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# BUCKING *CONVENTIONAL* WISDOM: RUSSIA'S UNILATERAL "SUSPENSION" OF THE CFE TREATY

## INTRODUCTION

The Treaty on Conventional Armed Forces in Europe ("CFE Treaty") is a seminal arms control agreement between the member states of the North Atlantic Treaty Organization ("NATO") and the former Warsaw Pact.<sup>1</sup> Signed in Paris on November 19, 1990, and having entered into force on November 9, 1992, the Treaty established the reduction of troop and armament levels throughout Europe based on a system of parity.<sup>2</sup> Frequently described as "the cornerstone of European security," the CFE Treaty facilitated the demobilization of "more than 60,000 battle tanks, armoured combat vehicles, artillery, combat aircraft and attack helicopters."<sup>3</sup> On July 14, 2007, President Vladimir Putin announced that the Russian Federation was unilaterally "suspending" its

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1. See Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 6 (1991), available at [http://www.osce.org/documents/doclib/1990/11/13752\\_en.pdf](http://www.osce.org/documents/doclib/1990/11/13752_en.pdf) (last visited Apr. 17, 2008) [hereinafter CFE Treaty]. NATO, currently with twenty-six member states, is a collective security alliance that was established on April 4, 1949 with the signing of the North Atlantic Treaty. NATO Web site, Frequently Asked Questions, <http://www.nato.int/issues/faq/index.html#A1> (last visited Apr. 12, 2008). The States Parties to the CFE Treaty who are NATO members are: Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States of America. See *supra* CFE Treaty at 1; NATO Web site, NATO Member Countries, <http://www.nato.int/structur/countries.htm> (last visited Apr. 12, 2008). The Warsaw Pact was a competing military alliance that formed on May 14, 1955, and was officially dissolved on July 1, 1991. See generally AN INSIDE HISTORY OF THE WARSAW PACT, 1955–1991: DOCUMENTARY COMPANION TO A CARDBOARD CASTLE? (Vojtech Mastny et al. eds., 2005), available at <http://www.php.isn.ethz.ch/collections/colltopic.cfm?lng=en&id=15697>. The former Warsaw Pact countries who are States Parties to the CFE Treaty were: Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and the Union of Soviet Socialist Republics ("USSR"). See CFE Treaty *supra* at 1; Treaty of Friendship, Cooperation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 3, available at <http://www.yale.edu/lawweb/avalon/intdip/soviet/warsaw.htm>.

2. See U.S. Dep't of State, Bureau of Arms Control, Fact Sheet: Conventional Armed Forces in Europe (CFE) Treaty (June 18, 2002), <http://www.state.gov/t/ac/rls/fs/11243.htm>.

3. Extraordinary Conference of the States Parties to the CFE Treaty, Background, [http://www.osce.org/conferences/cfe\\_2007.html?page=24854](http://www.osce.org/conferences/cfe_2007.html?page=24854) (last visited Apr. 25, 2008) [hereinafter CFE Treaty Background].

participation in the CFE Treaty.<sup>4</sup> Russia's suspension officially went into effect on December 12, 2007.<sup>5</sup>

Russia's decision to suspend its implementation of the CFE Treaty came in the midst of a period of rising tensions in its relations with the West. Ahead of the G8 summit in June 2007, President Putin threatened to aim Russia's missiles at Europe if the United States proceeded with plans to install a missile defense shield in Poland and the Czech Republic.<sup>6</sup> In late July 2007, the United Kingdom expelled four Russian diplomats for Moscow's failure to cooperate in the investigation of the murder of former Russian spy Alexander Litvinenko; three days later, the Russian Foreign Ministry responded in kind, expelling four British diplomats.<sup>7</sup> In August 2007, Russian Air Force bombers resumed long-range sorties over the world's oceans, a Cold War-era practice that had been discontinued in the early 1990s.<sup>8</sup>

Russia's announcement of its "suspension" of CFE Treaty participation is reminiscent of the United States' notification of its withdrawal from the Anti-Ballistic Missile Treaty ("ABM Treaty") in December 2001.<sup>9</sup> The U.S. withdrawal from the ABM Treaty inspired much international legal scholarship.<sup>10</sup> Referring to the highly political—rather than legal—

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4. See President of Russia, Information on the Decree "On Suspending the Russian Federation's Participation in the Treaty on Conventional Armed Forces in Europe and Related International Agreements" (July 14, 2007), <http://kremlin.ru/eng/text/docs/2007/07/137839.shtml> [hereinafter Suspension Announcement].

5. See Statement by Russia's Ministry of Foreign Affairs Regarding Suspension by Russian Federation of Treaty on Conventional Armed Forces in Europe (CFE Treaty) (Dec. 12, 2007), [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/10da6dd509e4d164c32573af004cc4be?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/10da6dd509e4d164c32573af004cc4be?OpenDocument) [hereinafter December Russian MFA Statement].

6. Luke Harding, *The New Cold War: Russia's Missiles to Target Europe*, THE GUARDIAN, June 4, 2007, at 1, available at <http://www.guardian.co.uk/russia/article/0,,2094839,00.html>.

7. Luke Harding, *Putin Hits Back at UK by Expelling Diplomats*, THE GUARDIAN, July 20, 2007, at 1, available at <http://www.guardian.co.uk/russia/article/0,,2130814,00.html>.

8. Andrew E. Kramer, *Recalling Cold War, Russia Resumes Long-Range Sorties*, N.Y. TIMES, Aug. 18, 2007, available at <http://www.nytimes.com/2007/08/18/world/europe/18russia.html>.

9. See U.S. Dep't of St., Off. of the Press Sec'y, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), <http://www.state.gov/t/ac/rls/fs/2001/6848.htm> [hereinafter ABM Withdrawal].

10. See, e.g., Rein Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law*, 50 INT'L & COMP. L.Q. 509 (2001); Emily K. Penney, Comment, *Is That Legal?: The United States' Withdrawal from the Anti-Ballistic Missile Treaty*, 51 CATH. U. L. REV. 1287 (2001-02); Patricia Hewitson,

justification for withdrawal provided by President Bush, one commentator mused that “it is possible that the stated grounds of the U.S. withdrawal [from the ABM Treaty] could be regarded as supplying a precedent for withdrawal by the United States *or other countries* from other arms control treaties containing similar withdrawal clauses.”<sup>11</sup> However, scant attention has been given to the legal implications of Russia’s “suspension.”<sup>12</sup> This is especially surprising given the fact that the CFE Treaty does not contain a “suspension” clause but only a “withdrawal” clause.<sup>13</sup> Russia’s unilateral “suspension” of its obligations under the CFE Treaty, and the validity of Russia’s justifications are legal issues that may be analyzed under the law of treaties.

Part I of this Note provides background on the adaptation of the CFE Treaty, a description of Russia’s “suspension” and a summary of the reactions of NATO members and other parties to the Treaty. Part II analyzes the differences between “withdrawal” and “suspension” in the law of treaties, and Part III closely examines the “Extraordinary Events” clause that appears in the CFE Treaty. Three customary international law grounds for treaty suspension are discussed in Part IV. Finally, Part V considers the legality of Russia’s unilateral “suspension” of its obligations under the CFE Treaty, determining that the act constitutes a material breach under customary international law.

#### I. THE ADAPTED CFE TREATY, RUSSIA’S “SUSPENSION” AND REACTIONS

Following the dissolution of the Warsaw Pact and the enlargement of NATO,<sup>14</sup> the States Parties to the CFE Treaty met in Istanbul and, on November 19, 1999, signed the Agreement on the Adaptation of the CFE Treaty (“CFE Adaptation Agreement”), replacing the anachronistic bloc-based limits of the CFE Treaty with national and territorial ceilings,<sup>15</sup>

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*Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT’L L. 405 (2003).

11. Frederic L. Kirgis, *Proposed Missile Defenses and the ABM Treaty*, *Second Addendum*, ASIL INSIGHTS, Dec. 2001, available at <http://www.asil.org/insights/insigh70.htm#addendum> (emphasis added).

12. *But see* Duncan B. Hollis, *Russia Suspends CFE Treaty Participation*, ASIL INSIGHTS, July 23, 2007, <http://asil.org/insights/2007/07/insights070723.html>.

13. *See* CFE Treaty, *supra* note 1, art. XIX(2).

14. The Czech Republic, Hungary, and Poland—all former Warsaw Pact members—acceded to NATO on March 12, 1999. CNN.com, Poland, Hungary, Czech Republic Joining NATO Today (Mar. 12, 1999), <http://www.cnn.com/WORLD/europe/9903/12/big.nato.01/index.html>.

15. CFE Treaty Background, *supra* note 3. “National ceilings” refers to the maximum amount of defined armaments and equipment that a State Party is allowed to deploy any-

and extending it to former Soviet republics.<sup>16</sup> However, only four signatories have since ratified the CFE Adaptation Agreement: Russia, Ukraine, Belarus, and Kazakhstan.<sup>17</sup>

At the time that the CFE Adaptation Agreement was signed in Istanbul in 1999, the Russian Federation specifically committed to withdrawing its military forces from the Republic of Moldova by the end of 2002, disbanding two of its military bases in Georgia by July 1, 2001, and negotiating the duration of two other Russian bases in Georgia in the year 2000.<sup>18</sup> Russia has not completed the removal of its “peacekeepers” from the Moldovan break-away region of Transdnistria, nor from Russia’s military base at Gudauta, Georgia.<sup>19</sup> NATO states have conditioned ratification upon Russia’s promised but as-of-yet-incomplete withdrawal of ex-Soviet military bases from Georgia and Moldova.<sup>20</sup>

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where in the area of the CFE Treaty’s application; “territorial ceilings” means the total amount of equipment in each category limited by the CFE Treaty that is allowed on the *territory* of a State Party, including equipment owned by any other States Parties. *Id.*

16. Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe, Nov. 19, 1999, available at [http://www.osce.org/documents/doclib/1999/11/13760\\_en.pdf](http://www.osce.org/documents/doclib/1999/11/13760_en.pdf) [hereinafter CFE Adaptation Agreement]. The following former Soviet republics signed the CFE Adaptation Agreement: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Moldova, Ukraine, and Russia. *Id.* at 1. The Czech Republic and the Slovak Republic (formally Czechoslovakia at the time the original CFE Treaty was signed) both signed the CFE Adaptation Agreement. *Id.*

17. Richard Weitz, *Extraordinary Conference Fails to Achieve Agreement on CFE Treaty Dispute*, WORLD POLITICS REVIEW, June 19, 2007, <http://www.worldpoliticsreview.com/article.aspx?id=861>.

