT. At the same time, when one considers that the subject matter of the NPT and the objective of reducing international conflict between states are somewhat intertwined, one could reasonably argue that all arms control, non-proliferation or disarmament instruments, including the NPT, have subject matters which are intrinsically related to security considerations.⁵⁸

Finally, the extraordinary events must jeopardise the withdrawing states subjectively determined 'supreme interest'. Although seeking to determine objectively precisely what constitutes a state's 'supreme interests' is certainly challenging, one may argue that given the subject matter of the NPT and its interrelationship with security-based considerations, 'it can be assumed that in the context of WMD control law such interests refer to the security interests of the State in question'.⁵⁹

The inclusion of the above substantive requirements differentiates the 'extraordinary events' clause from standard withdrawal requirements found elsewhere,⁶⁰ most of which generally impose only procedural requirements.⁶¹ As such, one could argue that Article X(1) – and extraordinary events clauses as a whole – have the effect of 'narrow[ing] the range of events which can properly be invoked to justify withdrawal',⁶² separating the NPT from other treaties which impose merely procedural requirements of notice by requiring justifications for legitimately invoking extraordinary events clauses.

In practice, however, it is widely accepted academically that it is the withdrawing state *itself* which is able to ascertain whether an extraordinary event related to the subject matter of the NPT has jeopardised its supreme interests. This point is made by Sims, who notes

Nevertheless, the withdrawal clause suffers from the disadvantage that the whole assessment is within the sole prerogative of the withdrawing states. It decided for itself if the three conditions have been met. It exercises its own judgement, which is then the final authority on the matter, regardless of how partial or faulty that judgment appears to others.⁶³

⁵⁸ A point noted by Coppen (n 54) 22.

⁵⁹ Den Dekker and Coppen (n 44) 36 (bracketed text added).

⁶⁰ Helfer (n 43) 633.

⁶¹ *ibid*; Cohn (n 47) 854.

⁶² N Sims, 'Withdrawal Clauses in Disarmament Treaties: A Questionable Logic?' (1999) 42 *Disarmament D* 16 (bracketed text added); Cohn (n 47) 854.

⁶³ *ibid*.

In other words, rather than containing an objective test for withdrawal, Article X(1) imposes an ‘auto-interpretive’,⁶⁴ or subjective test to be determined by the withdrawing state itself as to whether the criteria needed to satisfy the justification posed for withdrawal have been met.⁶⁵ This is made evident through a standard application of the rules of treaty interpretation codified under Articles 31 and 32 of the VCLT.⁶⁶

Taking the ordinary meaning first,⁶⁷ Article X(1) phrases the ability to withdraw from the NPT as a ‘right’, thereby emphasising the ‘individual, unilateral character of the right of withdrawal’ for each member state of the treaty.⁶⁸ Furthermore, the subjective nature of the determination to withdraw from the NPT is made evident by the phrase ‘if it decides’, which further alludes to the role of the withdrawing state to determine whether such extraordinary events that jeopardise ‘its’ subjectively determined supreme interests exist.⁶⁹ In addition, Article X(1) does not establish an international review process to assess the legality and legitimacy of the advanced justifications for withdrawal.⁷⁰ This again emphasises the lack of objective assessment of the exercise of the subjective right to withdraw. Finally, there seemed to be no objection to this subjective approach within the *travaux préparatoires* of the NPT, which, as discussed previously, intentionally granted flexibility to states when exercising the right of withdrawal as a sovereign act.⁷¹

Instead, the only limitation on this subjective assessment is the customary international law obligation upon state parties to perform all treaty obligations, including those relating to withdrawal, in ‘good faith’.⁷² In other words, any case of withdrawal should be implemented without any underlying ‘pretext or subterfuge’, and instead should be a sincere, or genuine act.⁷³ However, while

⁶⁴ As phrased by E Schwelb, ‘Withdrawal from the United Nations: The Indonesian Intermezzo’ (1967) 61(3) *AJIL* 661, 661.

⁶⁵ DH Joyner, ‘What if Iran Withdraws from the Nuclear Nonproliferation Treaty? Part 1: Can They Do That?’ (*ESIL Reflections*, 13 December 2012) <<https://esil-sedi.eu/wp-content/uploads/2012/12/ESIL-Reflections-Joyner.pdf>> accessed 7 July 2020; Roscini (n 56) 2–3; M Asada, ‘Arms Control Law in Crisis – A Study of the North Korean Nuclear Issue’ (2004) 9(3) *J C & S L* 331, 349.

⁶⁶ For more on treaty interpretation generally, see Report of the International Law Commission on the Work of the Second Part of Its Seventh Session, UN Doc A/6309/Rev.1, United Nations Yearbook of International Law Commission, Vol II (1969), 169; I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 114–53; and in relation to non-proliferation instruments, A Michie, ‘Interpretation of Non-Proliferation Treaties’ in DH Joyner and M Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge University Press 2012).

⁶⁷ UN Doc A/6309/Rev.1 (n 66) 220.

⁶⁸ This is noted by Joyner (n 65) 3.

⁶⁹ Roscini (n 56) 2–3; den Dekker and Coppen (n 44) 38.

⁷⁰ This is discussed further in Section 3.A. below.

⁷¹ Shaker (n 13) Vol II, 889.

⁷² Article 26, VCLT.

⁷³ Joyner (n 65) 4.

the requirement to withdraw in good faith arguably 'provides no more than minor "objectivity" in an otherwise purely subjective clause',⁷⁴ demonstrating good faith here can be useful in helping a withdrawing state generate a sense of legitimacy when invoking the right to withdraw under Article X(1). Indeed, by invoking reasonable, materialised (as opposed to possible future) acts as evidence of an 'extraordinary event' which the withdrawing state genuinely believed to have threatened its supreme interests, there is a greater—though by no means guarantee—chance that the international community will be more accepting of the invocation for withdrawal. In contrast, if a state seeks to exploit the subjective withdrawal clause in order to engage in prohibited activity, offering relatively feeble excuses for its decision to withdraw, this will most likely result in condemnation, and possible repercussions by the international community or the UNSC acting on its behalf.

B Procedural requirements

Although the substantive requirements of Article X(1) impose meagre, subjectively determined criteria that remain subject only to a good faith application, further procedural steps are also incorporated in Article X(1). Quoting the NPT directly, the withdrawing state

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.

It is apparent that the first sentence that these procedural requirements are not wholly dissimilar to those incorporated within other international treaties, which merely require written notice of withdrawal to be received by either the Depositary, the UNSC, or other specified groups of states or organisations, and a specified period after which withdrawal will take effect.⁷⁵ The primary purpose of imposing a notice length period—in this case three months—and the need to transmit such notice to all other parties and UNSC, is 'to inform the latter of that important decision and to give them the opportunities to persuade the withdrawing party to reconsider the decision'.⁷⁶ Equally, the three-month notice period may provide the remaining NPT parties sufficient time to prepare for any future contingencies resulting from the withdrawal of another party, both on an individual and collective basis.⁷⁷

⁷⁴ Den Dekker and Coppen (n 44) 38.

⁷⁵ As noted by Helfer (n 43) 633–44.

⁷⁶ Asada (n 65) 348; and M Roscini, 'Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia' (2007) 7(3) *Chinese JIL* 593, 614.

⁷⁷ This point is made by W Krutzsch and R Trapp, *A Commentary on the Chemical Weapons Convention* (1st edn, Martinus Nijhoff 1994) 248 in relation to the withdrawal provisions incorporated into the Chemical Weapons Convention.

Undoubtedly the most unique requirement in arms control withdrawal provisions is the need to provide a 'statement of the extraordinary events' specifying its intention to withdraw and the reasons for this. While the withdrawing state is able to subjectively determine for itself whether the stated extraordinary events have jeopardised its supreme interests,⁷⁸ this procedural criteria to provide a statement of such events ultimately requires the withdrawing state to explain the 'factual grounds for its decision' to withdraw.⁷⁹ In other words, the statement must explain what the withdrawing state considers to be the extraordinary events jeopardising its supreme interests, allowing other state parties and the UNSC that have a 'legitimate interest in knowing why such action was being taken' to be made aware of the underlying justifications for the decision to withdraw.⁸⁰

It has been suggested that by requiring states parties to give notice of withdrawal to the UNSC, the NPT specifically allows cases of withdrawal to 'be reviewed by the UNSC and the international community to pass a judgement on it'.⁸¹ In effect, this provides the UNSC an opportunity to determine whether the withdrawal constitutes as a threat to peace and security,⁸² which in turn, could lead to the Security Council imposing sanctions or other measures in response to such a withdrawal under Chapter VII of the UN Charter.⁸³ While this course of action is certainly possible—as will be seen in Section 4 below—the NPT does not, however, specifically define a role for the UNSC in directly assessing the validity of a claim for withdrawal under the NPT. Nor does it grant the Security Council *de jure* authorisation to determine or decide whether the conditions of withdrawal under Article X(1) have been satisfied. The US has argued as much during the 2007 NPT Preparatory Committee, stating 'the NPT conveys no power to stop withdrawal from taking effect if the reasons given are in the judgment of the international community frivolous or improper'.⁸⁴

In light of these additional procedural steps, one may wonder whether the failure to comply with the procedural requirements of the withdrawal can itself invalidate the right to withdraw provided by Article X(1). Indeed, Asada has

⁷⁸ As noted in Section 3.B.

