

IRREVERSIBLE NUCLEAR DISARMAMENT



Prohibition Treaties and Irreversibility

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Introduction

The focus of this working paper is to explore irreversibility in prohibition treaties. Focussing on prohibition treaties allows us to differentiate disarmament from arms control. The types of prohibitions we are interested in are prohibitions on material things, like weapons, but this can also extend to prohibitions on practices (especially violent practices). The treaties and negotiations analysed here therefore go beyond those relating to nuclear weapons in order to assess the relationship between irreversibility and prohibition in other contexts, including prohibitions of other weapons, but also extending to other issue areas.

First, the paper looks at how the idea of 'irreversibility' in treaties has been understood and applied in academic scholarship. Given that the concept of irreversibility is quite vague and its definition varies depending on the context, the research explores the use and role related terms, such as 'binding', 'permanent', 'non-withdrawal', and so on. Second, the paper looks at how irreversibility has been approached in treaty texts, specifically how the term or related terms are used, either substantively and explicitly in the text or through inference, and how irreversibility has been understood in the negotiations and discussions, if not the final form of the treaty. This will include prohibitions on material objects and practices. The final part looks at the ways in which irreversibility has been enacted.

The purpose of the paper is therefore to provide an overview of the state of scholarship on irreversibility and prohibition and a succinct summary of how irreversibility has been approached in prohibition treaties.

Scholarship on irreversibility and prohibition

Prior to discussing irreversibility in treaties, it is important to assess the extent to which academic scholarship has examined irreversibility in prohibition agreements and how the codification of irreversibility affects state behaviour.

A review of the scholarship shows that there has been very limited discussion of the concept and practice of irreversibility in relation to prohibition treaties. This is in part because irreversibility is seen as an indelible part of establishing a 'regime of permanence' through a new treaty under which reversal or withdrawal from legal commitments is assumed to be highly unlikely and undesirable.

One of the reasons behind the creation of international prohibition regimes is the "inadequacy of unilateral and bilateral law enforcement measures in the face of criminal activities that transcend national borders". International prohibition regimes are part of a global system that aims to limit the potential for certain crimes to be

committed by individuals, states and other actors. By creating a system where international cooperation is expected through bilateral or multilateral treaties, states are induced to cooperate with one another.

The role of moral persuasion by non-government and transnational actors also has a role to play. Arguably, moral persuasion is part of what has enabled the rise of prohibition agreements of practices considered morally unacceptable, such as slavery and genocide. Multilateral prohibition treaties are a way of developing and embedding a norm as universal and shared, rather than culturally, politically or religiously specific.

Overall, however, the small scholarship on prohibition regimes has mostly focused on issues of terrorism, climate change, human rights, and the arms trade. There, however, is a limited literature on issues pertaining to the rights of withdrawal and irreversibility. However, the scholarship identifies a logical paradox insofar as when states agree to sign and ratify a multilateral treaty in good faith, they take on a *de facto* irreversible obligation even though many treaties have withdrawal clauses and states have a sovereign right to withdraw from agreements. States might not necessarily exercise a right to withdraw in order to reverse a prohibition commitment, but this would very likely be the case.

For example, the TPNW includes a core obligation to never “Develop, test, produce, manufacture, otherwise acquire, possess or stockpile” nuclear weapons. However, the treaty also includes a withdrawal clause, and the academic scholarship has examined the incompatibility between the core obligations and the possibility of withdrawal. This paradox between a sovereign right to withdrawal, which is often codified in a treaty text, and a collective intention to establish a ‘regime of permanence’ based on irreversible commitments is a feature of disarmament treaties more widely, such as the CWC and BTWC. While non-weapon treaties also contain withdrawal clauses, these are often more transactional and do not necessarily infer the reversal of a prohibition commitment in the same way that disarmament treaties do. The presence of withdrawal clauses allowing for the possibility of reversing a prohibition commitment therefore creates a potential clash between the legal and political obligations of states. I.e., the possibility of withdrawal codified in a treaty text is in tension with a principle of irreversibility.

Key to this is the supremacy of state sovereignty in relation to withdrawal clauses that creates two problems. First, typically a withdrawal clause can be triggered if the ‘supreme interests’ of a States Party has come under threat through ‘extraordinary events’. The resulting, and second, problem is that the assessment of supreme interests and extraordinary events and the decision to withdraw is exclusively within the prerogative of a States Party. In the case of the TPNW, the withdrawal clause recognises the right of ‘exercising national sovereignty’, but it provides states with legal pathway to reverse a commitment to irreversible disarmament.