18. Final Act of the Conference of the States Parties to the Treaty on Conventional Armed Forces in Europe, 12–13, Nov. 19, 1999, available at [http://www.osce.org/documents/doclib/1999/11/13761\\_en.pdf](http://www.osce.org/documents/doclib/1999/11/13761_en.pdf). The agreements with Moldova and Georgia are commonly referred to as the “Istanbul commitments.” See CFE Treaty Background, *supra* note 3 (referring to Moscow’s “obligations under the Adapted CFE Treaty and what have become known as the Istanbul commitments”).

19. See NATO, Questions and Answers on CFE, 2–3, 5, May 2007, available at [http://www.nato.int/issues/arms\\_control/cfe\\_qa\\_factsheet.pdf](http://www.nato.int/issues/arms_control/cfe_qa_factsheet.pdf).

20. See Richard Weitz, *Georgia and the CFE Saga*, CENTRAL ASIA-CAUCASUS ANALYST, June 27, 2007, available at <http://www.cacianalyst.org/?q=node/4643>. There had been particular controversy over a lingering Russian military presence at Gudauta, Georgia, which the Russian Federation insists fulfills merely support functions for its “peacekeeping force in Abkhazia.” *Id.* However, a North Atlantic Council statement released ahead of the NATO summit in Bucharest in April 2008 suggested that NATO states had softened their stance. See Press Release, NATO, NAC Statement on CFE (Mar. 28, 2008), available at <http://www.nato.int/docu/pr/2008/p08-047e.html> [hereinafter March 2008 NAC Statement] (pledging to “move forward on ratification of the Adapted CFE Treaty in parallel with implementation of specific, agreed steps by the Russian Federation to resolve outstanding issues related to Russian forces/facilities in the Republic of Moldova and Georgia”) (emphasis added). Russia, however, seems not to have viewed

In his annual address to the Russian Parliament on April 26, 2007, President Putin warned of “a moratorium on [Russia’s] observance of [the CFE] treaty until such time as all NATO members without exception ratify it and start strictly observing its provisions, as Russia has been doing so far on a unilateral basis.”<sup>21</sup> Approximately one month later, the Russian Federation formally requested the Depository of the CFE Treaty (the Netherlands) to convene an “Extraordinary Conference of the States Parties.”<sup>22</sup> Article XXI of the CFE Treaty provides that such a conference will be convened if a party “considers that exceptional circumstances relating to this Treaty have arisen[.]”<sup>23</sup> In a press release, the Russian Ministry of Foreign Affairs (“Russian MFA”) pointed to “the serious problems that have arisen with the NATO nations’ implementation of the Treaty as a result of its enlargement and NATO foot-dragging on ratification of the [CFE Adaptation Agreement], signed in 1999.”<sup>24</sup> A NATO document circulated in May 2007 asserted that “no provision in the Treaty . . . would allow for a unilateral moratorium on implementation of the Treaty” and that such a move “would constitute direct violation of the Treaty.”<sup>25</sup>

The Extraordinary Conference, held in Vienna on June 12–15, 2007, failed to produce any agreement on ratification: NATO members steadfastly declined to ratify the CFE Adaptation Agreement until Russia completed the withdrawal of its military forces from Moldova and Georgia (both of whom agreed with NATO), while Russia criticized the “artificial” linking of treaty ratification with Russia’s Istanbul commit-

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this softening of rhetoric as a genuine concession, describing NATO’s continued reference to ‘Russian forces/facilities in the Republic of Moldova and Georgia’ as positions “that actually hinder exit from the current situation surrounding CFE” because Russia has already implemented its Istanbul commitments. See Press Release, Russian MFA Information and Press Department Commentary on NATO’s Statement on Treaty on Conventional Armed Forces in Europe (CFE) (Apr. 1, 2008), *available at* [http://www.in.mid.ru/brp\\_4.nsf/f68cd37b84711611c3256f6d00541094/7ab167be6f20e0cdc325741f002dbe48?OpenDocument](http://www.in.mid.ru/brp_4.nsf/f68cd37b84711611c3256f6d00541094/7ab167be6f20e0cdc325741f002dbe48?OpenDocument).

21. Vladimir Putin, President of the Russian Federation, Annual Address to the Federal Assembly (Apr. 26, 2007), *available at* [http://www.kremlin.ru/eng/speeches/2007/04/26/1209\\_type70029type82912\\_125670.shtml](http://www.kremlin.ru/eng/speeches/2007/04/26/1209_type70029type82912_125670.shtml).

22. Press Release, Ministry of Foreign Affairs of the Russian Federation, Convening an Extraordinary Conference to Discuss CFE Treaty (May 28, 2007), *available at* [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/2e0b88fe13533efbc32572ea00419155?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/2e0b88fe13533efbc32572ea00419155?OpenDocument) [hereinafter Russian MFA Extraordinary Conference Request].

23. CFE Treaty, *supra* note 1, art. XXI(2).

24. Russian MFA Extraordinary Conference Request, *supra* note 22.

25. Questions and Answers on CFE, *supra* note 19, at 3.

ments.<sup>26</sup> The head of the Russian delegation, Anatoly Antonov, said after the conference that his government “would ‘carefully analyze and ponder’ the stalemate[,] . . . warn[ing], however, that Russia might have to suspend its implementation if the CFE remained unaltered for another year.”<sup>27</sup>

Russia acted much more expeditiously. On July 14, 2007, President Putin issued an official decree declaring that “[e]xceptional circumstances surrounding the CFE Treaty have led the Russian Federation to consider suspending its participation in the Treaty until NATO members ratify the Adapted Treaty and begin to implement the document in good faith.”<sup>28</sup> Putin’s announcement did not formally invoke article XIX (the “Extraordinary Events” clause) of the CFE Treaty, but he did offer the following six “exceptional circumstances that affect the security of the Russian Federation” in support of Russia’s decision to “suspend” the CFE Treaty:

1. The failure of Bulgaria, Hungary, Poland, Romania, Slovakia and the Czech Republic to make the necessary changes in the composition of group of states party to the Treaty on the accession of these countries to NATO;
2. The excessive parties to the CFE Treaty that belong to NATO, and the exclusive group that formed among CFE Treaty members as a result of the widening of the alliance;
3. The negative impact of the planned deployment of America’s conventional forces in Bulgaria and Romania because of this exclusive group mentality;
4. The failure of a number of parties of the CFE Treaty to comply with the political obligations contained in the Istanbul Agreements relating to the early ratification of the Adapted Treaty;

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26. Weitz, *supra* note 17.

27. *Id.*

28. Suspension Announcement, *supra* note 4. The announcement stated that “[t]he operation of the [CFE] Treaty will be suspended in 150 days as of the date of Russia’s notifying the depositary and other member states of its decision.” *Id.* This notice period appears to derive from CFE Treaty article XIX(2), which requires that “[a] State Party intending to withdraw shall give notice of its decision to do so to the Depository and to all other States Parties [and that] [s]uch notice shall be given at least 150 days prior to the intended withdrawal from this Treaty.” CFE Treaty, *supra* note 1, art. XIX(2); *see also* Hollis, *supra* note 12 (pointing out that Russia’s “150 day notice period matches that required for withdrawal under CFE Article XIX(2)”).

5. The failure of Hungary, Poland, Slovakia and the Czech Republic to comply with commitments accepted in Istanbul to adjust their territorial ceilings;

6. Estonia, Latvia and Lithuania's failure to participate in the CFE Treaty has adverse effects on Russia's ability to implement its political commitments to military containment in the northwestern part of the Russian Federation. Estonia, Latvia and Lithuania's actions result in a territory in which there are no restrictions on the deployment of conventional forces, including other countries' forces.<sup>29</sup>

The statement indicated that the suspension is "in conformity with international law" and that "in case of necessity, immediate action to suspend the CFE Treaty can be taken by the President of the Russian Federation."<sup>30</sup>

The Russian MFA released a statement elaborating on President Putin's decree.<sup>31</sup> The MFA confirmed that it conveyed formal notification of Russia's suspension to the "depositories [sic] and other states parties to the CFE Treaty" on July 14, 2007.<sup>32</sup> The statement also intimated the practical effects of the suspension on the Russian Federation's obligations under the CFE Treaty:

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29. Suspension Announcement, *supra* note 4. The CFE Treaty provides that the required notice "shall include a statement of the extraordinary events the State Party regards as having jeopardized its supreme interests." CFE Treaty, *supra* note 1, art. XIX(2).

30. Suspension Announcement, *supra* note 4. Article 37(4) of the 1995 Federal Law of the Russian Federation on International Treaties of the Russian Federation provides:

The operation of an international treaty of the Russian Federation, the decision concerning consent to the bindingness of which for the Russian Federation was adopted in the form of a Federal Law, may be *suspended* by the President of the Russian Federation in instances requiring the taking of urgent measures, with the obligatory immediate informing of the Soviet of the Federation and the State Duma and the submission to the State Duma of a draft respective Federal Law.

WILLIAM E. BUTLER, THE LAW OF TREATIES IN RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES 190 (2002) (emphasis added).

31. Press Release, Ministry of Foreign Affairs of the Russian Federation, Statement by the Ministry of Foreign Affairs of the Russian Federation (July 14, 2007) [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcb3/95413db612370d01c325731a0030e1b5?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcb3/95413db612370d01c325731a0030e1b5?OpenDocument) [hereinafter July MFA Statement]. The July MFA Statement is dated July 14, 2007, but is filed on the MFA Web site under July 16, 2007. See Documents and Materials of the Russian MFA, [http://www.mid.ru/brp\\_4.nsf/english?OpenView&Start=2.404](http://www.mid.ru/brp_4.nsf/english?OpenView&Start=2.404) (last visited Apr. 25, 2008).

32. *Id.* The CFE Treaty designates "the Government of the Kingdom of Netherlands" as the Depository. CFE Treaty, *supra* note 1, art. XXII(1).



[I]n particular, providing information and receiving and conducting inspections will be temporarily suspended. Russia during the suspension will not be bound by any limits on conventional arms. But the real quantities of Russian military equipment will depend on the evolution of the military-political situation, particularly on the readiness of the other states parties to the CFE Treaty to show adequate restraint. . . . The Russian moratorium does not mean that we are shutting the door to further dialogue. In case of the solution of the questions raised by us it will be possible to quickly ensure the collective fulfillment of the Treaty's provisions.<sup>33</sup>

Notwithstanding the ostensibly equivocal language in Putin's decree that Russia was "considering" a suspension, NATO responded as follows in a statement on July 16, 2007:

The announcement by the Russian Federation issued on the 14th of July 2007 to suspend as of the 12th of December 2007 its participation in the work of this landmark Treaty, including its flank regime and associated documents is deeply disappointing. The Allies are very concerned by this unilateral decision.<sup>34</sup>

NATO Spokesman James Appathurai described Russia's move as "a step in the wrong direction."<sup>35</sup> The U.S. Department of State echoed these sentiments.<sup>36</sup> Even Ukraine, which has ratified the CFE Adaptation

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33. July MFA Statement, *supra* note 31. Two months after the suspension announcement, a Russian general informed the State Duma (the lower chamber of Russia's Parliament) that "Russia will not scale up armaments for the duration of a moratorium" on the CFE Treaty. *Russia Promises Not to Build Up Arms During CFE Moratorium*, RIA NOVOSTI, Sept. 19, 2007, available at <http://en.rian.ru/world/20070919/79524231.html>.