⁷⁹ A Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 249.

⁸⁰ Asada (n 65) 349.

⁸¹ J Nielsen and J Simpson, 'The NPT Withdrawal Clause and its Negotiating History' (*Mountbatten Centre for International Studies*, July 2004) <https://eprints.soton.ac.uk/39771/1/withdrawal_clause_NPT_nielsen%2526simpson_2004.pdf> accessed 7 July 2020, 7.

⁸² As noted by FL Kirgis, 'North Korea's Withdrawal from the Nuclear Nonproliferation Treaty' (*American Society of International Law: Insights*, 24 January 2003) <www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty> accessed 7 July 2020.

⁸³ Indeed, this is precisely what occurred in the case of the DPRK, see Section 4.A.

⁸⁴ Working paper submitted by the United States of America, 'Article X of the NPT: deterring and responding to withdrawal by treaty violators', NPT/CONF.2010/PC.I/WP.22, 3 May 2007, 3.

convincingly argued that because that the right to withdraw from the NPT is framed as an 'exercise of national sovereignty',⁸⁵ the failure to comply with the procedural requirements

should not be treated as something that would completely invalidate a party's notice of withdrawal ... in other words, the notice requirements should not be treated as conditions to be met for a withdrawal notice to be valid, but rather as *procedural obligations a violation of which would only give rise to some form of reparation*.⁸⁶

Kirgis takes a similar position and suggests that failure to comply with the three-month notice period 'does not necessarily mean that the withdrawal from the NPT is invalid. The requirement is couched in terms of a *promise to give three months' notice rather than as a condition* that would have to be met in order to make the withdrawal effective'.⁸⁷ Although this stated position would seem to undermine the stringency of the Article X(1) requirements, and while it would of course remain preferable for these procedural requirements to be satisfied by the withdrawing state, it is questionable whether non-compliance with these procedural steps will invalidate the withdrawal action.⁸⁸

Overall, the determination of whether such events jeopardise its supreme interest is ultimately to be made by the withdrawing state themselves, and should therefore be assumed to exist whenever the withdrawing state declares them to exist.⁸⁹ The procedural requirements do impose some additional steps the withdrawing state must take, but failure to comply fully with such criteria is unlikely to invalidate the invocation of withdrawal. In light of the above, it is no surprise that some commentators consider Article X(1) to be a 'fundamental weakness' of the NPT,⁹⁰ incorporating relatively easy requirements that a withdrawing state can satisfy with little objective oversight.

The extraordinary events clause in action

The following Section will now turn to discuss instances where 'extraordinary events' clauses have been invoked in three notable cases; the DPRK withdrawal from the NPT in 2003; the US withdrawal from the Anti-Ballistic Missile Treaty

⁸⁵ Asada (n 65) 347–48, also citing *Case concerning Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* [1996] ICJ Rep 612, [24].

⁸⁶ *ibid* (emphasis added).

⁸⁷ Kirgis (n 82) (emphasis added).

⁸⁸ Joyner (n 65) 7; Asada (65) 348.

⁸⁹ Asada (n 65) 349; Kirgis (n 82).

⁹⁰ R Winters, 'Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revision to the Nuclear Non-Proliferation Treaty' (2005) 38 *Vand J Transnat'l L* 1499, 1513.

in 2002; and the most recent US withdrawal from the Intermediate-Range Nuclear Forces Treaty in 2019. An overview of both the circumstances and reasons for each withdrawal, along with reviewing the subsequent responses of states—and whether the legality of withdrawal was questioned for any reasons—will provide an intriguing background to compare whether Iran, in the present day, has either stronger, weaker, or equally valid stated grounds for withdrawal. This will also reaffirm how the ability to invoke the extraordinary events withdrawal clause under Article X(1) remains a largely subjective matter for the withdrawing state itself in practice too.

A. The DPRK withdrawal from the NPT

While this is not the place to explore the complex circumstances of the DPRK's withdrawal from the NPT in detail, a brief contextual overview is required.⁹¹ The DPRK first announced its intention to withdraw from the NPT on 12 March 1993, citing the bias of the IAEA against the DPRK by demanding extensive access to undeclared nuclear materials and facilities, along with 'the resumption of the "Team Spirit" joint military exercises in 1993' between the US and South Korea.⁹² However, on 11 June 1993, one day before the withdrawal was due to take effect, the DPRK announced that it had 'decided unilaterally to *suspend* as long as it considers necessary the effectuation of its withdrawal',⁹³ and began to assert a 'unique status' under the NPT, claiming that it was not obligated to allow IAEA inspectors to carry out their work as required by its safeguards commitments.⁹⁴ The issue remained settled for the next few years, particularly following the negotiation of the Agreed Framework in October 1994.⁹⁵

Circumstances changed following the election of President Bush Jr. in November 2000, who declared the DPRK to be included within the infamous 'axis of evil'.⁹⁶ Following a visit by Assistant Secretary of State James Kelly to the DPRK in October 2002, the US announced that the DPRK confirmed that it had an advanced hidden nuclear weapons programme,⁹⁷ an admission which arguably placed the DPRK in violation of both Article II, and the terms of the

⁹¹ See for an excellent analysis of the circumstances and legality of the DPRK's withdrawal, Asada (n 65).

⁹² *ibid* 335.

⁹³ See Joint Statement of the DPRK and the US, 11 June 1993.

⁹⁴ IAEA, 'Fact Sheet on DPRK Nuclear Safeguards', Media Advisory Release 2002/52, 16 December 2002.

⁹⁵ Asada (n 65) 336–38.

⁹⁶ See President George W. Bush, State of the Union Address, 29 January 2002.

⁹⁷ US State Department, 'Press Statement by Richard Boucher, Spokesman: North Korea Nuclear Programme', 16 October 2002; DE Sanger, 'North Korea Says it has a Program on Nuclear Arms' (*New York Times*, 17 October 2002) <www.nytimes.com/2002/10/17/world/north-korea-says-it-has-a-program-on-nuclear-arms.html> accessed 6 October 2020.

Agreed Framework negotiated between the US and DPRK.⁹⁸ The DPRK subsequently ordered IAEA inspectors to leave on 27 December 2002. Shortly after, on 10 January 2003, the DPRK revoked its previous suspension of withdrawal from 1993, thereby arguing that its withdrawal from the NPT would take place just one day later on 11 January 2003. According to Kirgis, the DPRK again noted that the US was threatening its security through military exercises, and 'had singled it out as a target of a pre-emptive military attack and had threatened it with a blockade and military punishment'.⁹⁹ The legality and complexity of the circumstances of the DPRK's withdrawal, particularly whether its initial 'suspension' of withdrawal was permitted under the NPT, have raised much debate.¹⁰⁰

A more pressing concern for current purposes relates to the statements advanced by the DPRK explaining the extraordinary events which had jeopardised its supreme interests, thus resulting in its decision to withdraw in 2003. The DPRK highlighted numerous incidents to justify its withdrawal from the NPT, in both 1993 and 2003, such as; the renewal of joint military exercises by the US and South Korea; inherent procedural bias of the IAEA inspections against the DPRK and the IAEA's description of the DPRK as a 'criminal'; the 'vicious, hostile policy of the USA towards the Democratic People's Republic of Korea' in which the Bush administration declared the DPRK to be part of the 'axis of evil' in its broader 'War on Terror' campaign; and the instigation of 'nuclear war moves' by the US against the DPRK; all of which created a situation in which the DPRK claimed its 'supreme interests are most seriously threatened'.¹⁰¹ Notably, however, although no materialised armed attack using military force had occurred against the DPRK in either 1993 or 2003, the DPRK still explicitly stated that the withdrawal represented a 'legitimate self-defensive measure' in response to the actions of the US to protect its supreme interests.¹⁰²

What then was the general response from the international community to both the 1993 and 2003 withdrawal actions of the DPRK? In terms of the March 1993 announcement, the US, UK and Russia issued a joint statement

⁹⁸ This is assuming that its manufacturing process reached an advanced stage whilst the DPRK remained a party to the NPT, see Liles (n 24) 113–14 who argues that 'many experts think it unlikely that North Korea somehow just acquired nuclear weapons technology after it left the NPT'. If this is the case, it may be that while the DPRK had not manufactured nuclear weapons per se, its admission of having a nuclear weapons program at an advanced stage would suffice to suggest it violated Article II of the NPT.

⁹⁹ Kirgis (n 82).

¹⁰⁰ See eg Asada (n 65) 342–50; Liles (n 24); C Ahlström, 'Withdrawal from Arms Control Treaties', in *SIPRI Yearbook 2004* (Oxford University Press 2004) 770–74; G Bunn and R Timerbaev, 'The Right to Withdraw from the NPT: The Views of Two NPT Negotiators' (2005) 10 *Nuclear Control Digest* 20.

¹⁰¹ 'Statement of DPRK Government on its withdrawal from NPT' (reprinted in the *New York Times*, 10 January 2003) <www.nytimes.com/2003/01/10/international/asia/full-text-north-koreas-statement-of-withdrawal.html> accessed 7 July 2020.