Treaties intended to establish an irreversible prohibition of a practice or material object often rely on establishing a norm or set of norms to do so. These norms then need to evolve, 'cascade' and be accepted by a growing number of states. Norms of irreversibility do not necessarily have to originate with dominant states, as coalitions of small and middle powers can be successful in developing norms, international regimes, and institutions. International prohibition norms and regimes emerge as a result of campaigning and concerted pressure in both domestic and international politics. Non-governmental and transnational organisations act as "transactional moral entrepreneurs". Norm dispersal resulting from these pressures and the subsequent codification of a norm in treaties is essential to explaining the success of certain prohibition regimes. In addition, norms that constrain behaviour can evolve outside of formal process. For example, the concept of 'nuclear taboo' describes the normative development of nuclear weapons as immoral and unacceptable tools of war, which helps explain their non-use. The argument here is that norms, especially moral prohibitions and domestic and transnational actors that support them, can influence the policies of states, even very powerful state. Norms therefore have a role to play in the decisions of policymakers as part of the larger, more complex set of meanings and perceptions through which the policymakers understand and engage with the world around them. This includes a norm of irreversibility in prohibition treaties entered into in good faith, despite any legal pathways to reversal through a withdrawal clause.

Academics have previously identified the emergence of a norms-based global prohibition order related to the nuclear, chemical and biological weapons. These weapons in particular lie at the intersection of norms, interests and ethics as 'weapons of mass destruction'. They have therefore been most prominent in ideas of irreversible disarmament. The idea of a WMD prohibition regime encompassing a norm of irreversibility extends in some cases beyond international law into domestic law, such as UNSCR 1540. Here, international legal obligation and norms are embedded in domestic criminal law to encompass actors beyond the state. Reinforcing a norm of irreversibility through a prohibition agreement embedded in international and in domestic law in ways that criminalise prohibited activities can be explored further.

In sum, there remains a dearth of scholarship on connections between norms of irreversibility, prohibition agreements and global nuclear disarmament. This is especially so with regards to multilateral treaties and how irreversibility norms are established and perpetuated.

Irreversibility in treaties

This section looks at how prohibition treaties address the concept of irreversibility starting with weapons- and then non-weapons-related prohibition agreements. In particular, what role, if any, the concept and/or terminology of irreversibility played in negotiations and final treaty texts, including in relation to withdrawal, verification and enforcement. In doing so, we can get an initial sense of whether norms of

irreversibility are more salient in relation to weapons or other forms of prohibition and whether there are any patterns of codification and norm establishment.

However, this is an initial scoping review rather than an exhaustive analysis and irreversibility has rarely been explicitly mentioned in multilateral agreements. Moreover, there does not seem to be a single unified definition of 'irreversibility' in general, which complicates attempts to establish effective frameworks or guidelines on how to achieve irreversible nuclear disarmament.

There are three possible options when it comes to the role of irreversibility in prohibition treaties: 1) irreversibility is not mentioned anywhere; 2) irreversibility is discussed in negotiations but not included in a final text; or 3) irreversibility is discussed and included in the final text. If it is included, it is possible to trace how its conceptualisation has been framed, contested and evolved over the course of negotiations to its final form. If it is excluded, however, then it may be possible to do the same, as well as identify why and how it came to be omitted through a negotiation record. If irreversibility is included in the final text of the treaty, then we can look at what form it takes and how it is tied to verification and withdrawal.

This report mostly focuses on the treaties where irreversibility is included in some form, whether it is made explicit or is implied through use of terms such as 'permanent', 'non-withdrawal' and so on. Looking in detail at negotiating records for a range of prohibition treaties is more significant undertaking and a potential avenue for future research.

This scoping exercise takes an initial look at both prohibitions of material objects as well as prohibitions of practices, though with an emphasis on the former. Prohibitions of material objects, especially weapons, include nuclear, chemical or biological weapons, launchers and delivery vehicles, as well as other conventional weapons. Treaties may also include prohibitions on production facilities. Proposals prohibiting practices focus on explicit or implicit bans on specific types of behaviour.

Irreversibility in weapons treaties

Irreversibility is seldom explicitly mentioned in weapons-related treaties. Instead, irreversibility is often implied through use of terms such as 'complete disarmament', 'destruction' and obligations prohibiting possession, stockpiling and production of specific materials and objects. Most of these treaties have a broadly similar procedure for withdrawal that, as noted above, sits in tension with a norm of irreversibility.