34. Press Release, NATO, NATO Response to Russian Announcement of Intent to Suspend Obligations Under the CFE Treaty (July 16, 2007), available at <http://www.nato.int/docu/pr/2007/p07-085e.html>. NATO's indication that Russia's "suspension" would go into effect on December 12, 2007 (a date that did not appear in President Putin's announcement) suggests that NATO regarded Putin's announcement as the official beginning of the 150-day notice period required in article XIX(2) of the CFE Treaty. See Hollis, *supra* note 12, at n.7.

35. Slobodan Lekic, *Suspension of CFE Treaty is a 'Step in the Wrong Direction,' NATO Says*, July 16, 2007, THE INDEPENDENT, available at <http://news.independent.co.uk/europe/article2773165.ece>.

36. See Press Release, U.S. Dep't of State, Russian Announcement of Intention to Suspend Implementation of Conventional Armed Forces in Europe Treaty (July 14, 2007), available at <http://www.state.gov/r/pa/prs/ps/2007/88417.htm> ("The United States is disappointed by the Russian announcement of its intention to suspend implementation of the Conventional Armed Forces in Europe (CFE) Treaty.").

Agreement, expressed alarm at Russia's suspension.<sup>37</sup> Although some have questioned the legal basis for Russia's "suspension,"<sup>38</sup> thus far no State Party to the CFE Treaty has challenged the legality of Russia's move.<sup>39</sup>

## II. WITHDRAWAL VS. SUSPENSION

Russia's pronouncements have consistently warned of a "suspension" or a "moratorium," but never of a "withdrawal." However, the CFE Treaty provides only for the latter.<sup>40</sup> These terms, and the mechanisms they represent, are not interchangeable.<sup>41</sup> The Vienna Convention on the

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37. Press Release, Statement of the Ministry of Foreign Affairs of Ukraine in Connection with Declaration of the Russian Federation of Implementation Suspension of the Conventional Armed Forces in Europe Treaty, July 19, 2007, available at <http://www.mfa.gov.ua/mfa/en/publication/content/12547.htm> [hereinafter Ukraine MFA Statement] ("Suspension of the CFE Treaty may be an impact for restoration of the atmosphere of distrust and have negative consequences for the European security system.").

38. See Hollis, *supra* note 12; Vladimir Socor, *Russia Would Re-Write or Kill CFE Treaty*, EURASIA DAILY MONITOR, July 18, 2007, [http://www.jamestown.org/edm/article.php?article\\_id=2372298](http://www.jamestown.org/edm/article.php?article_id=2372298) (asserting that "Russia is placing itself in violation of the treaty in a legal sense and would be violating it in practical terms as well if it proceeds with the unilateral moratorium on compliance with the treaty's terms"); see also Yuri Zakharovich, *Why Putin Pulled Out of a Key Treaty*, TIME.COM, July 14, 2007, <http://www.time.com/time/world/article/0,8599,1643566,00.html> ("[A]s no provision for a unilateral moratorium was built into the CFE treaty, Russia's action amounts to non-compliance, strictly speaking.").

39. Neither NATO nor its member states have assailed the legality of Russia's suspension, despite NATO's claim in a May 2007 report that "[s]uspension of implementation of [CFE] Treaty obligations would constitute a direct violation of the Treaty." Questions and Answers on CFE, *supra* note 19, at 3.

40. See CFE Treaty, *supra* note 1, art. XIX(2). This provision reads:

Each State Party shall, in exercising its national sovereignty, have the right to *withdraw* from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. A State Party intending to withdraw shall give notice of its decision to do so to the Depository and to all other States Parties. Such notice shall be given at least 150 days prior to the intended withdrawal from this Treaty. It shall include a statement of the extraordinary events the State Party regards as having jeopardized its supreme interests.

*Id.* (emphasis added).

41. See Hollis, *supra* note 12 ("[The Vienna Convention on the Law of Treaties] carefully separates the rights of suspension and termination, without any indication of interchangeability or hierarchy.").

Law of Treaties<sup>42</sup> (“VCLT”), which “codified . . . the customary rules on the law of treaties,”<sup>43</sup> provides for “[t]ermination of or withdrawal from a treaty” in article 54, a separate provision from the suspension provision found in article 57.<sup>44</sup> VCLT article 70(2) provides that a withdrawal “releases the [withdrawing party] from any obligation further to perform the treaty,” while article 72(1)(a) provides that a suspension “releases the [suspending party] from the obligation to perform the treaty . . . *during the period of the suspension.*”<sup>45</sup> Presumably, “the treaty cannot bind the *withdrawing* state again unless it goes through a new procedure to express its consent to be bound,” whereas in a suspension “the treaty’s operation can be resumed and the parties continue to have a treaty relationship during the *suspension period.*”<sup>46</sup>

Because withdrawal is a more drastic and permanent method of exiting a treaty than is suspension, one construction regards suspension as a “lesser, included power within the power to . . . withdraw from a treaty.”<sup>47</sup> It would seem that “if the law of treaties seeks to preserve the stability of international commitments, it makes sense to always allow suspension in lieu of withdrawal or termination since the former will cause less injury to a treaty’s stability.”<sup>48</sup> VCLT article 62(3) appears to support this view by providing that “[i]f . . . a party may invoke a fundamental change of circumstances as a ground for *terminating or withdrawing* from a treaty it may also invoke the change as a ground for *suspending* the operation of the treaty.”<sup>49</sup> However, this is the only VCLT

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42. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT is widely considered to be the authoritative codification of the customary law of treaties, as well as a “progressive development” of it. *See, e.g.*, IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 26 (1973). The USSR, and by extension, the Russian Federation as the USSR’s state successor, acceded to the VCLT on April 29, 1986. Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection: Vienna Convention on the Law of Treaties, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/englishinternetbible/partI/chapterXXIII/treaty1.asp> (last visited Apr. 25, 2008).

43. *See* J.F. O’CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 108 (1991).

44. VCLT, *supra* note 42, arts. 54, 57; *see also* Hollis, *supra* note 12 (“[T]he fact that these rights come in two separate provisions militates against reading the powers as interchangeable; i.e., an express right to terminate only authorizes termination, not suspension.”).

45. VCLT, *supra* note 42, arts. 70(2), 72 (emphasis added).

46. Hollis, *supra* note 12 (emphasis added).

47. *Id.*

48. *Id.* (citing PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* ¶ 237–38 (J. Mico and P. Haggemacher trans., 1989)).

49. VCLT, *supra* note 42, art. 62(3) (emphasis added). The validity of Russia’s suspension under VCLT article 62 will be considered *infra* text accompanying notes 188–91.

provision that seems to treat suspension as a derivative right of the right of withdrawal. This is likely because article 62 represents an “extremely narrow and restrictive” codification of the doctrine of *rebus sic stantibus*, now called “fundamental change of circumstances,” which has proved daunting for any state to invoke successfully.<sup>50</sup> Thus, the VCLT’s general approach is to regard suspension as a distinct right under the law of treaties.<sup>51</sup>

International lawyers who negotiate treaties “use denunciation and withdrawal clauses to promote ratification and reduce uncertainty about the future.”<sup>52</sup> Withdrawal clauses are attractive to states considering ratification of a treaty because they allay a state’s fear that it will be indefinitely bound by a treaty at the expense of its national interests.<sup>53</sup> An empirical survey of treaty exit provisions identified six common variations of denunciation and withdrawal clauses, but did not indicate that any exit clauses provided for suspension in lieu of or in addition to withdrawal.<sup>54</sup> These findings suggest that treaty drafters over the years have not viewed a right to suspension as having the same risk-management appeal as does the right to unilateral withdrawal; otherwise, “suspension” clauses would be included in a substantial number of treaties. Moreover, nearly all Cold War arms control treaties have included the “Extraordinary Events” clause that provides for withdrawal,<sup>55</sup> but not for suspension.

Especially where the suspending party does not place temporal limits on the suspension period, or establish firm conditions under which it will resume compliance with the treaty, suspension may damage a treaty’s stability at least as much as, if not more than, withdrawal. When a state party formally withdraws from a treaty, other states parties can continue to implement the treaty with the knowledge that they no longer owe legal

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50. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1643 (2005); see also Hollis, *supra* note 12. For additional discussion of VCLT article 62, see *infra* text accompanying notes 108–18.

51. Article 59 is illustrative of the VCLT’s distinct treatment of suspension. Paragraph 1 of article 59 addresses termination of a treaty implied by conclusion of a later treaty, but paragraph 2 provides that “[t]he earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.” VCLT, *supra* note 42, art. 59.

52. Helfer, *supra* note 50, at 1647.

53. See *id.* at 1633.

54. See *id.* at 1597.

55. See Cindy A. Cohn, Note, *Interpreting the Withdrawal Clause in Arms Control Treaties*, 10 MICH. J. INT’L L. 849, 851 (1989). The language of the prototypical “Extraordinary Events” clause is virtually identical to that in article XIX(2) of the CFE Treaty, which is reproduced *supra* note 40.

obligations under the treaty to the withdrawing state.<sup>56</sup> However, when a state unilaterally suspends a treaty, it is unclear to other state parties whether the suspending party will ultimately resume implementation of the treaty or maintain its suspension indefinitely.<sup>57</sup> Whereas the VCLT includes a separate article setting forth conditions under which a party can *withdraw* from a treaty that contains no provision for termination or withdrawal,<sup>58</sup> the VCLT does not provide for unilateral *suspension* unless it conforms with the treaty's provisions or is consented to by all the parties.<sup>59</sup> Thus, the VCLT implicitly acknowledges that unilateral suspension is potentially more volatile than unilateral withdrawal.

### III. THE "EXTRAORDINARY EVENTS" CLAUSE

Analytically distinct from the parsing of withdrawal and suspension rights under customary international law is the issue of justification: on what grounds may a state party withdraw from a treaty? Whereas most withdrawal clauses analyzed in three editions of a United Nations ("U.N.") handbook "do not require a state to provide any justification for its decision to quit a treaty," arms control treaties generally require a state to provide to the other states parties advance notice that includes an explanation of its reasons for withdrawal.<sup>60</sup> Even if a treaty does not contain a withdrawal clause, VCLT article 65 provides that "notification shall indicate the measure proposed to be taken [i.e., withdrawal or suspension] and the reasons therefore."<sup>61</sup>

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56. See VCLT, *supra* note 42, art. 70. Withdrawal "releases the parties from any obligation further to perform the treaty." *Id.* art. 70(a).