¹⁰² *ibid.*

which ‘questioned’ whether the stated grounds for withdrawal constituted extraordinary events relating to the subject-matter of the NPT.¹⁰³ Yet although this clearly sought to challenge the invocation of withdrawal, no further consequences or subsequent action stemmed from this initial statement. The UNSC eventually responded on 11 May 1993 by adopting Resolution 825 which ‘considered with concern’ the decision announced by the DPRK to withdraw from the NPT. However, this Resolution 825 went no further than merely calling upon the DPRK to ‘reconsider’ its decision and to reaffirm its commitments to both its NPT and IAEA obligations.¹⁰⁴ In addition, the underlying grounds for withdrawal raised by the DPRK were not questioned or challenged by the UNSC in Resolution 825, though the joint US, UK and Russian statement was noted.

The second invocation of withdrawal was similarly met by a muted response. In April 2003, the UNSC issued a statement—as opposed to a Resolution—which again merely ‘expressed concern’ over the situation in the DPRK and its decision to withdraw from the NPT.¹⁰⁵ Unlike the 1993 statement by the UK, US and France, this joint statement did not question the legitimacy of the extraordinary events invoked by the DPRK. Indeed, den Dekker and Coppen have since determined that ‘no State has challenged the legality of the grounds invoked by the DPRK to withdraw from the NPT’.¹⁰⁶ Rather, it seems that the only basis on which the withdrawal raised substantial legal questions related to whether the procedural requirements of Article X(1) were satisfied by the DPRK, specifically whether a statement of the extraordinary events was issued, and circulated amongst all NPT Member States.¹⁰⁷

The UNSC did, however, later take a more active stance in response to nuclear weapons tests carried out by the DPRK in September 2006,¹⁰⁸ and May 2009.¹⁰⁹ Under Resolution 1874, the UNSC demanded that the DPRK ‘immediately retracts its announcement of withdrawal’ and return to the NPT and IAEA safeguards ‘at an early date’.¹¹⁰ Again, however, although the UNSC explicitly deplored the DPRK announcement of withdrawal from the NPT in both Resolutions 1718 and 1874—thereby expressing clear dissatisfaction with the decision—neither Resolution questioned the legality of the justifications put forward for withdrawal. In fact, Resolution 1874 implicitly acknowledges that the DPRK has successfully withdrawn from the NPT by demanding that it re-join the treaty ‘at an early date’.

A final observation worth noting at this point is the legality of Resolution 1874. Although the UNSC adopted Resolution 1874 under the Council’s

¹⁰³ Asada (n 65) 350. For this statement, see UN Doc S/25515, 2 April 1993, 2.

¹⁰⁴ UN SC Res 825 (1993), [1].

¹⁰⁵ ‘Fact Sheet on DPRK Nuclear Safeguards: April 2003’ (IAEA) <www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards> accessed 7 July 2020.

¹⁰⁶ Den Dekker and Coppen (n 44) 37–38.

¹⁰⁷ See generally, Asada (n 65) 342–50.

¹⁰⁸ UN SC Res 1718 (2006).

¹⁰⁹ UN SC Res 1874 (2009).

¹¹⁰ *ibid* [5] and [6].

primary role to act in situations where there is a threat to international peace and security under Article 39 of the UN Charter,¹¹¹ it could arguably be claimed that requesting a sovereign state to re-join a treaty that it previously left in accordance with its established withdrawal clause may constitute an *ultra vires abuse* of UNSC powers, even if issued under Chapter VII.¹¹² At the same time, however, one could equally claim that the circumstances in this particular instance—specifically the DPRK's open admittance to having a nuclear weapons programme—did represent a genuine, and potential serious threat to international peace and security, thereby permitting the adoption of Resolution 1874 and appropriate measures under Chapter VII powers.¹¹³ This argument seems persuasive given the extent of the DPRK's clandestine nuclear weapons-related activity prior to its withdrawal in 2003. In any case, as will be discussed further in Section 6, the possibility of UNSC action in response to treaty withdrawal may constitute a course of action which could be taken should Iran hypothetically decide to withdraw from the NPT.

B US withdrawal from the Anti-Ballistic Missile Treaty

Another invocation of the extraordinary events clause was made by the US to withdraw from the Anti-Ballistic Missile Treaty (ABM Treaty) 1972.¹¹⁴ Article XV(2) of the ABM Treaty contains a broadly comparable extraordinary events clause to the NPT, but differs slightly by established a six-month notice period as opposed to three. In addition, Article XV(2) does not require the statement of extraordinary events to be transmitted to the UNSC, but rather only to the other parties to the agreement; that is the US, Russia, Belarus, Kazakhstan and Ukraine.¹¹⁵ As a result, and mirroring the NPT, Müllerson reiterates that this clause means that 'though it is up to the Party which is taking the decision to denounce the Treaty to assess those extraordinary events in light of its supreme interests, the withdrawing Party has the obligation *vis-à-vis* its Treaty partner to justify in good faith the necessity of withdrawal from the Treaty'.¹¹⁶

President Bush announced the decision to withdraw the US from the ABM Treaty on 13 December 2001, sending a diplomatic note containing the

¹¹¹ Joyner and Roscini (n 44) 165–66.

¹¹² For a discussion of the possible *ultra vires* nature of UNSC Res 1540, see Joyner (n 12) 175–97.

¹¹³ See generally for an assessment of this, Joyner and Roscini (n 44) 163–67.

¹¹⁴ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (adopted 26 May 1972, entered into force 3 October 1972). For an extensive discussion of this incident, see Penney (n 49); R Müllerson, 'The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law' (2001) 50(3) *Intl Comp L Q* 509.

¹¹⁵ See Memorandum of Understanding on Succession, Anti-Ballistic Missile Treaty, US Department of State, 26 September 1997.

¹¹⁶ Müllerson (n 114) 531.

statement of the extraordinary events in question to the remaining parties, Russia, Belarus, Kazakhstan and Ukraine.¹¹⁷ The withdrawal subsequently became effective six-months later on 13 June 2002. The statement highlights various events as grounds for its withdrawal, though did not explicitly suggest that any of the occurrences were extraordinary *per se*. The statement claims:

The United States recognises that the Treaty was entered into with the USSR, which ceased to exist in 1991. Since then, we have entered into a new strategic relationship with Russia *that is cooperative rather than adversarial* . . .

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 of these 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*.¹¹⁸

In effect, the US attempted to rely on *both* the terms included under Article XV(2), but also alluded to more general rules on treaty termination under the VCLT, specifically a *rebus sic stantibus* orientated argument by referencing the fundamentally changed circumstances since the end of the Cold War and with the threat of further terrorist attacks and proliferation.¹¹⁹ The legality of the US withdrawal has been examined by Penney, who argues that the changed geopolitical environment brought on by the end of the Cold War—while extraordinary *at the time* in which it occurred—could not be considered a good faith justification as grounds in 2002, specifically due to the simply issue that a significantly long passage of time has passed since the dissolution of the Soviet Union in 1991.¹²⁰

By contrast, Penney does concede that the onset of new nuclear security threats posed by both ‘rogue’ state and non-state terrorist groups could imply a ‘good faith’ justification for withdrawal.¹²¹ Indeed, the fact that the US had been subject to a relatively recent grave armed attack by al-Qaeda on

¹¹⁷ For a duplication of this note, see ‘U.S. Withdrawal from the ABM Treaty: President Bush’s Remarks and U.S. Diplomatic Notes’ (2002) 32(1) *Arms Control Today* 21.

¹¹⁸ *ibid* (emphasis added).

¹¹⁹ Den Dekker and Coppen (n 44) 30; Kirgis (n 82). This justification has been regarded as a controversial excuse, see Max Shterngel, ‘Bucking Conventional Wisdom: Russia’s Unilateral “Suspension” of the CFE Treaty’ (2008) 33(3) *Brook J Int’l L* 1037, 1055.

¹²⁰ Penney (n 49) 1315–16.

¹²¹ *ibid* 1317.

September 11th,¹²² permitting a recognised right to self-defence as noted by UNSC Resolution 1368, may arguably afford further evidence that the unprecedented scale and nature of the terrorist attack constituted a threat to the US' national security, thus jeopardising its supreme interests.¹²³ However, although President Bush made reference to the 9/11 terrorist attack explicitly within his announcement of the US withdrawal, this event was only implicitly referenced within the statement of extraordinary events transmitted to the other parties of the ABM Treaty.

Moreover, Ahlström argues that the supposed threats mentioned with the statement lack specification and detail, and merely puts forward a 'general assertion that several states and non-state entities have acquired, or are seeking to acquire, weapons of mass destruction'.¹²⁴ Ahlström even suggests that concerns over the proliferation of both weapons of mass destruction 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'.¹²⁵ This argument is not entirely convincing. Indeed, the primary purpose of anti-ballistic missile defence capacities is to counter inbound long-range, intercontinental ballistic missiles (ICBM). Assuming the US believed that a genuine threat from ICBM exists, developing further defensive capabilities otherwise restricted under the ABM Treaty would seem to fall within the subject matter of this instrument.

Even if the grounds provided can be considered dubious, what is more telling is that the response from the international community, and Russia most notably, remained largely muted. As Joyner notes, Russia did not question the 'objective validity of the reasons stated in the U.S. declaration', even though none of the reasons cited by the US were specifically referred to as extraordinary events.¹²⁶ Russia instead expressed its discontent by withdrawing from the largely symbolic START II agreement that had not yet entered-into-force. Perhaps most significantly, despite the somewhat dubious, unconvincing grounds for withdrawal advanced by the US, no state, including Russia challenged the invocation of Article XV(2) or the auto-interpretative approach under the extraordinary events clause of the ABM Treaty.