The Non-Proliferation Treaty

Irreversibility is not mentioned in the main text of the NPT. The text includes prohibitions on the manufacture or acquisition nuclear weapons by non-nuclear-weapon states, the transfer of nuclear weapons to non-nuclear-weapon states, or

other support to a non-nuclear weapon state in the manufacturing or acquisition of nuclear weapons. Whilst these are mainly prohibitions of materials things, they also cover certain practices (like encouraging or inducing). Nuclear disarmament is covered in Article 6, in the context of 'general and complete disarmament'. However, no mention is made of irreversibility and in fact irreversibility only comes up for the first time in an NPT context in the Final Document of the 2000 NPT Review Conference. This was tied to the proposals of several states to negotiate a ban on production of fissile materials excess to military purposes.

The idea of irreversibility in this treaty and, as shall be seen in many others, are at odds with the withdrawal clauses present in the final texts of the treaties. The withdrawal procedure in the NPT is outlined in Article 10. Withdrawal is acceptable if a state decides that extraordinary events, related to the subject of the treaty, threaten the state's supreme interests. In these circumstances, states are required to state the extraordinary events in a withdrawal letter with their withdrawal coming into effect three months after the notice has been served to the other parties to the Treaty and the UN Security Council.

The Comprehensive Test Ban Treaty

The CTBT is a treaty prohibiting a practice rather than material objects. It places a ban on the explosive testing of nuclear weapons and other nuclear devices for either military or civilian purposes in all environments. Although it was adopted by the UNGA, but it still has not entered into force due to 8 out of 44 Annex 2 not having ratified it. There is no mention of irreversibility, either implicit or explicit, in the text of the treaty (or its predecessors, the Partial Test Ban Treaty, the Threshold Test Ban Treaty, and Peaceful Nuclear Explosions Treaty) or in one of the best accounts of it. Instead, it is only implied through reference to 'general and complete disarmament' as part of global denuclearisation.

There is, however, a precedent for irreversible dismantlement of nuclear testing facilities in connection to CTBT. After signing the CTBT in 1996, France started the work on dismantling its nuclear test sites and completed the dismantling of its Pacific Test Centre by 1998.

As in the case of NPT, states have the ultimate decision to withdraw citing extraordinary circumstances related to the substance of the treaty that threaten the state's supreme interests. Article 9 of the treaty requires states to submit a notification to other State Parties to the treaty six months in advance.

Treaty on the Prohibition of Nuclear Weapons (TPNW)

Along with CTBT, the TPNW is one of the most prominent nuclear disarmament treaties which remains to be adopted by the nuclear-weapon states. Opened for signature in 2017, it has since been signed and ratified by 68 states. The treaty focuses on irreversibility in a different way to most discussions surrounding nuclear

disarmament. The treaty originated from a reframing of nuclear weapons on the potentially humanitarian and ecological consequences of the use of nuclear weapons. By shifting the focus to these consequences, an attempt was made to move the discussion on nuclear disarmament and reinforce the case for an irreversible nuclear disarmament process. The treaty explicitly refers to “the irreversible, verifiable and transparent elimination of nuclear weapons”, “the elimination or irreversible conversion of all nuclear-weapons-related facilities” and “the verified, time-bound and irreversible elimination of nuclear-weapon programmes”.

At the same time, the TPNW did not set out to provide an exhaustive path to complete nuclear disarmament and therefore what ‘irreversibility’ might mean in practice. This treaty also contains the withdrawal clause with the same postulation of extraordinary events and the need to notify the other state Parties 12 months in advance.

United States-Russia Highly Enriched Uranium Purchase Agreement in 1993 (also known as the ‘Megatons to Megawatts Program’)

The ‘Megaton to Megawatts’ agreement is an example of a treaty where irreversibility is not codified, but is instead implied in the context. The agreement, signed in 1993, allows Russia and United States to cooperate on the disposal of HEU from dismantled Russian nuclear warheads. This disposal would involve the down-blending of HEU into LEU from dismantled nuclear warheads under relevant bilateral arms control agreements (START from 1994, SORT from 2001), and then sale of the LEU to the US for use as reactor fuel commercial energy production. The process was to all intents and purposes an irreversible elimination of Russia weapons-grade HEU. Additionally, a 2013 report explains that the verification measures for down-blending to ensure irreversible conversion to LEU by a US monitoring team.