57. Cf. Craig Dunkerley, Address at the Carnegie Moscow Center, The Politics of CFE—One American Perspective, (Nov. 16, 2007), at 18, *available at* <http://www.carnegie.ru/en/pubs/media/1074411%2016%2007%20Dunkerley%20CFE%20Speaking%20Notes.pdf> ("I am not predicting that any particular set of hard and fast events would inevitably follow from a mid-December Russian suspension of their CFE compliance but precisely the contrary: greater uncertainty."). The VCLT seeks to mitigate the uncertainty surrounding the suspending party's ultimate intentions by providing that "the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty" during the suspension period. See VCLT, *supra* note 42, art. 72(2).

58. VCLT, *supra* note 42, art. 56 (providing for denunciation or withdrawal if "it is established that the parties intended to admit the possibility of denunciation or withdrawal" or if "a right of denunciation or withdrawal may be implied by the nature of the treaty" so long as a party "give[s] not less than twelve months' notice of its intention to denounce or withdraw").

59. See *id.* art. 57.

60. Helfer, *supra* note 50, at 1598.

61. VCLT, *supra* note 42, art. 65(1). It has been suggested that VCLT article 65 is not addressed to states parties withdrawing from or suspending compliance with a treaty that expressly provides for withdrawal or suspension. See Antonio F. Perez, *Survival of Rights*

Since 1963, “all bilateral arms agreements between the U.S. and the Soviet Union [footnote omitted] and almost all multilateral arms treaties” have included the “Extraordinary Events” clause.<sup>62</sup> The Clause<sup>63</sup> refers to the withdrawing state’s “national sovereignty” and “supreme interests,” but narrowly circumscribes the clause’s scope in that a state can only withdraw in response to “extraordinary events, related to the subject matter of this Treaty.”<sup>64</sup> No tribunal has formally defined or interpreted this clause under international law.<sup>65</sup> In fact, it has been fully exercised by a withdrawing state party on only two prior occasions: by North Korea when it announced its withdrawal from the Nuclear Non-Proliferation Treaty (“NPT”) in 2003<sup>66</sup> and by the United States when it gave notice of its withdrawal from the ABM Treaty in 2001.<sup>67</sup>

The clause first appeared in article IV of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, Outer Space and Underwater<sup>68</sup> (also known as the “Partial Test Ban Treaty,” or “PTBT”). In negotiating the PTBT, the United States and the USSR contemplated three primary grounds justifying withdrawal under the “Extraordinary Events” clause: (1) breach of the treaty by a State Party, (2) nuclear tests by a state not party to the treaty that might jeopardize the national security of the withdrawing party, and (3) nuclear explosions conducted by an unknown actor that would have violated the treaty or jeopardized the withdrawing party’s national security were the actor to be identified as either a State Party or a state not party to the treaty.<sup>69</sup> Although the clause’s wording

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*Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT’L. L. 749, 779 n.89 (1994) (asserting that “[t]he domain of article 65 must . . . be those treaties which are silent on the subject” of treaty exit).

62. Cohn, *supra* note 55, at 851.

63. The text of the “Extraordinary Events” clause in the CFE Treaty is reproduced *supra* note 40.

64. See Cohn, *supra* note 55, at 854.

65. See Penney, *supra* note 10, at 1301 (citing Cohn, *supra* note 55, at 855).

66. See *Statement of DPRK Government on its Withdrawal from NPT*, Korean Central News Agency of DPRK, Jan. 10, 2003, available at <http://www.kcna.co.jp/item/2003/200301/news01/11.htm> [hereinafter *DPRK Statement*].

67. See Kirgis, *supra* note 11.

68. Cohn, *supra* note 55, at 851.

69. 2 MOHAMED I. SHAKER, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959–1979*, at 887–88 (1980). To the extent that analyses of the withdrawal clause in the NPT include a discussion of the negotiating history of the original “Extraordinary Events” clause in the PTBT, such background information is helpful in interpreting the scope of the same clause in the CFE Treaty. *Cf. id.* at 885 (“Since [the withdrawal] right has been previously affirmed in the Partial Test-Ban Treaty, it would be

seemed to leave “judgements on the existence of the extraordinary events completely to the discretion of the withdrawing state,”<sup>70</sup> in testimony before the Senate Foreign Relations Committee in 1963, then U.S. Secretary of State Dean Rusk expressed his view that “a country could not withdraw for simply frivolous or unrelated matters as a matter of whim and still pretend that it is legal within the treaty to do so.”<sup>71</sup> Although Rusk’s statement suggests that certain reasons for withdrawal are not covered under the “Extraordinary Events” clause, neither the PTBT nor the CFE Treaty includes a provision for resolving a dispute between States Parties about the validity of a withdrawal under the clause.<sup>72</sup>

The paragraph that follows the withdrawal clause in the CFE Treaty spells out one circumstance where the right to withdraw is guaranteed: if a State Party attempts to circumvent the treaty by amassing conventional weapons holdings beyond the treaty’s scope, thereby threatening the balance of forces.<sup>73</sup> A U.S. Department of Defense analysis explains that

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quite relevant here [with regard to the NPT] to trace back its origins in the negotiating history of the latter.”)

70. JENNY NIELSEN & JOHN SIMPSON, MOUNTBATTEN CTR. FOR INT’L STUD., *THE NPT WITHDRAWAL CLAUSE AND ITS NEGOTIATING HISTORY* 4 (2004), [http://www.mcis.soton.ac.uk/Site\\_Files/pdf/withdrawal\\_clause\\_NPT\\_nielsen&simpson\\_2004.pdf](http://www.mcis.soton.ac.uk/Site_Files/pdf/withdrawal_clause_NPT_nielsen&simpson_2004.pdf).

71. Cohn, *supra* note 55, at 851–52 (quoting *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater: Hearings Before the S. Comm. on Foreign Relations*, 88th Cong. 50 (1963) (statement of Dean Rusk, U.S. Sec’y of State)).

72. A provision of the CFE Treaty does require the Depository to “convene a conference of the States Parties which shall open no later than 21 days after receipt of the notice of withdrawal in order to consider questions relating to the withdrawal from this Treaty.” CFE Treaty, *supra* note 1, art. XXI(4). However, such a conference cannot be regarded as an adjudicative mechanism; it is simply an opportunity for multilateral negotiations. Somewhat in contrast is the withdrawal clause in the NPT Treaty, which, while otherwise identical to that in the CFE Treaty (except for a three months’ notice period instead of 150 days), requires that the withdrawing party also provide notice to the United Nations (“U.N.”) Security Council. *See Treaty on the Non-Proliferation of Nuclear Weapons*, art. X(1), *opened for signature* July 1, 1968, 21 U.S.T. 483, 493, 721 U.N.T.S. 161, 175 (entered into force Mar. 5, 1970) [hereinafter NPT Treaty].

If the [Security] Council then found that the withdrawal might foreshadow [a ‘threat to the peace’ under UN Charter Articles 24, 39 and 41–42], it would have authority to take action to delay or prevent withdrawal, or to require other action by the withdrawing party to keep the peace before it would have permission to withdraw.

George Bunn & Roland Timerbaev, *The Right to Withdraw from the Nuclear Non-Proliferation Treaty (NPT): The Views of Two NPT Negotiators*, 10 YADERNY KONTROL [NUCLEAR CONTROL] DIGEST 20, 25 (2005), *available at* [http://iisdb.stanford.edu/pubs/21011/Bunn\\_Timerbaev.pdf](http://iisdb.stanford.edu/pubs/21011/Bunn_Timerbaev.pdf).

73. CFE Treaty, *supra* note 1, art. XIX(3). The paragraph provides:

this provision was included to deter the Soviet Union from stockpiling armaments and equipment just east of the Ural Mountains, which would be outside the CFE Treaty's area of application, and from building up conventional armaments not limited by the treaty, such as armored combat vehicles controlled by paramilitary groups.<sup>74</sup> This provision demonstrates that the phrase "subject matter of this Treaty" in article XIX(2)<sup>75</sup> is a relatively flexible concept that provides the right to withdraw even in the absence of a party's breach of its explicit treaty obligations.

The question of the scope of the CFE Treaty's withdrawal clause was broached several times during U.S. Senate ratification hearings in 1991. In response to a question by Senator Biden about whether the United States would withdraw in the event that the USSR breached a "political pledge" to neutralize equipment east of the Urals, then Secretary of State James Baker III replied that "we have withdrawal rights that are perhaps a bit broader than just for reasons of circumvention of the treaty" and affirmed that "[w]e would have the right [to withdraw] under our national security withdrawal rights."<sup>76</sup> In a written response to a similar line of questioning by Senator Lugar, Secretary Baker stated that "violation of the statement alone would give rise to a compliance issue in the Joint Consultative Group and it could, depending in [sic] its seriousness, create a right of withdrawal from the treaty under article XIX."<sup>77</sup> Another area

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Each State Party shall, in particular, in exercising its national sovereignty, have the right to withdraw from this Treaty if another State Party increases its holdings in battle tanks, armoured combat vehicles, artillery, combat aircraft or attack helicopters, as defined in Article II, which are outside the scope of the limitations of this Treaty, in such proportions as to pose an obvious threat to the balance of forces within the area of application.

*Id.*

74. U.S. Dep't of Defense., Off. of the Under Sec'y for Acquisition, Technology, and Logistics, Treaty Compliance, CFE Treaty: Article-by-Article Analysis—Article XIX, <http://www.dod.mil/acq/acic/treaties/cfe/artbyart/analysis19.htm> (last visited Apr. 26, 2008) [hereinafter DOD Analysis].

75. CFE Treaty, *supra* note 1, art. XIX(2).

76. *Treaty on Conventional Armed Forces in Europe: Hearing Before the Subcomm. on European Affairs of the S. Comm. on Foreign Relations*, 102nd Cong. 887 (1991) (statement of James Baker III, U.S. Sec'y of State), available at <http://www.dod.mil/acq/acic/treaties/cfe/congress/rattest2.htm> [hereinafter *Baker Testimony*].

77. *Id.* The Joint Consultative Group, established in article XVI of the CFE Treaty and governed by procedures set forth in the Protocol on the Joint Consultative Group, is charged with, inter alia, "address[ing] questions relating to compliance with or possible circumvention of the provisions of this Treaty" and "consider[ing] matters of dispute



of inquiry concerned the U.S. right to withdraw if Russia, Ukraine or Belarus gained independence and refused to join the CFE Treaty. Secretary Baker's written statement indicated that withdrawal would be a prerogative in this eventuality.<sup>78</sup> These flexible interpretations of the "Extraordinary Events" clause should be contextualized in a ratification process wherein the State Department endeavors to assuage Senators' concerns about U.S. obligations under the Treaty. Nevertheless, they reflect one State Party's understanding that withdrawal under article XIX(2) could be a legally sound response in various circumstances surrounding the CFE Treaty.