¹²² Only a few months before the US announced its decision to withdraw from the ABM Treaty.

¹²³ B Spring, 'Talking Points: Terrorist Attack on America Confirms the Growing Need for Missile Defense' (*The Heritage Foundation*, 20 September 2001) <www.heritage.org/defense/report/talking-points-terrorist-attack-america-confirms-the-growing-need-missile-defense> accessed 7 July 2020.

¹²⁴ Ahlström (n 100) 775.

¹²⁵ *ibid.*

¹²⁶ Joyner (n 65) 5.

C US withdrawal from the INF Treaty

A final and more recent invocation of the extraordinary events clause was the US decision to withdraw from the Intermediate-Range Nuclear Forces Treaty (INF Treaty) 1987.¹²⁷ Following persistent allegations that Russia was in violation of the INF Treaty, on 2 February 2019¹²⁸ the US formally notified Russia of its intention to withdraw from the treaty in accordance with Article XV(2).¹²⁹ On the same day, Russia announced that it too had decided to suspend its obligations under the INF Treaty following the US announcement of withdrawal.¹³⁰ The US withdrawal was subsequently completed effect on 2 August 2019.

The press release issued on the 2 February 2019 by Secretary of State Pompeo advanced the reasons why the decision to withdraw was taken. Most significantly, the US began by reaffirming that it had previously announced and expressed concern on 4 December 2018 that Russia's development and deployment of the 9M729 missile-system violated the terms of the treaty and thus reiterated its view that Russia has since failed to 'take necessary steps to return to compliance' with the INF Treaty.¹³¹ Secretary Pompeo continued, stating

[t]he United States has concluded that extraordinary events related to the subject matter of the Treaty arising from Russia's continued non-compliance have jeopardized the United States' supreme interests, and the United States can no longer be restricted by the Treaty while Russia openly violates it.¹³²

As a result, Pompeo concluded by noting that the US perceived the INF Treaty to 'no longer be effective due to Russia's ongoing material breach. Today's actions are to defend U.S. national security interest and those of our allies and partners'.¹³³

Unsurprisingly, many US allies endorsed the grounds for withdrawal invoked by Secretary Pompeo. UK Foreign Secretary Dominic Raab for instance argued

¹²⁷ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (adopted 8 December 1987, entered into force 1 June 1988). For an overview of the key restrictions imposed by the INF Treaty, see D Kimball, 'The Intermediate-Range Nuclear Forces (INF) Treaty at a Glance' (*Arms Control Association*, last updated August 2019) <www.armscontrol.org/factsheets/INFtreaty> accessed 7 July 2020.

¹²⁸ Secretary of State Pompeo, 'U.S. Withdrawal from the INF Treaty on February 2, 2019' (*US Department of State Press Release*, 2 February 2019) <www.state.gov/u-s-intent-to-withdraw-from-the-inf-treaty-february-2-2019/> accessed 7 July 2020.

¹²⁹ The reflects the extraordinary events clause of the ABM Treaty, imposing a six-month notice period, see Article XV(2), INF Treaty.

¹³⁰ 'Russia suspends INF Treaty in 'mirror response' to US halting the agreement' (*RT News*, 2 February 2019) <www.rt.com/news/450395-russia-suspends-inf-treaty/>

¹³¹ Secretary of State Pompeo (n 128).

¹³² *ibid.*

¹³³ *ibid.*

that 'Russia caused the INF Treaty to collapse by secretly developing and deploying a treaty-violating missile system which can target Europe's capitals'.¹³⁴ Similar sentiment was expressed by NATO Secretary General Jens Stoltenberg.¹³⁵ Other states, however, questioned the US justification for withdrawal. Russia responded by denying all claims of non-compliance on its part, and instead argued that the US had 'long opted for destroying the INF Treaty so as to remove any restrictions that hindered the build-up of its missile potential'.¹³⁶ China raised similar apprehensions, while further emphasising that the withdrawal represented an expression of US 'unilateralism', and claiming the underlying objective of the US withdrawal was 'to make the treaty no longer binding on itself so that it can unilaterally seek [a] military and strategic edge'.¹³⁷

To some extent, the good faith concerns of both Russia and China were arguably justified when less than three weeks after the termination of the INF Treaty, the US tested a ground-launched cruise missile from San Nicolas Island at a target more located more than 500 km away.¹³⁸ Russia subsequently argued that the speed in which this test was pursued clearly demonstrated the bad faith motives of the US withdrawal and evidence of prior non-compliance with the INF Treaty, particularly as the MK-41 vertical launch system used during the test had previously been deployed in a different configuration in Romania, despite claims by the US that this system lacked the capability to launch offensive ballistic missiles.¹³⁹

Nevertheless, neither of the claims by Russia or China relating to the lawfulness of the grounds put forward by the US, or suspected prior violation of the treaty had any effect on invalidating the withdrawal itself. Instead, both the US and Russia had voiced concerns that China's ICBM arsenal remained unconstrained by the INF Treaty, and suggested drafting a new instrument which would capture the nuclear arsenals of both China and other nuclear powers.¹⁴⁰ In other words, the general willingness to accept, with little challenge, the US

¹³⁴ Dominic Raab @DominicRaab (Twitter, dated 2 August 2019) <<https://twitter.com/DominicRaab/status/1157241494278946816>> accessed 7 July 2020.

¹³⁵ Jens Stoltenberg @jensstoltenberg (Twitter, dated 2 August 2019) <<https://twitter.com/jensstoltenberg/status/1157222972794572800>> accessed 7 July 2020.

¹³⁶ 'Foreign Ministry Statement' (*The Ministry for Foreign Affairs of the Russian Federations*, 2 February 2019) <https://www.mid.ru/en/web/guest/maps/us/-/asset_publisher/unVXBbj4Z6e8/content/id/3495846> accessed 7 July 2020.

¹³⁷ Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference (*Ministry of Foreign Affairs of the Peoples Republic of China*, 2 August 2019) <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1685765.shtml> accessed 7 July 2020 (bracketed text added).

¹³⁸ S Bugos, 'U.S. Completed INF Treaty Withdrawal' (2019) 49(7) *Arms Control Today* 24, 25.

¹³⁹ K Reif and S Bugos, 'Russia, China Criticize U.S. Missile Tests' (2019) 49(8) *Arms Control Today* 18, 18.

¹⁴⁰ As noted by J Galbraith, 'United States Initiates Withdrawal from Intermediate-Range nuclear Forces Treaty' (2019) 113(3) *AJIL* 631, 633.

withdrawal, particularly by Russia, is likely to have occurred because the INF Treaty no longer served its strategic interests also.¹⁴¹

Overall, each instance of withdrawal discussed above simply demonstrates how easily a withdrawing state can satisfy the substantive and procedural requirements imposed within 'extraordinary events' clauses. Moreover, the above cases also reaffirm that the determination as to whether extraordinary events jeopardising the supreme interests of the state exists remains a purely subjective determination. No state, at any stage, sought to challenge this assertion.

Grounds for Iran's possible withdrawal from the NPT

Having determined the nature of the Article X(1) withdrawal clause, and providing examples of its invocation in practice, the following Section seeks to determine whether Iran has comparably sufficient grounds to invoke the Article X(1) withdrawal clause, thus relieving Iran of its aforementioned non-proliferation obligations under Article II.¹⁴² While the right to withdraw under Article X(1) remains a largely subjective exercise,¹⁴³ if Iran can demonstrate unequivocally that clear justifiable events exist which threaten its supreme interests, Iran's exercise of Article X(1) will be subject to less controversy, and may even prove defensible to some extent. Consequently, the following discussion—building upon prior examples discussed in Section 4—intends to analyse whether recent events provide Iran with valid grounds to possibly withdraw from NPT, thus freeing Iran from its treaty-based commitments not to manufacture or otherwise acquire nuclear weapons.¹⁴⁴

The question of Iran's potential grounds for withdrawal has already been discussed previously by Joyner as early as 2012.¹⁴⁵ Iranian officials have previously claimed that Iran has been denied the benefits associated with upholding the 'Grand Bargain' of the NPT, particularly the exchange and benefits of the peaceful application of nuclear energy and materials under Article IV. Like the DPRK, Iran asserted that the IAEA is being used to facilitate the interests of the US in particular, whilst concurrently claiming that the organisation has an underlying bias against Tehran. Despite this, Iran did not express an explicit

¹⁴¹ Arguably a similar case could be raised in this regard in connection with the ABM Treaty.

¹⁴² As discussed in Section 2.

¹⁴³ Section 3 generally.

¹⁴⁴ Notwithstanding the debate as to whether a customary international law norm prohibiting the acquisition of nuclear weapon exists, see (n 16) and accompanying text.

