

Withdrawal Clauses in Arms Control Treaties: Some Reflections about a Future Treaty Prohibiting Nuclear Weapons

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This paper aims at summarizing the situation regarding withdrawal clauses included in arms control treaties and, as a result, stimulate the negotiations towards a treaty prohibiting nuclear weapons. It does not take a stance on whether it is appropriate to include or not a withdrawal clause in such a treaty. SLND might come up with a position paper at a later stage.²

In part (A), an overview of withdrawal clauses in “traditional” arms control treaties will be given. In part (B), examples of modified withdrawal clauses adapted to the “humanitarian” nature of certain treaties will be discussed. Part (C) will address and compare advantages and drawbacks of withdrawal clause and part (D) will suggest certain aspects that we consider particularly important for the negotiations in view of a new treaty banning nuclear weapons.

A. Standard clauses inserted in “traditional” arms control treaties

One of the common features of arms control treaties is the fact that they are concluded for unlimited duration but contain very similar withdrawal clauses. Such clauses were inserted in all major arms control treaties dealing with nuclear weapons. Already the 1963 Partial Test Ban Treaty (PTBT) provided for such a clause:

This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.³

This clause is sometimes referred to as the “extraordinary events” formula and its application is subject to several formal and substantial conditions.⁴ It served as a template for arms control treaties concluded later. For instance, a very similar clause was inserted in the 1968 NPT:⁵

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² A more extensive version of this paper is posted here: <https://safna.org/2017/03/22/withdrawal-clauses-in-arms-control-treaties-some-reflections-about-a-future-treaty-prohibiting-nuclear-weapons/>

³ Article IV.

⁴ See, for more details, D.H. Joyner and M. Roscini, Withdrawal from non-proliferation treaties, in: D.H. Joyner and M. Roscini, *Non-proliferation Law as a Special Regime, A contribution to fragmentation theory in international law*, Cambridge University Press, 2012, pp. 151-171, and D. Rietiker, *Le régime juridique des traités de maîtrise des armements, Plaidoyer pour l'unité de l'ordre juridique international*, Stämpfli and Bruylant, 2010, pp. 490-509.

⁵ The NPT entered into force in 1970 and was initially concluded for 25 years in accordance with Article X § 2. In 1995, it was extended for unlimited period.

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests. (...).⁶

Even in more recent treaties such a standard withdrawal clause was included, for instance in the 1996 Comprehensive Test Ban Treaty (CTBT), which has not yet entered into force.⁷

Withdrawal clauses were also included in all five treaties establishing nuclear weapons free zones (NWFZ) in certain regions, some of them differing slightly or clearly from the solution adopted within the PTBT, the NPT or the CTBT. Article 30 of the 1968 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), the first of those treaties, reads as follows:

1. This Treaty shall be of a permanent nature and shall remain in force indefinitely, but any Party may denounce it by notifying the General Secretary of the Agency if, in the opinion of the denouncing State, there have arisen or may arise circumstances connected with the content of this Treaty or of the annexed Additional Protocols I and II which affect its supreme interests or the peace and security of one or more Contracting Parties.

This clause does not refer to “extraordinary events” and, as a result, seems to request a lower threshold for withdrawal than the PTBT or the NPT. Article 13 of the 1985 Treaty of Rarotonga establishing a South Pacific Nuclear Free Zone and Article 22 of the 1995 Treaty of Bangkok establishing a Southeast Asia Nuclear Weapon-Free Zone seem to be more specific insofar as they limit the right to withdrawal to the event of a violation of an essential provision:

This Treaty is of a permanent nature and shall remain in force indefinitely, provided that in the event of a violation by any Party of a provision of this Treaty essential to the achievement of the objectives of the Treaty or of the spirit of the Treaty, every other Party shall have the right to withdraw from the Treaty.⁸

It is noteworthy to mention that the 1996 Treaty of Pelindaba establishing an African Nuclear-Weapon-Free Zone,⁹ and the 2006 Treaty of Semipalatinsk establishing a Nuclear-Weapon-Free Zone in Central Asia,¹⁰ concluded later, contain again the “extraordinary events” formula.

B. Modified withdrawal clauses adapted to the “humanitarian” nature of certain treaties

Certain treaties dealing with conventional weapons that have a “hybrid” nature, standing between (traditional) arms control treaties and instruments dealing with humanitarian law, contain modified withdrawal clauses. This is in particular the case with the 1997 Convention on Anti-Personnel Mines (Ottawa Convention), which takes features of both type of treaties:

⁶ Article X.

⁷ Article IX.

⁸ Article 13 § 1 of the Treaty of Rarotonga; Article 22 §§ 1 and 2 of the Bangkok Treaty are almost identical.

⁹ Article 20.

¹⁰ Article 16.

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six- month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.
4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.¹¹

Paragraph 3 is a clause that is inspired by withdrawal clauses included in treaties protecting the individual in times of war, in particular the 1949 Geneva Conventions and the Additional Protocols thereto, adopted in 1977.¹²

The 2008 Convention on Cluster Munitions (Oslo Convention) follows in many respects the Ottawa Convention. This is also the case concerning its withdrawal clause, even though it does not contain a paragraph 4:

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.¹³

A third example for that kind of “hybrid” treaty containing such a mixed clause is the 1980 Convention on Certain Conventional Weapons (CCW).¹⁴

C. The pros and cons of withdrawal clauses in arms control treaties

It may be argued, on the one hand, that the presence of withdrawal clauses might provoke States Parties to leave the treaty and, therefore, undermine its universality. For this reason, the drafters of a new convention might opt against the inclusion of a withdrawal clause. The international

¹¹ Article 20.