Thirty years after the original "Extraordinary Events" clause was born, a state invoked it for the first time. On March 12, 1993, the Democratic People's Republic of Korea ("DPRK") notified the U.N. Security Council of its intent to withdraw from the NPT<sup>79</sup> under article X(1), effective three months later.<sup>80</sup> This notice included two reasons for the DPRK's decision: (1) a 1993 joint military exercise between South Korea and the United States that the DPRK claimed threatened its security, and (2) the International Atomic Energy Association ("IAEA") inspectors' alleged lack of objectivity in carrying out a specially authorized inspection of sites in the vicinity of DPRK nuclear energy facilities.<sup>81</sup>

In the following months, the NPT's depositaries—the United States, the United Kingdom, and the Russian Federation—as well as the U.N. Security Council, prevailed upon the DPRK to reverse its planned withdrawal.<sup>82</sup> A joint statement by the depositaries "question[ed] whether the DPRK's stated reasons for withdrawing constitute[d] extraordinary

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arising out of the implementation of this Treaty." CFE Treaty, *supra* note 1, arts. XVI(2)(A), XVI(2)(I), (7).

78. *Baker Testimony*, *supra* note 76 ("The Treaty contains mechanisms for withdrawal should this be necessary."). The Senate Foreign Relations Committee, in collaboration with the Bush Sr. administration, developed a protocol for reacting to non-accession by militarily significant former Soviet republics; it gave the President the power to recommend withdrawal from the Treaty to the Senate following an unsuccessful "extraordinary conference" convened under article XXI. See CONG. REC. S18001, S18025 (daily ed. Nov. 25, 1991) (statement of Sen. Biden), available at <http://www.dod.mil/acq/acic/treaties/cfe/congress/rattest15.htm>.

79. NPT Treaty, *supra* note 72, art. X(1).

80. Perez, *supra* note 61, at 750. The NPT's requirement that a party withdrawing under the "Extraordinary Events" clause give notice of its intention to withdraw to the U.N. Security Council creates potential for third-party review of a withdrawal's validity. See Bunn & Timerbaev, *supra* note 72, at 22, 25.

81. Bunn & Timerbaev, *supra* note 72, at 20–21.

82. Perez, *supra* note 61, at 751.

events relating to the subject-matter of the Treaty.”<sup>83</sup> On June 11, 1993 just one day before its withdrawal was to become effective, the DPRK announced that it was “suspending” its withdrawal and “accept[ed] safeguards on all its nuclear material.”<sup>84</sup>

For nearly the next ten years, the DPRK remained a party to the NPT, until January 10, 2003, when it declared “an automatic and immediate effectuation of its withdrawal from the NPT, on which ‘it unilaterally announced a moratorium as long as it deemed necessary’ according to the June 11, 1993, DPRK-U.S. joint statement.”<sup>85</sup> The DPRK’s position was that it was reinstating its 1993 notice of withdrawal, under which remained all but one day before it was to become legally binding.<sup>86</sup> The States Parties to the NPT rejected this argument, regarding the DPRK’s declaration as a new notice of a withdrawal that would not become effective until April 10, 2003.<sup>87</sup> Neither the NPT nor the VCLT makes provision for the “suspension” of a notice of withdrawal.<sup>88</sup> The VCLT provides only that “[a] notification or instrument [of withdrawal] may be *revoked* at any time before it takes effect.”<sup>89</sup> The NPT parties’ apparent interpretation of the DPRK’s 1993 “moratorium” on its withdrawal as a full “revocation” under VCLT article 68 suggests that customary international law does not permit states to implement “suspension” where the VCLT provides only for a more stable measure like “revocation.”<sup>90</sup>

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83. NPT Co-Depositaries Statement, *reprinted in* letter Dated 1 April 1993 from the Representatives of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America Addressed to the President of the Security Council, U.N. SCOR, 48th Sess., Annex, at 2, U.N. Doc. S/25515 (Apr. 2, 1993) [hereinafter NPT Co-Depositaries Statement]. The statement of the depositaries also noted that “nuclear-related security assurances have been provided to the DPRK as a non-nuclear-weapon state party to the NPT.” *Id.* This fact ostensibly served to undermine the DPRK’s claims about any “extraordinary events” threatening its security. *See* Perez, *supra* note 61, at 774 (“[The relevant context for interpreting [NPT] article X(1) arguably includes the assurances given by the [Nuclear Weapon State parties] as an inducement for [Non Nuclear Weapon State] parties to adhere to the NPT[.]”).

84. Perez, *supra* note 61, at 751.

85. DPRK Statement, *supra* note 66.

86. *See* Bunn & Timerbaev, *supra* note 72, at 21.

87. *See* Jean du Preez & William Potter, James Martin Ctr. for Nonproliferation Stud., North Korea’s Withdrawal from the NPT: A Reality Check (Apr. 9, 2003), <http://cns.miis.edu/pubs/week/030409.htm> (“[T]he generally held view is that North Korea’s withdrawal [came] into effect on 10 April 2003 when its three-month notice of withdrawal expire[d].”).

88. *See* Perez, *supra* note 61, at 751 n.9.

89. VCLT, *supra* note 42, art. 68 (emphasis added).

90. The official commentary to the International Law Commission’s 1966 Draft Articles on the Law of Treaties, upon which the VCLT is based, affirmed the importance of a right of revocation during the notice period without mentioning the “suspension” of a

Moreover, although the DPRK claimed to act “under the grave situation where [its] supreme interests are most seriously threatened,”<sup>91</sup> its grounds for withdrawal in 2003 were no more valid under the “Extraordinary Events” clause than they were in 1993.<sup>92</sup> However, the U.N. Security Council did not invalidate the DPRK’s reasons for withdrawal and order the DPRK to remain within the NPT because China would have vetoed such a resolution.<sup>93</sup>

Perhaps the United States did not challenge the legality of the DPRK’s 2003 withdrawal from the NPT because the United States had, about one year earlier, itself unilaterally withdrawn from a landmark arms control treaty.<sup>94</sup> On December 13, 2001, the United States conveyed notice of its withdrawal from the ABM Treaty to Russia, Belarus, Kazakhstan and Ukraine.<sup>95</sup> The U.S. statement expressly invoked article XV(2) of the ABM Treaty, which is substantively identical to the CFE Treaty’s withdrawal clause.<sup>96</sup> After noting that the “strategic relationship with Russia . . . is cooperative rather than adversarial,” unlike when the Treaty was concluded in 1972, the United States described the development of long-

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withdrawal notice. See Int’l Law Comm’n, *Reports of the International Law Commission to the General Assembly*, at 38, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. Int’l L. Comm’n 169, 264 U.N. Doc. A/CN.4/191 [hereinafter *ILC Draft Articles on the Law of Treaties with commentaries*] (“[T]he considerations militating in favour of encouraging the revocation of notices and instruments of denunciations, terminations, etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument.”).

91. *DPRK Statement*, *supra* note 66.

92. See Bunn & Timerbaev, *supra* note 72, at 22–23 (contending that the 2003 withdrawal notice must have relied upon the two reasons provided by the DPRK in its aborted 1993 withdrawal, both of which were inadequate because they did not “relate to the ‘subject matter’ of the NPT”).

93. See *id.* at 24. The Security Council only “call[ed] upon North Korea to permit IAEA [International Atomic Energy Agency] inspections.” *Id.* at 23.

94. See ABM Withdrawal, *supra* note 9 (indicating that the U.S. withdrawal would go into effect “six months from [December 13, 2001]”—on June 13, 2002).

95. Press Release, U.S. Dept. of St., Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and Ukraine (Dec. 14, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/6859.htm> [hereinafter ABM Withdrawal Diplomatic Notice]. Pursuant to a 1997 Memorandum of Understanding, these four post-Soviet states were deemed the official “successor states” to the USSR, as regards the ABM Treaty. See generally Linda McCarty, Note, *Succession of the ABM Treaty*, 9 NEW. ENG. J. INT’L & COMP. L. 603 (2003).

96. See ABM Withdrawal Diplomatic Notice, *supra* note 95. The only differences between the withdrawal clauses in the ABM and CFE Treaties is that the former requires a six-month notice period and does not require notice to any “depository.” See Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3434.

range ballistic missiles by certain states and the active attempt to acquire “weapons of mass destruction” by “a number of state and non-state entities” as “pos[ing] a direct threat to the territory and security of the United States and jeopardiz[ing] its supreme interests.”<sup>97</sup> President Putin, in a televised response, declared that the U.S. decision was “mistaken” but that it did “not pose a threat to the national security of the Russian Federation.”<sup>98</sup> However, many other world leaders and U.S. senators expressed concern that the U.S. repudiation of the ABM Treaty could spur a new arms race in anti-ballistic missiles.<sup>99</sup>

Most legal analyses leading up to and in the wake of the U.S. withdrawal concluded that growing threats from “rogue states” and terrorists, especially after the attacks of September 11, 2001, constituted “extraordinary events” justifying unilateral withdrawal from the Treaty.<sup>100</sup> At the same time, commentators warned that negotiation and compromise with Russia to modify the ABM Treaty would have been a sounder policy for the U.S. given third-party states’ dependence on the security environment established by the Treaty.<sup>101</sup> More controversial was whether the U.S. withdrawal comported with the “fundamental change of circumstances” doctrine in VCLT article 62, which the White House seemed implicitly to invoke in its withdrawal statement.<sup>102</sup> Some suggested that

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97. ABM Withdrawal Diplomatic Notice, *supra* note 95.

98. U.S. Withdrawal from ABM Treaty: International Comment and Reaction, <http://www.acronym.org.uk/docs/0112/doc01.htm#int> (last visited Apr. 26, 2008).

99. *See id.* (citing U.N. Secretary-General Annan’s concern that “the annulation of the [ABM Treaty] may provoke an arms race, especially in the missile area, and further undermine disarmament and non-proliferation regimes”). U.S. Senate Majority Leader Thomas Daschle said that withdrawal from the ABM Treaty “presents some very serious questions with regard to future arms races involving other countries, and sends the wrong message to the world with regard to [the United States’] intent in abiding with treaties.” *Id.*

100. *See, e.g.*, Müllerson, *supra* note 10, at 531–35; Penney, *supra* note 10, at 1317 (“[T]he Bush administration could frame a valid, good faith argument for withdrawal on national security interests.”).