¹⁴⁵ See generally Joyner (n 65); DH Joyner, 'What if Iran Withdraws from the Nuclear Nonproliferation Treaty? Part II: What Would the Legal Implications Be?' (*ESIL Reflections*, 27 December 2012) <<https://esil-sedi.eu/wp-content/uploads/2012/12/ESIL-Reflections-Joyner-II.pdf>> accessed 30 September 2020.

intention to leave the NPT, though the issue was clearly of concern for the international community.¹⁴⁶

Joyner's analysis ultimately came to the conclusion that if Iran sought to withdraw from the NPT, 'it can do so upon its own subjective determination of the criteria of Article X(1), and there should be no basis for other states, or for the U.N. Security Council, to determine that such withdrawal is ineffective on either substantive or procedural grounds'.¹⁴⁷ Moreover, Joyner determines that

the case of the U.S. withdrawal from the ABM treaty in 2002, and its stated reasons for withdrawal in that case, which received acquiescence from Russia, would appear to demonstrate that the reasons Iran could state in its declaration of withdrawal under current circumstances, are at least as compelling and as related to the criteria stipulated in the relevant treaty withdrawal clause, as were those cited by the U.S. in 2002.¹⁴⁸

With this earlier conclusion in mind, the remaining discussion intends to determine if the same conclusion can be reached in light of recent events since May 2018, when the US announced its decision to withdraw from the JCPOA and reimpose both general and targeted sanctions against Iran, until the targeted killing of General Soleimani in January 2020.

A. US withdrawal from the JCPOA and imposition of unilateral sanctions

A first ground for withdrawal could be raised relating to the imposition of coercive unilateral sanctions by the US since its withdrawal from the JCPOA in May 2018. The JCPOA, imposed various constraints on Iran's civilian nuclear energy programme, including restrictions on levels of uranium enrichment up to 3.67% and the number of gas centrifuges permitted for civilian research. The JCPOA further subjected Iran's civilian nuclear programme to the most extensive safeguarding and inspections framework carried out in conjunction with the International Atomic Energy Agency (IAEA).¹⁴⁹ The agreement itself was endorsed by the UNSC under Resolution 2231 which similarly decided to terminate its previously enacted economic sanctions against Tehran.¹⁵⁰

However, although the IAEA continued to regularly verify Iran's compliance with the terms of the JCPOA,¹⁵¹ the US unilaterally terminated its participation

¹⁴⁶ For an overview of concerns relating to Iran's nuclear programme generally, see Joyner (n 12) Chapter 1.

¹⁴⁷ Joyner (n 65) 7.

¹⁴⁸ *ibid* 8.

¹⁴⁹ For a discussion of the restrictions imposed by the JCPOA, see Joyner (n 11) 221–46.

¹⁵⁰ UN SC Res 2231 (2015).

¹⁵¹ Up until May 2019, once Iran announced it would scale back its commitments under the JCPOA, the IAEA had verified that Iran was abiding by the terms of the deal, see 'Verification and monitoring in the Islamic Republic of Iran in light of United Nations

from the agreement in May 2018, and soon after began re-imposing harsh economic sections on vital financial sectors in Iran, particularly on oil exports.¹⁵² In response, Iran has gradually, though under IAEA verification,¹⁵³ been scaling back compliance with the JCPOA limitations, including notably by enriching uranium above 4.5% U-235, the isotope required for nuclear weapons.¹⁵⁴ The most significant reversal occurred on 5 January 2020 following the killing of Soleimani, when Iran announced its intention to no longer abide by the limitations imposed by the JCPOA. The statement explicitly claimed that Iran's civilian nuclear programme 'no longer faces any operational restrictions, including enrichment capacity, percentage of enrichment, amount of enriched material, and research and development',¹⁵⁵ though fell short of withdrawing from the JCPOA altogether.

The US withdrawal from the JCPOA in May 2018, and the subsequent imposition of heavy unilateral sanctions on Iran's crude oil exports affords one valid justification in which Iran may use in explaining its withdrawal from the NPT. The sanctions imposed by the US have taken the form of both general and targeted economic measures against Iran's financial sectors, and political and military leaders.¹⁵⁶ General sanctions embargoes on the export of crude oil from Iran has in turn crippled the value of the Iranian currency causing massive inflation, a return to recession, ultimately resulting in steady rise in living costs, particularly the price of food and other essential items.¹⁵⁷ Iran's economy is forecast to have shrunk overall by 9.5% in 2019 alone, while unemployment was similarly predicted to rise by 16.8% last year.¹⁵⁸ The US has also implemented specific targeted sanction against the financial assets of military and political leaders including, among others, Ayatollah Khamenei, Foreign Minister

Security Council Resolution 2231 (2015)' (IAEA, 31 May 2019) <www.iaea.org/sites/default/files/19/06/gov2019-21.pdf> accessed 7 July 2020.

¹⁵² Joyner (n 1).

¹⁵³ That is, allowing the IAEA to inspect each step taken.

¹⁵⁴ A Taylor, 'What Iran's uranium enrichment actually means' (*The Washington Post*, 8 July 2019) <www.washingtonpost.com/world/2019/07/02/future-iranian-nuclear-deal-could-hinge-one-key-detail/?utm_term=.bfab7bf29aff> accessed 7 July 2020.

¹⁵⁵ 'Iran takes final JCPOA step, removing last limit on nuclear program' (*Mehr News Agency*, 5 January 2020) <<https://en.mehrnews.com/news/154191/Iran-takes-final-JCPOA-step-removing-last-limit-on-nuclear-program>> accessed 7 July 2020.

¹⁵⁶ For counter-proliferation sanctions, see DH Joyner, 'United Nations Counter-Proliferation Sanctions and International Law' in L van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing 2017).

¹⁵⁷ 'Iran, Islamic Republic of; Recent Developments' (*World Bank*, October 2019) <<http://pubdocs.worldbank.org/en/355601570664054605/EN-MPO-OCT19-Iran.pdf>> accessed 7 July 2020.

¹⁵⁸ World Economic Outlook: Global Manufacturing Downturn, Rising Trade Barriers: Annex: Table 1.1.4. 'Middle East and Central Asia Economies: Real GDP, Consumer Prices, Current Account Balance, and Unemployment' (*International Monetary Fund*, October 2019) <www.elibrary.imf.org/doc/IMF081/28248-9781513508214/28248-9781513508214/Other_formats/Source_PDF/28248-9781513516165.pdf> accessed 7 July 2020.

Zarif and Islamic Revolutionary Guard Corps (IRGC) commanders.¹⁵⁹ The combined effect of such economic sanctions will likely contribute towards a potential humanitarian crisis and further domestic protests, all of which may be interpreted as threatening the supreme interests of Iran, though it is perhaps questionable whether such grounds relate to the subject matter of the NPT.

Furthermore, the imposition of unilateral economic sanctions may also constitute evidence of 'economic warfare' by the US against Iran.¹⁶⁰ Although sanctions, if properly implemented, can certainly represent a lawful act of retortions or countermeasures in response to an internationally wrongful act, the legality of the issued sanction will depend upon the circumstances in each specific case.¹⁶¹ While Article 2(4) of the UN Charter does not prohibit economic force, Joyner argues that the principle of non-intervention into 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely'¹⁶² would likely be infringed by economic sanctions which are 'purposed in coercing states to change their behaviour in issue areas in which it is their sovereign right to choose their own policies'.¹⁶³ Finally, the fact that counter-proliferation sanctions may be used in order to bring a violating state back 'into harmony with its legal obligations'¹⁶⁴ seems inapplicable here because Iran, at least at the time in which the US withdrew from the JCPOA and reimposed sanctions in May 2018, initially remained in compliance with both the JCPOA restrictions,¹⁶⁵ and its Article II non-proliferation commitments under the NPT.¹⁶⁶ Instead, Iran could conceivably claim that the re-imposition of economic sanctions by the US violate the principle of non-intervention under customary international law,¹⁶⁷ amounting to a deliberately hostile act threatening Iran's supreme interests and ability to exercise its sovereign right to decide its own internal affairs.¹⁶⁸

¹⁵⁹ K Katzman, 'Iran Sanctions' (*Congressional Research Service*, 15 November 2019) <<https://fas.org/sgp/crs/mideast/RS20871.pdf>> accessed 7 July 2020.

¹⁶⁰ V Lowe and A Tzanakopoulos, 'Economic Warfare' (2013) *Max Planck Encyclopaedia of International Law*.

¹⁶¹ T Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Elgar Publishing 2017).

¹⁶² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [205].

¹⁶³ Joyner (n 156) 116.

¹⁶⁴ As noted above. This possibility may also arise in many other circumstances Joyner *ibid* 118.

¹⁶⁵ Although as noted previously, Iran subsequently began to scale back its compliance since July 2019.

¹⁶⁶ See Section 2 above which reaches this same conclusion. This contrasts with the position of the DPRK which in 2002, whilst still an NPT party, 'confirmed it had a clandestine nuclear program based on uranium fissile material', Liles (n 25) 109.

¹⁶⁷ See M Jamnejad and M Wood, 'The Principle of Non-Intervention' (2009) 22(2) *LJIL* 345.

¹⁶⁸ M Rouhi, 'Will Iran Follow North Korea's Path and Ditch the NPT?' (*Foreign Policy*, 16 March 2020) <<https://foreignpolicy.com/2020/03/16/will-iran-follow-north-korea-path-ditch-npt-nuclear-bomb/>> accessed 30 September 2020.