¹² See Articles 63, 62, 142 and 158 of Geneva Conventions I to IV respectively, and Articles 99 and 25 of Additional Protocols I and II respectively.

¹³ Article 20.

¹⁴ Article 9.

practice indicates that even very important treaties, such as the Charter of the United Nations, do not always include such a clause.

On the other hand, it may be argued that the mere presence of a withdrawal clause, comparable to a clause allowing certain reservations to a treaty, might make it easier for States to ratify or adhere to a treaty since they recognize in such clauses an exit door if this turns out necessary. Therefore, the inclusion of such a clause is likely to enhance universality of participation in the treaty. Moreover, in light of the rare State practice – the DPRK’s definitive withdrawal from the NPT on 10 January 2003 is actually the only example of a withdrawal from a *universal* arms control treaty – it may be asserted that such treaties, in spite of the possibility of withdrawal, have proven very stable. In other words, the insertion of those clauses, as such, has apparently not endangered the treaty regimes. Finally, the formal and substantial conditions of the clauses, interpreted in good faith, contain certain guarantees against abusive or hasty withdrawal.

D. Important aspects to be considered in a new treaty banning nuclear weapons

We argue that, if States Parties to a new treaty banning nuclear weapons opt for the inclusion of a withdrawal clause, such a clause has to be accompanied by certain guarantees, such as:

1. Strict conditions for withdrawal: If the negotiations States consider the inclusion of a withdrawal clause appropriate, such a clause should be subject to well defined and strict conditions, which have to be interpreted narrowly and in good faith.

2. Formal mechanism to avoid abuse of the withdrawal clause: Delegations might wish to consider the usefulness of a formal mechanism to ensure compliance with the conditions for withdrawal and, as a result, avoid abuse of such a clause. This could be coupled with phrasing of the criteria for withdrawal in objective terms. For example, in the PTBT clause,¹⁵ the phrase “it decides that” would be removed :

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if [consider deleting: it decides that] extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.

Generally, arms control treaties include a provision on friendly settlement of disputes providing for different means of settlement. See, for instance, Article 10 § 1 of the Oslo Convention:

When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

The expression “interpretation or application” covers, from our point of view, the situation in which a State Party intends to make use of a withdrawal clause contained in a treaty. As a result, States Parties facing a withdrawal declaration of another State Party might propose one of the means of settlement provided, including the recourse to the ICJ. The States negotiating a new treaty might wish to include such a clause in the provision dealing with the right to withdrawal.

¹⁵ See above, A.

3. No withdrawal from the treaty during an ongoing armed conflict: The insertion of a paragraph ensuring that a State cannot withdraw from the treaty during an ongoing armed conflict should be considered by the negotiating States. By virtue of such a paragraph, States Parties are prevented from engaging in activities prohibited by the treaty during an armed conflict, which might turn out particularly relevant regarding the use of nuclear weapons. The Ottawa and Oslo Conventions, referred to above, can serve as examples for such a paragraph.¹⁶

4. Obligations deriving from other treaties and customary international law remaining unaffected: The insertion of a paragraph recalling that a State Party, even if it withdraws from the treaty, would still be bound by other relevant treaties that it has ratified, may be considered useful. In the case of a treaty banning nuclear weapons, such relevant treaties would be, *inter alia*, the NPT, the CTBT, the PTBT, or treaties establishing regional NWFZ. Moreover, a paragraph reiterating the principle that those duties imposed by the treaty that are also customary in nature continue to be applicable to the withdrawing State should also be considered. We are of the opinion that, at least, the use of nuclear weapons falls under this category.

5. Peremptory norms of international law remaining unaffected: The insertion of a paragraph recalling that there are principles and norms that cannot be derogated from since they constitute peremptory norms of general international law may be considered useful.¹⁷ In other words, even if a State Party withdraws from the treaty, it would still be bound by such principles and norms. Inspiration can be found, *inter alia*, in Article 1 § 2 of Additional Protocol I to the 1949 Geneva Conventions, containing a modern version of the so-called “Martens Clause”:¹⁸

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

In addition, a reference to non-derogable human rights, such as the prohibition of torture and inhuman and degrading treatment, or the prohibition of genocide, might be considered useful.¹⁹

6. Temporary suspension of the treaty rather than definitive withdrawal: It might be appropriate to consider a clause that would allow only temporary suspension but not definitive withdrawal. Such a solution would be compatible with international law²⁰ and has the advantage that a State Party does not leave the treaty regime forever.

7. Partial withdrawal/suspension only: The negotiating States might wish to limit the scope of withdrawal/suspension from the treaty to certain obligations only and not allow them in case of others that they consider particularly important. We are of the opinion that no withdrawal should be possible, at least, from the prohibition of use of nuclear weapons.

¹⁶ See above, B.

¹⁷ See in particular Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT).

¹⁸ The Martens Clause is named after the Russian jurist Fedor Fedorovitch Martens who was instrumental in drafting it and who ensured its adoption. It first appeared in the Preamble to the 1899 Hague Convention IV.

¹⁹ See, for instance, Article 15 § 2 of the European Convention on Human Rights.

²⁰ Article 57 VCLT.