101. *See* Müllerson, *supra* note 10, at 536 (“The unilateral withdrawal of the U.S. from the ABM Treaty without seeking arrangements with Russia may undermine other arms-control agreements.”).

102. *Compare id.* at 539 (contending that “current changes are of such a magnitude and character that if *rebus sic stantibus* can ever be justifiably used this may be one of such cases”), and Frederic L. Kirgis, *Proposed Missile Defenses and the ABM Treaty*, ASIL INSIGHTS, May 2001, available at <http://www.asil.org/insights/insigh70.htm> (stating that “President Bush thus appears to have set the stage for a change-of-circumstances argument”), with MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 195 (2005) (concluding that “there would seem to be sufficient reason to question the applicability of the doctrine of fundamental change of circumstances in the context of the termination of the ABM Treaty”).

the U.S. withdrawal from the ABM Treaty set a precedent for future withdrawal from arms control treaties.<sup>103</sup> However, the consensus was that the implications of the U.S. withdrawal, and any resolution to a treaty dispute with Russia, would likely be political rather than legal.<sup>104</sup>

#### IV. POSSIBLE GROUNDS FOR SUSPENSION UNDER CUSTOMARY INTERNATIONAL LAW

A U.S. Department of Defense analysis of the CFE Treaty states that the “right of withdrawal [under article XIX(2)] is in addition to any other rights a State Party has under customary international law regarding termination or suspension of the Treaty . . . .”<sup>105</sup> Such additional rights under customary law are to be found exclusively in the provisions of the VCLT.<sup>106</sup> The three relevant VCLT provisions for unilateral treaty exit are article 62 (Fundamental Change of Circumstances), article 60 (Breach), and article 61 (Impossibility).<sup>107</sup>

The centuries-old customary doctrine of *rebus sic stantibus* was codified, amidst much debate, in what eventually became VCLT article 62.<sup>108</sup> At the 1968 Diplomatic Conference on the Law of Treaties there was, however, agreement “that it was essential to make this doctrine as restrictive as possible to safeguard against abuse and to emphasize that its application in practice should be exceptional, and that the stability of treaties should be maintained.”<sup>109</sup> Thus, paragraph 1 of article 62 in effect requires satisfaction of five conditions: (1) there must be a change of cir-

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103. See, e.g., Kirgis, *supra* note 11 (noting that “it is possible that the stated grounds of the U.S. withdrawal could be regarded as supplying a precedent for withdrawal by the United States or other countries from other arms control treaties containing similar withdrawal clauses”); Hewitson, *supra* note 10, at 434 (discussing “the precedential value of the U.S. ABM Treaty withdrawal” for the DPRK’s subsequent withdrawal from the NPT).

104. See David Sloss, *Proposed Missile Defenses and the ABM Treaty, Reply to Response*, ASIL INSIGHTS, Aug. 2001, <http://www.asil.org/insights/insigh70.htm#reply> (“[T]he issue must be resolved politically, not legally.”).

105. DOD Analysis, *supra* note 74.

106. VCLT, *supra* note 42, art. 42(2) (providing that termination, denunciation, withdrawal, or suspension of a treaty’s operation “may take place only as a result of the application of the provisions of the treaty or of the present Convention”).

107. See Hollis, *supra* note 12. VCLT article 56 also provides for unilateral denunciation or withdrawal from a treaty, but can only be invoked by a party seeking to leave a treaty that “does not provide for denunciation or withdrawal.” VCLT, *supra* note 42, art. 56. Insofar as the CFE Treaty includes a withdrawal clause, VCLT article 56 is inapplicable. CFE Treaty, *supra* note 1, art. XIX(2).

108. See generally ILC Draft Articles on the Law of Treaties with commentaries, *supra* note 90, at 257–60.

109. FITZMAURICE & ELIAS, *supra* note 102, at 176.

cumstances existing when the treaty was concluded, (2) the change must be “fundamental,” (3) the parties must not have foreseen the change, (4) the existence of those circumstances must have been an essential basis for the parties’ original consent to be bound by the treaty, and (5) the change must radically transform the “extent” of treaty obligations still to be performed.<sup>110</sup>

Article 62 of the VCLT does not define the terms “fundamental” or “extent of obligations still to be performed,”<sup>111</sup> nor, for that matter, delineate the scope of the term “circumstances.” Paragraph 2 expressly disqualifies invocation of the doctrine in two cases: if the treaty in question establishes a boundary, or if the invoking party’s own breach of any international obligation owed to a party to the treaty is the cause of the claimed “fundamental change.”<sup>112</sup> Finally, as discussed *supra* above in Part II, paragraph 3 of article 62 provides that a party invoking article 62 to *suspend* a treaty’s operation must satisfy the same conditions required for termination or withdrawal—the five-part test of paragraph 1.<sup>113</sup>

Traditionally, the outbreak of war between parties to a treaty or the creation of new states have both been accepted as grounds for application of the *rebus sic stantibus* doctrine, whereas internal political revolutions, policy shifts, or the partial loss of treaty goals have been rejected.<sup>114</sup> In the *Gabčíkovo-Nagymaros* case before the International Court of Justice (“ICJ”), Hungary claimed that its 1992 termination of a 1977 treaty with then Czechoslovakia was justified under VCLT article 62 because the policy of “socialist integration” had disappeared, market economies had emerged in both states, a “unilateral scheme” had replaced a “single and indivisible operational system,” and the treaty had become “a prescription for environmental disaster.”<sup>115</sup> The 1997 judgment of the ICJ determined that the collective effect of these changed circumstances would not “radically transform the extent of the obligations still to be performed.”<sup>116</sup> The court thus confirmed the exacting customary law standard required for invocation of article 62.<sup>117</sup> Moreover, since the “Ex-

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110. *Id.* at 177.

111. Kirgis, *supra* note 102. Thus, “[l]acking any common criteria of what is fundamental, decision makers attach significance to certain changes through the screen of their own pursued and perceived values.” ARI DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* 49 (1975).

112. VCLT, *supra* note 42, art. 62(2).

113. *See id.* art. 62(3). The five-part test is discussed *supra* note 110 and accompanying text.

114. *See Cohn, supra* note 55, at 858–63.

115. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 57 (Sept. 25).

116. *Id.* at 61.

117. *See FITZMAURICE & ELIAS, supra* note 102, at 361–62.

traordinary Events” clause is available to states parties to arms control treaties, the “fundamental change of circumstances” doctrine “at best . . . would operate as a secondary argument which has no immediate legal effect.”<sup>118</sup>

VCLT article 60 permits a party to suspend unilaterally a multilateral treaty as a response to a specific event: material breach of that treaty by one of the parties.<sup>119</sup> If a party is “specially affected by the breach,” then it can “suspend[] the operation of the treaty in whole or in part in the relations between itself and the defaulting State.”<sup>120</sup> Alternately, in a treaty “of such a character that a material breach of its provisions by one party radically changes the position of every party,” any party (besides the defaulting state) can suspend the treaty in whole or in part.<sup>121</sup> This latter provision was designed for disarmament or arms control treaties.<sup>122</sup> Paragraph 3 defines “material” breaches as either “a repudiation of the treaty not sanctioned by the present Convention” or “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”<sup>123</sup>

The ICJ also had occasion to interpret article 60 in the *Gabčíkovo-Nagymaros* case, insofar as Hungary claimed that Czechoslovakia materially breached a treaty in 1991 by launching a project known as “Variant C” to divert the Danube River.<sup>124</sup> The court, in rejecting Hungary’s contention, stressed the importance of procedural rules, and applied article 60 “in a very rigorous manner.”<sup>125</sup> Moreover, “if [a] breach is not material . . . any purported denunciation on the grounds of breach will be illegal and invalid . . . becom[ing] a breach in itself giving the other party a right to take countermeasures.”<sup>126</sup>

VCLT article 61 provides that an “impossibility of performing a treaty” may be invoked “as a ground for suspending the operation of the treaty” where the “impossibility results from the . . . [temporary] disappearance or destruction of an object indispensable for the execution of

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118. *Id.* at 193. *But see* Cohn, *supra* note 55, at 870 (applying the “Fundamental Change of Circumstances” analysis as an “analogy” to assess whether the United States could withdraw from the ABM Treaty in 1989 under the Treaty’s “Extraordinary Events” clause).

119. *See* VCLT, *supra* note 42, art. 60.

120. *Id.* art. 60(2)(b).

121. *Id.* art. 60(2)(c).

122. *See* MOHAMMED M. GOMAA, *SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH* 104 (1996).

123. VCLT, *supra* note 42, art. 60(3).

124. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 63 (Sept. 25).

125. FITZMAURICE & ELIAS, *supra* note 102, at 365.

126. GOMAA, *supra* note 122, at 135–36.

the treaty.”<sup>127</sup> Paragraph 2 precludes the invocation of impossibility “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”<sup>128</sup> In *Gabčíkovo-Nagymaros*, the ICJ suggested a narrow interpretation of impossibility of performance based on the discussions at the 1968 Diplomatic Conference that adopted the VCLT.<sup>129</sup> While the court found it unnecessary “to determine whether the term ‘object’ in Article 61 can also be understood to embrace a legal régime”—as Hungary had argued it should—the court dutifully applied paragraph 2, finding that Hungary’s own breaches of the treaty brought about any “impossibility.”<sup>130</sup>

#### V. ASSESSING THE (IL)LEGALITY OF RUSSIA’S “SUSPENSION”

Russia’s unilateral “suspension” of the CFE Treaty has drawn a swarm of political and media attention,<sup>131</sup> but not much reaction from scholars of international law.<sup>132</sup> There may be a presumption that Russia’s move, following the treaty withdrawals of the DPRK and the United States earlier this decade, is legally unassailable because of the “Extraordinary Events” clause.<sup>133</sup> This view is misguided. Russia’s suspension has uncovered a novel question in the law of treaties, an exploration of which may not only facilitate resolution of the ongoing impasse over the CFE Treaty, but also help enhance the stability of arms control agreements in general.

Russia’s suspension of the CFE Treaty’s operation, in effect as of December 12, 2007,<sup>134</sup> amounts to breach of the treaty, embodying both

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127. VCLT, *supra* note 42, art. 61(1). This article first provides for termination or withdrawal based on “permanent” impossibility before stipulating that “[i]f the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.” *Id.*

128. *Id.* art. 61(2).

129. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at 60.

130. *Id.* at 60–61.

131. See, e.g., Federico Bordonaro, *The Implications of Russia’s Moratorium of the C.F.E. Treaty*, POWER AND INTEREST NEWS REP., Nov. 14, 2007, [http://www.pinr.com/report.php?ac=view\\_report&report\\_id=721&language\\_id=1](http://www.pinr.com/report.php?ac=view_report&report_id=721&language_id=1); Richard Weitz, *Russia’s CFE Suspension Threatens European Arms Control*, WORLD POLITICS REVIEW, Dec. 19, 2007, <http://www.worldpoliticsreview.com/article.aspx?id=1448>.