B US–Iran hostilities throughout 2019

Alongside the US withdrawal from the JCPOA, US–Iranian hostilities and tensions were also on the rise throughout 2019. On 9 April 2019, the US Department of State designated the IRGC a ‘Foreign Terrorist Organisation’ due to its alleged state sponsoring of terrorism across the Middle East.¹⁶⁹ On 5 May 2019, the US began deploying further military assets—including the deployment of the *USS Abraham Lincoln*, and four B-52 bombers capable of delivering nuclear warheads—to the Middle East to send a ‘clear and unmistakable message’ to Iran in response to intelligence reports highlighting threats against US forces and commercial interests in the region.¹⁷⁰ Tensions continued to escalate on 20 June after the IRGC shot down a US unmanned surveillance drone, claiming that the craft had violated Iranian airspace.¹⁷¹ These claims were rejected outright by the US, which subsequently responded by conducting a cyberattack against IRGC computer systems used to control the missile defences which shot down the drone.¹⁷² In July 2019, the USS Boxer reportedly disabled an Iranian unmanned aerial vehicle (UAV) that came within close proximity of the ship. Following this announcement, Iran denied that any of its drones were either missing or had been disabled.¹⁷³

It is relevant to note that Iran has also engaged in tit-for-tat military exchanges with the US, either directly or through one of its proxy forces in the Middle East. For example, July and August 2019 saw the seizure of commercial oil tankers by Iran in the Strait of Hormuz, one of which, the *Stena Impero*, was sailing under a British flag.¹⁷⁴ In September 2019, the Houthi rebels claimed responsibility for drone and possible cruise-missile strike against the

¹⁶⁹ ‘Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organisation’ (*The White House: Statements and Releases*, 8 April 2019) <www.whitehouse.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/> accessed 7 July 2020.

¹⁷⁰ ‘Statement from the National Security Advisory Ambassador John Bolton’ (*The White House: Statements and Releases*, 5 May 2019) <www.whitehouse.gov/briefings-statements/statement-national-security-advisor-ambassador-john-bolton-2/> accessed 7 July 2020.

¹⁷¹ J Kraska, ‘Misunderstanding of International Aviation Law May be Behind Iran’s Shootdown of the U.S. Global Hawk Drone’ (*EJIL: Talk!* 1 July 2019) <www.ejiltalk.org/misunderstanding-of-international-aviation-law-may-be-behind-irans-shootdown-of-the-u-s-global-hawk-drone/> accessed 7 July 2020.

¹⁷² M Schack, ‘Did the US Stay “Well Below the Threshold of War” With its June Cyberattack on Iran?’ (*EJIL: Talk!* 2 September 2019) <www.ejiltalk.org/did-the-us-stay-well-below-the-threshold-of-war-with-its-june-cyberattack-on-iran/> accessed 7 July 2020.

¹⁷³ ‘Iran releases footage it says disproves drone was downed by US’ (*BBC News*, 19 July 2019) <www.bbc.co.uk/news/world-middle-east-49052302> accessed 7 July 2020.

¹⁷⁴ For a brief analysis of the incidents relating to the seizing of commercial ships, see Matthias Hartwig, ‘Tanker Games – The Law Behind the Action’ (*EJIL: Talk!* 20 August 2019) <www.ejiltalk.org/tanker-games-the-law-behind-the-action/#more-17418> accessed 7 July 2020.

Saudi Arabian state-owned Aramco oil processing facilities in Abqaiq and Khurais. Both the US and Saudi Arabia claimed that Iran was culpable for the act, though Iran denied any involvement in the attack.¹⁷⁵

On 27 December, Iranian backed Shi'ite militias were blamed by Secretary Pompeo for an attack on the K-1 Air Base in the Kirkuk Governorate. Just four days later, Iranian back militia stormed the US embassy in Baghdad, although no deaths of US personnel were recorded.¹⁷⁶ However, hostilities escalated severely on 3 January 2020, when President Trump approved the targeted killing of General Qassim Soleimani near Baghdad International Airport, resulting in the death of Soleimani and nine others including Abu Mahdi al-Muhandis, the deputy commander of Iraq's Popular Mobilization Front.¹⁷⁷ Various legal justifications were put forward by the US, including that the attack aimed to disrupt an imminent armed attack, and that the strike was an act of decisive 'defensive actions' to prevent further attacks against US nationals in the region.¹⁷⁸ The President warned soon after that the US would target 52 Iranian significant sites, both military and cultural, should Iran respond aggressively to the killing of Soleimani against US interests in the Middle East, a clear, and alarming threat to engage in illegal actions contrary to International Humanitarian Law principles.¹⁷⁹

When one considers the frequency and scale of the hostile events described previously, including most significantly the targeted killing of perhaps the most high-ranking Iranian Military Official, these incidents, particularly the 3 January would constitute an extraordinary, or at the very least an abnormal or unusual, event which likely jeopardises Iran subjectively determined supreme interests. This becomes even more persuasive given that the DPRK invoked the perceived threats posed by joint military training exercises between the US and South Korea announced as grounds for withdrawal from the NPT in 2003.¹⁸⁰ Consequently, it would seem counterintuitive to suggest that an actual use of force against Iran and its military leaders in violation of Article 2(4) would not constitute an extraordinary event.

¹⁷⁵ ME O'Connell, 'Drone Attacks on Saudi Aramco Oil Installations' (*EJIL: Talk!* 17 September 2019) <www.ejiltalk.org/drone-attacks-on-saudi-aramco-oil-installations/> accessed 7 July 2020.

¹⁷⁶ L Harding, 'Trump accuses Iran over storming of US embassy compound in Baghdad' (*The Guardian*, 31 December 2019) <www.theguardian.com/world/2019/dec/31/us-embassy-stormed-in-baghdad> accessed 7 July 2020.

¹⁷⁷ See notes 3–5 above for a discussion of this event. Callamard (n 3) 22, notes that it is unclear whether civilians were also injured or killed in the attack.

¹⁷⁸ Statement by the Department of Defense (*US Department of Defense*, 2 January 2020) <www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/> accessed 7 July 2020.

¹⁷⁹ M Nevitt, 'Trump's Threat to Target Iranian Cultural Sites: Illegal Under International, Domestic and Military Law' (*Just Security*, 8 January 2020) <www.justsecurity.org/67961/trumps-threat-to-target-iranian-cultural-sites-illegal-under-international-domestic-and-military-law/> accessed 7 July 2020.

¹⁸⁰ See Section 4.A.

Furthermore, and in a sense similarly to the DPRK, Iran could also point to the threats of aggression made by the US which implicitly allude to the potential use of weapons of mass destruction, particularly nuclear weapons, against Iran itself. On 19 May 2019, for example, President Trump stated on Twitter that '[i]f Iran wants to fight, that will be the official end of Iran'.¹⁸¹ This is certainly more vague than President Trump's 'fire and fury' and other threats against the DPRK, including his tweet 'please inform him [Kim Jong-Un] that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!'.¹⁸² Yet, at the same time, suggesting the 'official end of Iran' clearly implies a large-scale use of force. Such threats of vast uses of armed force contrary to Article 2(4) of the UN Charter, and perhaps involving nuclear weapons, would likely amount to threats against the security interests of Iran, which could, as previously noted, be construed as intrinsically linked with subject matter of the NPT, thereby providing legitimate grounds for withdrawal.¹⁸³

C Material breach by the NWS?

Another separate, entirely unrelated justification could be put forward by Iran that each of the NWS under the NPT are in material breach of the obligation to pursue negotiations in good faith towards nuclear disarmament under Article VI. While Article VI itself is silent regarding precisely what measures should be adopted towards the goal of nuclear disarmament,¹⁸⁴ it has been persuasively suggested that the 'Thirteen Practical Steps Towards Disarmament' adopted by consensus during the 2000 NPT Review Conference¹⁸⁵ may constitute either evidence of a subsequent agreement or practice 'between the parties regarding the interpretation of the treaty or the application of its provisions' under Article 31(3)(a) and (b) VCLT,¹⁸⁶ thereby providing further clarification of the meaning of 'effective measures' under Article VI.¹⁸⁷ If this view is accepted,

¹⁸¹ Donald J Trump @realDonaldTrump (Twitter, dated 19 May 2019) <<https://twitter.com/realDonaldTrump/status/1130207891049332737>> accessed 7 July 2020.

¹⁸² Donald J Trump @realDonaldTrump (Twitter, dated 3 January 2018) <<https://twitter.com/realdonaldtrump/status/94835557022420992?lang=ga>> accessed 7 July 2020, account since suspended by Twitter. For a discussion on Twitter statements as threats of force, see Frances Grimal, 'Twitter and the Jus ad Bellum: Threats of Force and Other Implications' (2019) 6(2) *J Use Force Intl Law* 182.

¹⁸³ Section 3.

¹⁸⁴ Shaker (n 13) Vol II, 572.

¹⁸⁵ 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2000/28, New York, 2000, 14–15 (hereafter, Final Document, 2000 NPT Review Conference and '13 Steps').

¹⁸⁶ Art 31(3)(a), VCLT. Although the VCLT does not apply to treaties concluded before to its entry into force, its rules on interpretation are considered to constitute customary international law, see eg *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep. 466, [99].

