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

Swiss Lawyers for Nuclear Disarmament (SLND)[1]

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It might appear strange to care about withdrawal from a treaty before it has been negotiated or concluded. We are nevertheless of the opinion that, in modern treaty making, States conceive the acts of joining and leaving a treaty regime together and, therefore, the discussion of the right of withdrawal regarding a treaty banning nuclear weapons is clearly justified.

This paper aims at summarizing the legal situation regarding withdrawal clauses included in arms control treaties and, as a result, stimulate the negotiations towards the adoption of a treaty prohibiting nuclear weapons. This paper does not take a stance on whether it is appropriate to include or not a withdrawal clause in a future treaty, but intends to raise relevant questions and to outline possible options. SLND might come up with a position paper at a later stage.

In the first part (A), an overview of existing withdrawal clauses in "traditional" arms control treaties will be given. In the second part (B), examples of modified withdrawal clauses adapted to the "humanitarian" nature of certain arms control treaties will be discussed. The third part (C) will summarize the State practice regarding withdrawal clauses. The fourth part (D) will address and compare advantages and drawbacks of withdrawal clause and the last part (E) 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

[1] https://safna.org/ This contribution was prepared by Daniel Rietiker, PhD, lecturer at Lausanne University, president of SLND and member of the board of directors of IALANA (daniel.rietiker@unil.ch). The author thanks John Burroughs, Peter Weiss, Alyn Ware and Phon van den Biesen for their input and comments on the text. SLND are the Swiss affiliate of IALANA (International Association of Lawyers Against Nuclear Arms).

major arms control treaties dealing with nuclear weapons. Already the 1963 Partial Test Ban Treaty (PTBT, also called "Moscow Treaty") 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.[2]

This clause is sometimes referred to as the "extraordinary events" clause and its application is subject to several formal and substantial conditions.[3] It basically served as a template for arms control treaties concluded later. For instance, a very similar clause was inserted in the 1968 NPT:[4]

> 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. (…).[5]

Even in more recent treaties such a standard withdrawal clause was included, for instance in the 1996 Comprehensive Test Ban Treaty (CTBT):[6]

> 1. This Treaty shall be of unlimited duration.
>
> 2. 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.
>
> 3. Withdrawal shall be effected by giving notice six months in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council.

[2] Article IV.
[3] 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 Editions and Bruylant, 2010, pp. 490-509.
[4] 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.
[5] Article X.
[6] The CTBT has not yet entered into force in spite of the more than 160 ratifications.

> Notice of withdrawal shall include a statement of the extraordinary event or events which a State Party regards as jeopardizing its supreme interests.[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.
>
> 2. The denunciation shall take effect three months after the delivery to the General Secretary of the Agency of the notification by the Government of the signatory State concerned. The General Secretary shall immediately communicate such notification to the other Contracting Parties and to the Secretary-General of the United Nations for the information of the United Nations Security Council and the General Assembly. He shall also communicate it to the Secretary-General of the Organization of American States.

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 of the treaties:

> This Treaty is of a permanent nature and shall remain in force indefinitively, 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

[7] Article IX.
[8] Article 13 § 1 of the Treaty of Rarotonga and Article 22 §§ 1 and 2of the Treaty of Bangkok are almost identical.
[9] Article 20.

Zone in Central Asia,[10] concluded more recently, contain again the "extraordinary events" formula.

The inclusion of such withdrawal clauses has nevertheless not been limited to treaties dealing with nuclear weapons. Similar or identical clauses were included in treaties dealing with other weapons of mass destruction (WMD), for instance in the 1972 Biological Weapons Convention:

> 1. This Convention shall be of unlimited duration.
>
> 2. Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention 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 jeopardised its supreme interests.[11]

The 1993 Chemical Weapons Conventions contains in Article XVI also a withdrawal clause. Noteworthy is in particular its paragraph 3:

> 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 if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.
>
> 3. 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, particularly the Geneva Protocol of 1925.