132. *But see* Hollis, *supra* note 12. Professor Hollis’s timely article is, to the Author’s knowledge at the time of this Note’s publication, the only serious legal analysis of Russia’s “suspension” of the CFE Treaty besides this Note.

133. See Sloss, *supra* note 104 (“[T]he question whether a country’s ‘supreme interests’ have been jeopardized . . . is not a justiciable question.”).

134. December Russian MFA Statement, *supra* note 5.



forms of material breach delineated in VCLT article 60(3). First, the suspension is a material breach as “a repudiation of the treaty not sanctioned by [the VCLT].”<sup>135</sup> The VCLT allows for suspension that is either “in conformity with the provisions of the treaty” or has the “consent of all the parties after consultation with the other contracting States.”<sup>136</sup> Clearly, the parties to the CFE Treaty did not consent to the suspension: a NATO statement dated December 12, 2007 declared that “NATO Allies deeply regret” Russia’s decision.<sup>137</sup> Russia’s intended suspension was not a topic at the “Extraordinary Conference” in June 2007,<sup>138</sup> so there was effectively no formal “consultation with the other contracting states.”

Nor does Russia’s “suspension” conform to the provisions of the CFE Treaty. The Treaty, which is of “unlimited duration,” provides in article XIX(2) that “[e]ach State Party shall . . . have the right to *withdraw* from this Treaty . . . .”<sup>139</sup> Russian authorities have expressly distinguished Russia’s “suspension” from a withdrawal,<sup>140</sup> so there is no translation discrepancy. VCLT article 31(1) prescribes the general rule that “[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>141</sup> The ordinary meaning of the term “withdraw” may be ascertained from VCLT article 70, which provides that withdrawal “releases the [withdrawing party] from any obligation further

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135. VCLT, *supra* note 42, art. 60(3)(a).

136. *Id.* art. 57.

137. Press Release, NATO, Alliance’s Statement on the Russian Federation’s “Suspension” of its CFE Obligations (Dec. 12, 2007), *available at* <http://www.nato.int/docu/pr/2007/p07-139e.html>. NATO states reiterated their lack of consent to Russia’s “suspension” in a March 2008 statement. *See* March 2008 NAC Statement, *supra* note 20 (“Russia’s ‘suspension’ risks eroding the integrity of the CFE regime and undermines the cooperative approach to security which has been a core of the NATO-Russia relationship and European security for nearly two decades.”).

138. *Russia Will Not Talk CFE Treaty Withdrawal in Vienna*, RIA NOVOSTI, June 6, 2007, <http://en.rian.ru/russia/20070606/66759638.html>. The “emergency CFE conference” to which this article refers is the “Extraordinary Conference” discussed above. *See supra* text accompanying notes 23–27.

139. CFE Treaty, *supra* note 1, art. XIX(1), (2) (emphasis added).

140. *See, e.g., Russia’s Upper House Backs Suspension of CFE Treaty*, RADIO FREE EUROPE, Nov. 16, 2007, <http://www.rferl.org/featuresarticle/2007/11/E9FBE1AC-6A86-4DE1-8BE8-54DC8FBB10E8.html> (“[Russian Foreign Minister Sergei] Lavrov also made clear that the move should be considered a suspension, and not what he called the ‘extreme measure’ of withdrawal.”).

141. VCLT, *supra* note 42, art. 31(1) (emphasis added).

to perform the treaty.”<sup>142</sup> Thus, under an ordinary meaning interpretation of article XIX(2), Russia’s suspension is a clear violation.<sup>143</sup>

Yet Russia’s Foreign Minister has publicly placed Russia on the following legal footing:

From the legal point of view, the withdrawal provision in the CFE Treaty gives reason to assert that a member state has the right to suspend the Treaty on the same grounds on which it can withdraw from it. This conclusion arises from the general principle of law and the usual norm of international law, expressed by the formula ‘he who has greater leeway is also entitled to the smaller leeway contained in it.’ In the light of this legal principle repeatedly applied in international legal practice, withdrawal from the treaty is ‘greater leeway,’ and suspension ‘the smaller leeway’ therein contained.<sup>144</sup>

Here, then, lies the legal foundation of Russia’s “suspension”: a purported “general principle of law” used as a maxim of interpretation. The principle cited by Minister Lavrov, using his language, is not encountered in any authorities.<sup>145</sup> The closest Latin phrase is *major continet in se minus* (“the greater includes within itself the less.”).<sup>146</sup> However, neither this maxim, nor any application of it, is encountered in any international law materials. Even the English lay phrase “lesser, included power,”<sup>147</sup> which adequately captures the concept upon which Russia relies, is not found in any relevant authorities. Russia’s suggestion that the principle is frequently used in international law is thus unsupported.

In distinction is a competing Latin phrase: *expressio unius est exclusio alterius* (“to express or include one thing implies the exclusion of . . . the

142. *Id.* art. 70(1)(a), 70(2).

143. The VCLT provides that “[a] special meaning shall be given to a term if it is established that the parties so intended.” *Id.* art. 31(4). This cannot be established for reasons discussed below. *See infra* text accompanying notes 148–58.

144. Ministry of Foreign Affairs of the Russian Federation, Replies by Russian Minister of Foreign Affairs Sergey Lavrov to Questions from the German Newspaper *Frankfurter Allgemeine Zeitung*, Dec. 3, 2007, [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/7e227d8f37ec91b8c32573a70036fb3a?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/7e227d8f37ec91b8c32573a70036fb3a?OpenDocument).

145. Extensive text searches of Minister Lavrov’s term were performed in the Westlaw and Lexis-Nexis legal databases, as well in Google.

146. BALLENTINE’S LAW DICTIONARY 297 (1916); *cf.* STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 899 (1997) (*Omne majus continet in se minus, minus in se complectitur*: “the greater contains or embraces the less.”).

147. *See Hollis, supra* note 12 (“[I]n order for Russia to sustain its reliance on the CFE Treaty, the law of treaties would need either to regard suspension and withdrawal as interchangeable, or view the suspension power as a lesser, included power within the power to terminate or withdraw from a treaty.”).

alternative.”).<sup>148</sup> This well-known canon of interpretation has been discussed and endorsed in numerous treatises on the law of treaties.<sup>149</sup> It supports the proposition that the drafters of the CFE Treaty intended “withdrawal” to be exclusive; that is, if the parties had intended to admit the right to *suspend* the CFE Treaty, they would have made specific provision for *suspension*.<sup>150</sup>

Since article XIX(2) in the CFE Treaty traces its origin to the PTBT,<sup>151</sup> states’ interpretation of the PTBT may be applied to the CFE Treaty. In fact, a U.S. State Department Legal Adviser involved in the negotiation of the original “Extraordinary Events” clause<sup>152</sup> subsequently wrote that a “decision to end [the PTBT or NPT] very probably would require a far-reaching realignment of the country’s foreign-policy stance.”<sup>153</sup> He used the terms “end” and “termination” interchangeably with “withdrawal,” but never once substituted the term “suspension.”<sup>154</sup> Indeed, “suspension,”—a measure that bars the suspending party from “acts tending to obstruct the resumption of the operation of the treaty”<sup>155</sup>—appears plainly incompatible with a provision designed to safeguard a state’s “supreme interests” when they become “jeopardized” by the continued operation of the treaty in the face of “extraordinary events.”<sup>156</sup> Reflecting customary international law, the VCLT carefully divides suspension from other means of treaty exit, which further cautions against conflating “suspension” and withdrawal” in interpreting the CFE Treaty.<sup>157</sup> To summarize, Russia’s “suspension” does not conform to the CFE Treaty’s provisions; nor is Russia’s “repudiation”<sup>158</sup> of it salvaged by provisions

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148. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

149. See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 201 (2000); MARK E. VILLAGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 160 (2d. ed. 1997); SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 400 (2d. ed. 1916).

150. The CFE Treaty, including all Annexes and Protocols, is 118 pages long, suggesting exhaustiveness in drafting. See CFE Treaty, *supra* note 1.

151. See discussion *supra* text accompanying notes 68–72.

152. See John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881, 968 (1999) (discussing State Department Legal Adviser Abram Chayes’s “legal brief”).

153. Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 963 (1972).

154. *Id.* at 962–65.

155. VCLT, *supra* note 42, art. 72(2).

156. See CFE Treaty, *supra* note 1, art. XIX(2).

157. See Hollis, *supra* note 12 (“[T]he fact that these rights come in two separate provisions militates against reading the powers as interchangeable[.]”); see also discussion *supra* Part II (analyzing distinction between suspension and withdrawal).

158. See VCLT, *supra* note 42, art. 60(3)(a).

of the VCLT. Therefore, Russia has worked a material breach of the CFE Treaty.

Russia may contend that its domestic law did not allow it to “withdraw” from the CFE Treaty, but only to “suspend” the Treaty’s operation.<sup>159</sup> Article 37(4) of the 1995 *Federal Law of the Russian Federation on International Treaties of the Russian Federation* provides:

The operation of an international treaty of the Russian Federation, the decision concerning consent to the bindingness of which for the Russian Federation was adopted in the form of a Federal Law, may be *suspended* by the President of the Russian Federation in instances requiring the taking of urgent measures.<sup>160</sup>

In other words, under Russian law, when urgent action is needed, “suspension” of ratified treaties is the only measure available to the Russian President.<sup>161</sup> However, article 27 of the VCLT holds that “[a] party may *not* invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>162</sup> Hence, Russia cannot get very far with an argument about domestic law restrictions.

Although effecting a “suspension” where only a “withdrawal” was allowed, Russia did comply with the notice requirements in article XIX(2) of the CFE Treaty: it gave 150 days advance notice, both to the Depository and to all other States Parties, of its decision to withdraw from the Treaty.<sup>163</sup> However, there may be a further basis for establishing that Russia has worked a “repudiation of the treaty not sanctioned by the [VCLT],”<sup>164</sup> involving an assessment of the (in)adequacy of Russia’s stated grounds under the “Extraordinary Events” clause. For this purpose, the clause may be divided into three elements: (1) the occurrence of “extraordinary events,” (2) the relation of those extraordinary events to “the subject matter of the treaty,” and (3) that the state’s “supreme national interests” have been “jeopardized.”<sup>165</sup>

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159. See Hollis, *supra* note 12 (“An alternative explanation . . . may lie in Russian domestic legal requirements.”).