¹⁸⁷ This has been noted by Joyner (n 12) 59–61; Rietiker (n 17) 63–68; A Pietrobon, 'Nuclear Power's Disarmament Obligation under the Treaty on the Non-Proliferation

then the practical steps agreed upon by NPT parties become useful source for the interpretation of Article VI, amounting to the 'common understanding of all the parties to a treaty, as to the proper interpretation of it'.¹⁸⁸ Having said this, Ford is correct in noting that the '13 Steps' cannot, and should not, be considered as identifying of all the possible steps that may amount to 'effective measures'.¹⁸⁹

Regardless of whether this interpretation of the Final Documents is accepted, the '13 Steps' may nevertheless provide useful a 'yardstick' for the purposes of measuring NWS compliance with Article VI based upon the current implementation of steps.¹⁹⁰ However, when adopting this benchmark, it becomes apparent that insufficient progress has been made towards implementing these identified steps and measures.¹⁹¹ For example, in a 2015 report released by *Reaching Critical Will* which analyses the implementation of the 2010 Final Document 'Action Plan', the organisation determined after analysing the implementation of the 22 nuclear disarmament-related actions that eleven actions saw no progress, six saw limited progress, while only five steps were viewed as progressing forward.¹⁹² In fact, recent modernisation efforts of existing nuclear weapons programmes can further represent an indication of the NWS to retain their nuclear weapons stockpiles for the foreseeable future.¹⁹³

This lack of progress was recently brought to the attention of the International Court of Justice (ICJ) in 2016, where the Marshall Islands

and the Comprehensive Nuclear Test-Ban Treaty: Interactions Between Soft and Hard Law' (2014) 27(1) *Leid J Intl Law* 169, 178–79; M Roscini, 'On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' in I Caraccioli, M Pedrazzi and T V di Dachenhausen (eds), *Nuclear Weapons: Strengthening the International Legal Regime* (Eleven International Publishing 2015) 17. For a contrary assessment, see M Hayashi, 'Non-Proliferation Treaty and Nuclear Disarmament: Article VI of the NPT in Light of the ILC Draft Conclusions on Subsequent Agreements and Practice' (2020) 22(1) *Intl C L Rev* 84.

¹⁸⁸ Pietrobon (n 187) 179.

¹⁸⁹ Having said this, Ford is correct in noting that the '13 Steps' cannot, and should not, be considered as identifying of all the possible steps that may amount to 'effective measures', Ford (n 17) 412.

¹⁹⁰ Joyner (n 18) 412; AJ Grotto, 'Non-Proliferation Treaty (1968)' (2009) *Max Planck Encyclopedia of International Law* [59]. The Sixty-Four Point 'Action Plan' adopted at the 2010 NPT Review Conference may also be helpful in this respect, 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, 2010 NPT Review Conference, NPT.CONF/2010.50, Vol. I, New York, 2010; Conclusions and Recommendations, 19–29, particularly Actions 3–22 concerning nuclear disarmament.

¹⁹¹ See Joyner (n 18) 417; Nystuen and Hugo (n 13) 396; Rietiker (n 17) 64–65; Roscini (n 187) 17.

¹⁹² 'The NPT Action Plan Monitoring Report' (*Reaching Critical Will*, March 2015) <www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT_Action_Plan_2015.pdf> accessed 7 July 2020.

¹⁹³ For an overview of current NWPS modernisation efforts, see Women's International League for Peace and Freedom, 'Assuring Destruction Forever: 2019' (*Reaching Critical Will*, April 2019) <<http://reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever-2019.pdf>> accessed 7 July 2020.

instituted proceedings against the nine nuclear weapons-possessing states for alleged violations of Article VI, and its customary international law equivalent obligation. In the end, only the proceedings against the UK, India and Pakistan proceeded as each of these states recognise the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the ICJ.¹⁹⁴ Although the Court refused to exercise its jurisdiction on the premise that no legal dispute existed between the parties,¹⁹⁵ this further emphasises the belief amongst NNWS that NWS progress towards nuclear disarmament under Article VI has been almost non-existent over the last two decades.

Overall, considering that material breach of obligations was recently raised as a justification for withdrawal by the US in response to Russia's reported violations of the INF Treaty,¹⁹⁶ putting forward an argument claiming a material breach by each of the NWS of their respective nuclear disarmament related obligations under Article VI could remain a viable, persuasive justification for withdrawal for Iran.

Conclusion: should Iran withdraw?

In light of the discussion above, and recalling that the right to withdraw from the NPT under Article X(1) is generally a subjectively determined right, allowing extensive flexibility to the withdrawing state as to whether certain extraordinary events jeopardises its supreme interests, it seems clear that Iran would have few impediments which would prevent it from withdrawing from the NPT should it express an intention to do so. In contrast to the DPRK withdrawal, evidence suggests that Iran is not presently in violation of its non-proliferation obligations under Article II of the NPT,¹⁹⁷ and has in fact been victim of an actual, rather

¹⁹⁴ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK) Preliminary Objections* [2016] ICJ Rep 833; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) Jurisdiction and Admissibility* [2016] ICJ Rep 255; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) Jurisdiction and Admissibility* [2016] ICJ Rep 552.

¹⁹⁵ These cases and the absence of a dispute are discussed by J McIntyre, 'Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court' (2018) 19(2) *Melb J Intl Law* 546; J Black-Branch, 'International Obligations Concerning Disarmament and the Cessation of the Nuclear Arms Race: Justiciability over Justice in the Marshall Islands Cases at the International Court of Justice' (2019) 24(3) *J C & S L* 449.

¹⁹⁶ See Section 4.C.

¹⁹⁷ Though as noted in Section II, Iran has violated its bilateral comprehensive safeguards agreement with the IAEA and certain UNSC Resolutions demanding that Iran ceases its nuclear enrichment programmes. Interestingly, Joyner (n 154) 2, questions whether the DPRK had violated Art II, NPT prior to its withdrawal, claiming instead that like Iran, the only instance of non-compliance would be with its IAEA safeguards.

than threatened, use of force against its UAVs and General Soleimani.¹⁹⁸ Moreover, Iran has suffered from the consequences of the unilateral, coercive economic sanctions imposed by the US since 2018, which undoubtedly seek to disrupt Iran's internal political and economic stability, thus violating Iran's territorial integrity and sovereignty over its internal affairs. Finally, given that Iran's inalienable right to develop nuclear energy for peaceful purposes under Article IV is also curtailed by extensive IAEA monitoring and JCPOA restrictions—more so than another other NPT state party¹⁹⁹—the associated nuclear energy benefits of remaining a party to the NPT may be losing their appeal.

Ultimately, when one compares the prior invocations of the 'extraordinary events' clause examined in Section 4, Iran can clearly point to numerous examples of materialised events that it perceives as jeopardising its supreme interests. As such, should Iran decide to invoke the NPT withdrawal clause under Article X(1), hypothetically speaking, this would therefore constitute a justifiable good faith response to recent US hostility against Iran.²⁰⁰ Yet even if this were not the case, if Iran considers the above circumstances as amounting to extraordinary events that have jeopardised its supreme interests, then in purely legal terms, this subjective assessment would satisfy the rather weak requirements of Article X(1).²⁰¹

As a result, Iran can withdraw from the NPT both legally and relatively easily, and would even seem to have an objectively sound case to do so—even though the objective legitimacy of the grounds for withdraw does not come into the equation.²⁰² This conclusion should serve as a warning to the US, highlighting the necessity of alleviating hostilities and targeted sanctions in order to avoid the possible invocation of Article X(1) by Iran. Indeed, should Iran decide to leave the NPT, this would undoubtedly constitute a significant blow to an already fragile non-proliferation regime.²⁰³ By reducing its hostile rhetoric and acts, and efforts to undermine Iran's economic and civilian nuclear energy ambitions, the US can take immediate steps to reduce the likelihood of this outcome for the benefit of the non-proliferation legal regime, the international community and broader international peace and security, both regionally and globally.

Furthermore, although withdrawal may therefore be legally possible, justifiable to an extent, and potentially appealing, such an act would likely bring

¹⁹⁸ Again, contrasting with the justifications advanced by the DPRK.

¹⁹⁹ According to the 2018 IAEA Safeguards Statement, Iran was subject to 385 of the 421 inspections carried out by the IAEA in all states with an Additional Protocol' in place, 'The Safeguards Implementation Report for 2018', (IAEA, accessed via *Arms Control Law Blog*, 6 May 2019) <https://armscontrollaw.files.wordpress.com/2019/05/sir-2018_6may2019dstr.pdf> accessed 16 October 2019].

²⁰⁰ As discussed in Section 5 above.

²⁰¹ See Section 3.

²⁰² Nevertheless, this would make its justifications more reasonably defensible under a good faith standard.

²⁰³ The frailty of the NPT regime has been noted elsewhere, see eg C Kuppuswamy, 'Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking After the 2005 NPT Review Conference' (2006) 11(1) *J C & S L* 141.

various disadvantages that Iran should consider. A first consideration is that taking the decision to withdraw from the NPT would send an alarming message to the international community, and may imply that the Iranian regime intends to develop a nuclear weapons capability.²⁰⁴ While this is of course not guaranteed, particularly given that the Ayatollah Khomeini has previously issued a religious *fatwa* rejecting nuclear weapons as incompatible with Islam,²⁰⁵ each of the cases of withdrawal discussed in Section 4 demonstrate a common trend; the withdrawing state subsequently proceeded to acquire, or at the very least develop and test the weapon, missile, or defensive system that had previously been subject to restriction. In any case, this possible course of action would create a possible proliferation concern amongst the international community.

As such, should Iran take the decision to withdraw from the NPT, thus giving rise to the above implied intentions, there would logically be an increased probability that the US would escalate its response to Iran's nuclear-related activities, likely in the form of increased economic sanctions against Iranian officials and infrastructure. Most alarmingly for Iran is that when one considers the escalation of hostilities in cumulating with the targeted attack against Soleimani, it may be possible that the US could pursue military measures taking the form a pre-emptive attack against Iranian nuclear facilities. The US may even follow the dubious legal justification put forward during the invasion of Iraq in 2003, that Iran has a hidden weapon of mass destruction (WMD) programme. Although the legality of this specific use of force was widely criticised,²⁰⁶ and the assertion that Iraq had a clandestine WMD programme was ultimately proven to be false,²⁰⁷ this incident nonetheless demonstrates that there is precedent for US-led military action against other states, justified in part under the guise of preventing nuclear weapons proliferation.