Paragraph 3 simply but importantly recalls that even if a State decides to withdraw from the CWC, it is still bound by other relevant rules of international law. "Any relevant rules" is not restricted to other treaties, but includes also customary law.[12] Of particular relevance to the CWC is the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925 Geneva Protocol), which is

[10] Article 16.
[11] Article XIII.
[12] The sources of international law are listed in Article 38 § 1 of the Statute of the International Court of Justice (ICJ).

undoubtedly today also of customary nature.[13] In other words, even if a State denounced the CWC and the 1925 Geneva Protocol in the same time, it would still be bound by the latter prohibition by virtue of customary law.[14] This aspect is important and might turn out relevant for the Ban Treaty, as will be further explained below.[15]

B. Modified withdrawal clauses adapted to the "humanitarian" nature of certain arms control 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:

> 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. <u>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.</u>
>
> 4. <u>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.</u>[16]

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.[17] Paragraph 4 of this provision follows the logic of Article XVI § 3 CWC, mentioned above.[18]

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[13] See, for instance, ECtHR, *Van Anraat v. the Netherlands* (decision), no. 65389/09, 6 July 2010, § 82.
[14] In a similar fashion, Article XIII CWC states that nothing in this convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the 1925 Geneva Protocol and the 1972 Biological Weapons Convention (BWC).
[15] See below, D.
[16] Article 20.
[17] 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.
[18] See above, A.

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 thought 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.[19]

A third example for that kind of "hybrid" treaty containing such a mixed clause is the 1980 Convention on Certain Conventional Weapons (CCW).[20]

The 2013 Arms Control Treaty (ATT) is not a arms control treaty in the traditional sense neither, and might be best described as treaty *sui generis*. According to its Article 1 (Object and purpose), the treaty seeks to establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms and prevent and eradicate the illicit trade in conventional arms, and prevent their diversion. Its purpose is, *inter alia*, to reduce human suffering by avoiding arms deliveries to countries where the arms might be used to commit violations of human rights or humanitarian law or to perpetrate certain international crimes.[21]

The particular nature of the ATT is also reflected in the withdrawal clause which distinguishes itself from the clauses inserted in earlier arms control treaties. It does, *inter alia*, not refer to "extraordinary events" and reads as follows:

> 1. This Treaty shall be of unlimited duration.
>
> 2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notification of such withdrawal to the Depositary, which shall notify all other States Parties. The notification of withdrawal may include an

[19] Article 20.
[20] Article 9.
[21] See, in particular, Articles 6 and 7 ATT.

explanation of the reasons for its withdrawal. The notice of withdrawal shall take effect ninety days after the receipt of the notification of withdrawal by the Depositary, unless the notification of withdrawal specifies a later date.

3. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Treaty while it was a Party to this Treaty, including any financial obligations that it may have accrued.[22]

C. The State practice regarding withdrawal clauses

As a matter of fact, in spite of their generally vague and open formulation, only few States have made use of withdrawal clauses inserted in arms control treaties. First of all, the Democratic People's Republic of Korea (DPRK) declared its definitive withdrawal from the NPT on 10 January 2003, after having suspended its earlier withdrawal intention.[23] Second, on 13 December 2001, the United States withdrew from the 1972 Anti-Ballistic Missile Treaty (ABM Treaty),[24] concluded as bilateral agreement between the United States and the former Soviet Union.[25] Third, on 10 March 2015, Russia announced its definitive withdrawal from the 1990 Treaty on Conventional Armed Forces in Europe (CFE), after having suspended its application already on 14 July 2007.[26] Fourth, on a phone call with Russian President Vladimir Putin of 28 January 2017, President Donald Trump announced his willingness to denounce the New Strategic Arms Reduction Treaty concluded with Russia (New START).[27]

In light of the foregoing, it can be observed that only one State withdrew from an *universal* arms control treaty, namely the DPRK from the NPT. The other two examples concern either bilateral (ABM Treaty, New START) either regional (CFE) treaties. It is also important to recall that the States having made use of withdrawal clauses have generally based their withdrawal declaration on the special clauses contained in the relevant treaties and have duly motivated their decision in terms of the clauses.[28]

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

[22] Article 24.
[23] https://www.armscontrol.org/factsheets/dprkchron
[24] https://www.armscontrol.org/act/2002_01-02/docjanfeb02
[25] Article 15 § 2 of the ABM Treaty contained a standard withdrawal clause.
[26] http://www.currenteventspoland.com/news/russia-withdraws-from-the-treaty-on-conventional-armed-forces-in-europe-cfe.html
[27] https://www.brookings.edu/blog/order-from-chaos/2017/02/10/the-problem-with-president-trumps-hasty-denunciation-of-new-start/
[28] See, for an overview, Rietiker, *op.cit*., pp. 492-498.