160. BUTLER, *supra* note 30, at 190 (emphasis added). The law further calls for “the obligatory immediate informing of the Soviet of the Federation and the State Duma and the submission to the State Duma of a draft respective Federal Law.” *Id.*

161. See *id.* at 190, 194.

162. VCLT, *supra* note 42, art. 27 (emphasis added).

163. See Suspension Announcement, *supra* note 4.

164. VCLT, *supra* note 42, art. 60(3)(a).

165. See Perez, *supra* note 61, at 776–77 (describing similar elemental breakdown of NPT withdrawal clause).

Although the common understanding of the clause is that each of these three elements is subject only to self-judging by the withdrawing state,<sup>166</sup> there is one instance when a state's grounds under the clause were challenged: the United States, United Kingdom, and Russia "question[ed] whether the DPRK's stated reasons for withdrawing from the [NPT] Treaty constitute[d] extraordinary events relating to the subject-matter of the Treaty."<sup>167</sup> Notably, this challenge included the first two elements of the clause, but excluded the third element.<sup>168</sup> This suggests that only the third element regarding "supreme national interests" is steadfastly "self-judging."<sup>169</sup> The first two elements, being more objective, are thus amenable to third-party review.<sup>170</sup>

First, it should be pointed out that Russia technically never cited "extraordinary events;" rather, it enumerated six "*exceptional circumstances* that affect the security of the Russian Federation."<sup>171</sup> The "exceptional circumstances" language comes from article XXI(2) of the CFE Treaty, providing procedures for convening an "extraordinary conference" in response to a State Party's concern about "exceptional circumstances relating to this Treaty."<sup>172</sup> In distinguishing between "extraordinary events" and "exceptional circumstances" under an ordinary meaning interpretation of the CFE Treaty, one must conclude that "circumstances" refers to a set of conditions that has developed over time, whereas the term "events" describes distinct, episodic occurrences.<sup>173</sup> In this regard, past withdrawal announcements under the clause may be instructive: in March 1993, the DPRK cited a U.S.-South Korean joint military exercise as an "extraordinary event."<sup>174</sup> In December 2001, the United States cited the September 11, 2001 attacks as an "extraordinary event."<sup>175</sup> Both of these are properly regarded as "events" rather than "circumstances." Did President Putin's announcement simply mislabel the "extraordinary

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166. See SHAKER, *supra* note 69, at 898.

167. NPT Co-Depositories Statement, *supra* note 83.

168. See Perez, *supra* note 61, at 777 n.77.

169. *But see id.* at 777 (positing that "only the first two elements could be considered legally 'self-judging'").

170. See Cédric van Assche, *Withdrawal from the ABM Treaty: A Reply*, ASIL INSIGHTS, Sept. 2001, <http://www.asil.org/insights/insigh70.htm#vanassche> (asserting that "the occurrence of such extraordinary events is a matter for objective determination by a Court").

171. Suspension Announcement, *supra* note 4 (emphasis added).

172. CFE Treaty, *supra* note 1, art. XXI(2).

173. See AMERICAN HERITAGE DICTIONARY 338, 616 (4th ed. 2000).

174. See Bunn & Timerbaev, *supra* note 72, at 20.

175. See ABM Withdrawal, *supra* note 9.

events” as “exceptional circumstances,” or do Russia’s grounds for “suspension” bear substantive defects?

Russia’s first reason is cryptically translated and vague: it amounts to the failure of six new NATO members to make “necessary changes” in the “composition” of states party to the Treaty.<sup>176</sup> The statement does not elaborate on the “changes” desired. While it seems to relate to the “subject matter” of the CFE Treaty, it cannot properly be regarded as an “extraordinary event” since it appears to be an ongoing state of affairs. Russia’s second reason concerns the “excessive” and “exclusive” nature of the group of Treaty parties who are also NATO members.<sup>177</sup> This seems neither to be an “extraordinary event,” as it has existed for at least the past two years, nor to relate to the CFE Treaty’s “subject matter.” Therefore, the second ground is no “extraordinary event.” The third reason—the “planned deployment of America’s conventional forces in Bulgaria and Romania”<sup>178</sup>—is not quite an “event” since it has not yet occurred, nor does it really relate to the CFE Treaty, since the United States has secured the consent of the two states.<sup>179</sup>

The fourth reason provided in the Russian “suspension” announcement is the failure of many CFE Treaty parties to ratify the CFE Adaptation Agreement.<sup>180</sup> That agreement, however, was signed in December 1999; for nearly eight years, all but four countries have failed to ratify the CFE Adaptation Agreement. The status quo can hardly be an “extraordinary event.” The fifth reason given is the failure of four NATO members to “adjust their territorial ceilings” in compliance with their “commitments accepted in Istanbul.”<sup>181</sup> The same refutation given for the preceding reason applies here: although it “relates” to the CFE Treaty, it is not an “extraordinary event” because of its ongoing existence for this entire decade. Finally, Russia’s sixth reason is the Baltic countries’ (Estonia, Latvia, and Lithuania) non-participation in the CFE Treaty and the difficulty that presents to Russian security in its northwestern region.<sup>182</sup> In addition to being invalid for the reason that the state of affairs has remained static for years, it may be argued that this claim does not relate to the subject matter of the CFE Treaty, precisely because those states are not parties.

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176. Suspension Announcement, *supra* note 4.

177. *Id.*

178. *Id.*

179. See U.S. Embassy in Bulgaria, Frequently Asked Questions and Answers About Shared Military Facilities (Apr. 9, 2008), [http://sofia.usembassy.gov/shared\\_facilities\\_faq.html](http://sofia.usembassy.gov/shared_facilities_faq.html).

180. See Suspension Announcement, *supra* note 4.

181. *Id.*

182. *Id.*

The foregoing analysis, though quite informal, suggests that *all six* of Russia's grounds fail to constitute "extraordinary events" as that term's ordinary meaning is reasonably understood. Moreover, some of them do not "relate to the subject matter" of the CFE Treaty, or do so only marginally. It is important to note that a failure under either of the two elements analyzed invalidates that reason as a ground for lawful suspension. Not a single justification supplied by Russia emerges intact as "extraordinary events related to the subject matter" of the CFE Treaty. Hence, on a substantive level, Russia's purported invocation of article XIX(2) amounts to "a repudiation of the treaty not sanctioned by [the VCLT]."<sup>183</sup>

The principle of good faith is incorporated in the VCLT in article 26 (*Pacta sunt servanda*): "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>184</sup> Since President Putin issued his statement about Russia's intention to "suspend" the CFE Treaty, Russia has often declared that its move was meant to "restore the viability" of the treaty, that it is still very much open to negotiation, and that Russia does not plan to escalate its military forces in the treaty zone.<sup>185</sup> Thus, Russia may wish to rely on this ostensibly treaty-respecting behavior as a measure of its "good faith" under article 26. However, the countervailing consideration is that Russia has used its "suspension"—which has already been shown above to have been an illegitimate repudiation of the treaty—as a "bargaining chip" to exploit in its multi-dimensional diplomatic bouts with the United States, over such issues as ABM in Eastern Europe and the independence of Kosovo. This would count as a distinct absence of "good faith."

Furthermore, as a result of Russia's suspension of the CFE Treaty, it refused to provide data on its military at "an annual information exchange meeting" on December 14, 2007.<sup>186</sup> This frustrates one of the principal objectives of the Treaty, the promotion of transparency and cooperation with respect to conventional weapons in Europe. Thus, Russia has materially breached the CFE Treaty based on the second prong of VCLT article 60(3): it has "violat[ed] . . . a provision essential to the accomplishment of the object or purpose of the treaty."<sup>187</sup>

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183. VCLT, *supra* note 42, art. 60(3)(a).

184. *Id.* art. 26.

185. See, e.g., December Russian MFA Statement, *supra* note 5; *CFE Moratorium Does Not Imply Military Buildup—Russia's Lavrov*, RIA NOVOSTI, Dec. 18, 2007, available at <http://en.rian.ru/russia/20071218/92999608.html>.

186. *Russia Says No Info Exchange With NATO Under Arms Treaty Freeze*, RIA NOVOSTI, Dec. 14, 2007, available at <http://en.rian.ru/russia/20071214/92428637.html>.

187. VCLT, *supra* note 42, art. 60(3)(b).

Russia may venture to ground its unilateral suspension in customary international law as codified in the VCLT.<sup>188</sup> First, it may claim that its “suspension” was justified as an invocation of the “fundamental change of circumstances” doctrine.<sup>189</sup> However, Russia would be unable to show, under the five-part test described above in Part IV, that the dissolution of the USSR and the Warsaw Pact alliance was either unforeseen in November 1990, or that the existence of the USSR and the Warsaw Pact was “an essential basis”<sup>190</sup> for the parties’ original consent to be bound” by the CFE Treaty.<sup>191</sup> Russia will also be unable to rely upon VCLT article 60 to show that the parties to the CFE Treaty committed a “material breach” that entitled Russia to suspend its implementation of the treaty.<sup>192</sup> None of the other States Parties had “repudiated” the CFE Treaty or had violated a provision “essential to the accomplishment of the object or purpose” of the treaty.<sup>193</sup> Finally, impossibility of performance, as embodied in VCLT article 61, is of no use to Russia, since the “permanent disappearance or destruction” of the Warsaw Pact does not make performance of the treaty impossible in any sense.<sup>194</sup>

#### CONCLUSION

Russia’s unilateral “suspension” of the CFE Treaty—a “cornerstone of European security”<sup>195</sup>—cannot be legitimized under the terms of the Treaty itself or under customary international law. Indeed, Russia’s “repudiation” of the CFE Treaty, and its violation of provisions essential to the treaty’s object and purpose, constitutes a material breach of the treaty. Russia has violated international law.

It is important that this extralegal step by Russia not be overlooked—and thus effectively ratified—by the international community. Russia’s move not only imperils the future of European arms control and security, but also damages the foundation of public international law: the binding nature of treaties. Russia cannot in good faith abandon fundamental obli-

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188. See SINCLAIR, *supra* note 42, at 26.

189. See VCLT, *supra* note 42, art. 62.

190. *Id.*

191. See FITZMAURICE & ELIAS, *supra* note 102, at 177 (setting forth five-part test). The signing of the CFE Adaptation Agreement in 1999 demonstrates that the USSR and the Warsaw Pact did not constitute “an essential basis” for the parties’ consent to be bound, given that these entities had been defunct for nearly a decade. See CFE Adaptation Agreement, *supra* note 16.

192. See VCLT, *supra* note 42, art. 60(2)–(3).

193. *Id.*

194. *Id.* art. 61(1).

195. CFE Treaty Background, *supra* note 3.



gations under the CFE Treaty through a “suspension” not contemplated either by the plain language of the treaty or by customary international law. Such conduct opens the way for other states to depart from binding treaties in a curious, ad hoc fashion. This development would undermine the potential stability of all treaties and make states less likely to depend on treaties at all on the presumption that any party was free to leave at any time, in any manner.

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