As well as the US, there is also the possibility that Israel may seek to take pre-emptive military action to eliminate the perceived threat of nuclear proliferation in Iran.²⁰⁸ This course of action would arguably be unsurprising given that the Israel has previously taken pre-emptive military action in response to

²⁰⁴ As suggested by AM Scheinman, 'What if Iran Leaves the NPT?' (*Bulletin of the Atomic Scientist*, 8 June 2018) <<https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>> accessed 6 October 2020 ('It would likely mean that Iran's Supreme leader had given the green light to an Iranian nuclear weapon').

²⁰⁵ G Porter, 'When the Ayatollah Said No to Nukes' (*Foreign Policy*, 16 October 2014) <<https://foreignpolicy.com/2014/10/16/when-the-ayatollah-said-no-to-nukes/>> accessed 7 July 2020.

²⁰⁶ MC Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction' (2009) 31(1) *Mich J Int'l L* 1; SD Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92(1) *Geo L J* 173.

²⁰⁷ J Borger, 'There were no Weapons of Mass Destruction in Iraq' (*The Guardian*, 7 October 2004) <www.theguardian.com/world/2004/oct/07/usa.iraq1> accessed 6 October 2020.

²⁰⁸ The question of whether Israel could take military action to prevent Iran from acquiring nuclear weapons has been discussed by A Sarvarian, 'The Lawfulness of a Use of Force Upon Nuclear Facilities in Self-Defence' (2014) 1(2) *J Use Force Intl L* 247.

potential nuclear proliferation threats posed by Iraq at its Osiraq nuclear reactor in 1981, and against Syria's Al Kibar reactor in 2007.²⁰⁹ While the legality of using military force to prevent proliferation of weapons of mass destruction is beyond the scope of the present discussion,²¹⁰ it does represent a possible outcome stemming from any Iranian decision to withdraw from the NPT.

A second option could of course be action taken by the UNSC, a situation taken in response to the DPRK's withdrawal from the NPT. It is possible that the UNSC may pursue various forms of action in response to Iran invoking Article X(1). Shaker, for example, in his discussion of Article X(1) has suggested that an act of withdrawal from the NPT could be considered 'a "situation which might lead to international friction" justifying an investigation by the UNSC under Article 34 of the UN Charter' or a threat to peace under Article 39, permitting UNSC-led sanctions under Articles 40, 41 and 42.²¹¹ As such, should Iran withdraw and the UNSC determine a threat to peace to have arisen, this could lead to the re-imposition of pre-JCPOA sanctions, or possibly more strenuous economic sanctions against Iran, which must be enforced by all member states of the UN.²¹² Again, the DPRK withdrawal shows precedent for this course of action.

Furthermore, it remains a possibility that the UNSC could demand Iran to re-join the NPT by adopting a binding Chapter VII Resolution, similar to Resolution 1718 concerning the DPRK. This would prove a controversial, and as already noted may be construed as an *ultra vires* course of action by the UNSC.²¹³ Alternatively, Akande has noted that the UNSC 'would not need to order Iran to rejoin those treaties, [the NPT and IAEA comprehensive safeguards] it could just say that Iran has the same obligations as is contained in those treaties'.²¹⁴ While not every instance of treaty withdrawal would constitute a threat to international peace and security,²¹⁵ given Iran's previous history of failing to declare hidden nuclear activities dating back to the 1980s, and more recent undeclared activities since 2000, it would not be beyond the realm of imagination to envision a possible UNSC response in some form.

²⁰⁹ For a useful discussion of the legality of these instances, see Sarvarian (n 208); A Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence' (2011) 16(2) *J C & S L* 263.

²¹⁰ See generally on the use of force to prevent nuclear weapons proliferation; Waxman (n 206); Sarvarian (n 208); RA Weise, 'How Nuclear Weapons Changed the Doctrine of Self-Defense' (2012) 44(4) *Intl L Politics* 1333; C Gray, 'The Use of Force to Prevent the Proliferation of Nuclear Weapons' (2009) 52(1) *Japan Yrbk Intl L* 101.

²¹¹ Shaker (n 13) Vol II, 896.

²¹² See Art 25, UN Charter, 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

²¹³ Joyner (n 156).

²¹⁴ D Akande, 'Dan Joyner on "What if Iran Withdraws from the Nuclear Non-Proliferation Treaty?"' (*EJIL:Talk!* 9 January 2013) <www.ejiltalk.org/dan-joyner-on-what-if-iran-withdraws-from-the-nuclear-non-proliferation-treaty/comment-page-1/> accessed 30 September 2020 (bracketed text added).

²¹⁵ Roscini (n 56) 4.

Whether the UNSC would be able to reach agreement on any hypothetical Resolution condemning any future Iranian withdrawal and determining appropriate sanctions, or alternatively impose comparable non-proliferation obligations to be enforce under Chapter VII remains to be seen. Indeed, the recent deterioration of relations between the US and its Chinese and Russian counterparts may mean consensus is impossible in the present climate.²¹⁶ On the other hand, it may be that the threat of a nuclear-armed Iran is perceived to be so serious that the P5 states put aside existing differences in order to establish a sufficiently strong counter-proliferation sanction regime with the objective of making Iran reverse its decision to withdraw from the NPT and potentially acquire nuclear weapons.²¹⁷

Perhaps, therefore, a more appropriate path for Iran would be to raise the threat of withdrawal as a form of bargaining chip to try and mitigate the effect of US sanctions. Afrasiabi and Entessar have noted that there has been some suggestion within Iran to hit

the United Nations with a conditional notice of withdrawal from the NPT, stipulating that it will withhold its decision to quit the treaty only if the other signatories to the nuclear agreement [the JCPOA] uphold their commitments. The advantage of such a conditional notice of withdrawal is that, unlike North Korea's exit, Iran's move would not be automatically connected to a pernicious nuclear weapons drive, but rather to Iran's legitimate demand for fair play and the end of Western double standards exacting a heavy toll on Iran's economy and the well-being of its population.²¹⁸

In effect, Iran would be making a bluff, hoping its threat to withdraw will lead to a change in position among the international community, specifically the US. In some respects, this mirrors the approach taken by the DPRK in 1993 when it first announced its intention to withdraw, ultimately resulting in the Agreed Framework which brought certain nuclear energy-related benefits to the DPRK.²¹⁹ Yet while this may seem a desirable and perhaps even feasible option, it is an approach which would undoubtedly be fraught with possible dangers and risks. Indeed, this approach clearly poses a challenge to the legitimacy of the broader non-proliferation legal regime, whereby states are unwittingly invoking withdrawal clauses for political, economic, and even strategic gain.²²⁰ Furthermore, if the US does not agree to end its re-imposition of

²¹⁶ Scheinman (n 204) seems to share this position.

²¹⁷ Rouhi (n 168).

²¹⁸ KL Afrasiabi and N Entessar, 'Iran's impending exit from the NPT: A new nuclear crisis' (*Bulletin of the Atomic Scientists*, 28 January 2020) <<https://thebulletin.org/2020/01/irans-impending-exit-from-the-npt-a-new-nuclear-crisis/>> accessed 30 September 2020.

²¹⁹ Section 4.A.

²²⁰ Afrasiabi and Entessar (n 218).

sanctions, or if the remaining JCPOA parties cannot effectively remedy the offset economic advantaged for Iran from the nuclear deal,²²¹ Iran may be faced with a tough dilemma; it may be forced to either back down on its withdrawal with little gained benefits; or alternatively, Iran may simply decide to play its bluff through and still decide to withdraw from the NPT, thus facing the aforementioned consequences.

As a result, Iran would seem to be stuck between a rock and a hard place; not in terms of whether it can legally withdraw from the NPT under Article X(1), but rather whether the benefits of withdrawal outweigh the potential disadvantages stemming from the international communities possible response. Indeed, none of the aforementioned hypothetical outcomes discussed in Section 6 represent a desirable course for an already economically strained and politically tumultuous Iran, and withdrawal would likely further ostracise Iran from the rest of the international community in a similar vein to the DPRK. Consequently, while withdrawal may *prima facie* seem an attractive and legally possible option, freeing Iran from it's legal restraints under Article II of the NPT to develop a nuclear weapons capability without violating international law, this course of action should not be taken lightly. Fortunately, however, Iran's continuing membership and participation in the NPT process would seems to demonstrate an exercise of restraint, suggesting that the threat of NPT withdrawal, for now at least, does not pose an immediate concern.

²²¹ A situation which has already occurred, whereby Iran has demanded that the EU negotiate a sanctions relief package following the US re-imposition of sanctions since May 2018, see eg P Wintour, 'Iran lists demands for staying in nuclear deal' (*The Guardian*, 25 May 2018) <www.theguardian.com/world/2018/may/25/iran-lists-demands-nuclear-deal-eu-us-sanctions>; V Pietromarchi, 'EU launches mechanism to bypass US sanctions on Iran' (*Al Jazeera*, 31 January 2019) <www.aljazeera.com/news/2019/1/31/eu-launches-mechanism-to-bypass-us-sanctions-on-iran>.