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

In cases where no clause is inserted in a treaty, the general regime of the 1969 Vienna Convention of the Law of Treaties remains applicable, in particular Article 56 § 1, according to which a treaty which contains no provision regarding its termination is *not* subject to withdrawal unless, *inter alia*, a right of withdrawal may be implied by the nature of the treaty. The expression "nature" of a treaty is very vague and, as a result, it may be argued that the inclusion of a withdrawal clause in a treaty generally enhances legal certainty. Other provisions of the VCLT might also prove relevant for the withdrawal from arms control treaties, in particular Articles 60 (withdrawal as a consequence of the breach of the treaty) and 62 (fundamental change of circumstances) of the VCLT, but their scope of application are limited. To sum up, even if no withdrawal clause is inserted in a new treaty, States Parties might still claim the right to withdraw based on general international law.

On the other hand, it can 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, mentioned above, it may be asserted that arms control 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. The formal and substantial conditions of the clauses, interpreted in good faith, contain certain guarantees against abusive or hasty withdrawal and, as indicated above,[29] only few treaties have to date experienced cases of withdrawal.

E. Important aspects to be considered in the negotiations of a new treaty banning nuclear weapons

[29] See above, C.

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.[30]

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,[31] the phrase "it decides that" would be removed from this this sentence:

> 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.

As a general rule, comtemporary arms control treaties include a provision on friendly settlement of disputes providing for different means of settlement. As an example, we refer to Article 10 § 1 of the Oslo Convention on Cluster Munitions:

> 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 banning nuclear weapons might wish to include such a paragraph in the provision dealing with the right to withdrawal, even if a separate clause on friendly settlement of disputes is also inserted in the treaty.

[30] Article 26 of the VCLT codifies the principle *pacta sunt servanda*, imposing on the Parties the duty to execute the treaty in good faith. From our point of view, this applies also to the withdrawal from a treaty.
[31] See above, A.

A formal mechanism allowing to establish the legality of a withdrawal might take various shapes, including more oringial ones. As an example, it could provide for the possibility of the remaining States Parties to the treaty, for instance within an extraordinary meeting or conference of States Parties, to refer the situation to the UN Security Council or the UN General Assembly with a view to requesting the International Court of Justice (ICJ) to render an advisory opinion on the legality of the withdrawal declaration of a State.

It might be argued that a procedure before the ICJ takes too much time and, as a result, is not suitable for the situation of a withdrawal from a arms control treaty that is subject to constant political and technological change. This might be true, but this argument can, at least in part, be countered by the factd that, by virtue of Article 41 of its Statute, the ICJ may indicate to the parties to the proceedings provisional measures if it considers them necessary in order to preserve the respective rights of either party.

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.[32]

4. Obligations deriving from other treaties 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, might 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.

5. Obligations deriving from customary international law remaining unaffected: The insertion of a paragraph reiterating the principle that those duties imposed by the treaty that are customary in nature continue to be applicable to the withdrawing State by virtue of customary international law should be considered. We are of the opinion that, at least, the use of nuclear weapons would fall under this category.

[32] See above, B.

6. 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 (Articles 53 and 64 VCLT) might be considered useful. 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":[33]

> 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 to this wording, 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.[34]

7. 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 law (Article 57 VCLT) and has the advantage that a State Party does not leave the treaty regime forever. Such a clause could propose a defined period of time during which the application of the treaty is suspended, for instance six ot twelve months, maybe with the possibility of prolongation for the same period.

8. 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 withdrawal/suspension of others that they consider particularly important. We are of the opinion that no withdrawal should be possible from the prohibition of use and threat of use of nuclear weapons. At least the former one reflects, from our point of view, a prohibition imposed by customary international law.

[33] 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.
[34] See, for instance, Article 15 § 2 of the European Convention on Human Rights.