This is the only bilateral treaty and it is useful to include because it demonstrates cooperation between states, verification procedures and, most importantly, irreversibility even though this is only implied by the treaty.

Fissile Material Cut-Off Treaty (FCMT)

The proposed FCMT is an example of a treaty that aims to prohibit the production of material things. Discussions have centred on a ban on production of new fissile materials (i.e. a cut-off treaty - FMCT) versus a ban on production of new material *and* destruction of existing stocks (i.e. a more comprehensive fissile material treaty – FMT). To highlight the importance of the difference between the two, when looking at the US draft FCMT, there is no mention of irreversibility, the permanence of a fissile material control regime or the legally binding obligations of the treaty. It does not propose irreversible elimination of existing stocks. At the same time, it also allows for withdrawal on 3-months notice.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty)

The Ottawa Treaty aimed to eliminate anti-personnel mines due to their indiscriminate nature when triggered, and the unacceptable to civilians as well as combatants. Irreversibility is implied through the context of the prohibition of production and stockpiling of anti-personnel landmines, as well as the requirement on States Parties to “destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of [the] Convention”.

There are no provisions for enforcement or a verification system. The withdrawal protocol is similar to other treaties discussed above, whereby state Parties wishing to denounce the Convention are required to submit a note explaining their reasoning to other state Parties 6 months in advance of leaving.

The Convention on Cluster Munitions (CCM)

The CCM does not mention irreversibility explicitly, but the prohibitive range of activities is very extensive. By forbidding the use, development, production, stockpiling or retaining of cluster munitions, this is effectively a treaty calling for complete and irreversible disarmament in the context of cluster munitions. This includes a prohibition on both the practice of use of cluster munitions and their production as material objects.

This treaty also contains articles on withdrawal with the same allowances as given in other treaties discussed up to this point. The notice period in CCM is 6 months, and State Parties would be required to submit a note of withdrawal with their explanation of reasoning.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW)

The CCW focuses on material prohibition of certain conventional weapons, rather than on practices which may be associated with those weapons. Similar to other treaties discussed above, it also does not invoke the idea of irreversibility explicitly. Instead, it is implied through the prohibition of production, stockpiling and eventual destruction of the weapons in question, both in the preamble and main text of the convention.

Withdrawal may take place one year after submitting the notification to the depositary. This convention stands out, because it does not require the withdrawing state party to provide a reason for decision, nor does it mention anything about extraordinary circumstances in relation to the subject of the convention, which could justify the decision.

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

The BTWC focuses on the prohibitions related to biological and toxin weapons from a material perspective by banning the material aspects of development, production,

possession, stockpiling and transfer of biological weapons, equipment and methods of delivery. Both the main text and preamble make direct references to general and complete disarmament and the need for destruction and dismantlement of biological and toxin weapons.

The withdrawal clause is present and, like most other treaties discussed above requires a submission notifying of withdrawal from the treaty and explanation for the reasons behind it. This treaty also calls for a 3 month notice period.

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

The CWC also refers to general and complete disarmament. It obligates States Parties to dismantle chemical weapons as well as the chemical weapons production facilities, and thereby arguably established norm of chemical weapons disarmament and irreversibility.

The withdrawal clause once again is in place and requires a 90-day (i.e., 3 months) notification period with an explanation of extraordinary circumstances for the withdrawal.

Irreversibility in non-weapons treaties

This section briefly looks a number of selection non-weapon treaties that cover material and practice prohibitions, particularly multilateral environment treaties.

Montreal Protocol on Substances the Deplete the Ozone Layer

The Montreal Protocol aims to address the depletion of the ozone layer through man-made substances and chemicals. The text of the protocol forbids both material production of those substances, as well as the practices associated with them. The preamble outlines the ultimate objective as “elimination [of the ozone-depleting substances] on the basis of developments in scientific knowledge”. Elimination of these substances implies an irreversible process. Through developing scientific knowledge, the aim is to create substitutes which do not have the same effect on the ozone layer. In addition to prohibition on production of those substances, Article 4 also prohibits import and export of the banned substances. The only exception to export is if it is done solely for the purposes of destruction.

Like the weapons treaties discussed above, the Montreal Protocol also has a withdrawal clause giving the state parties the option to leave the treaty a year after notifying the other States Parties. However, what separates this Protocol from other treaties is that the withdrawal clause only becomes operational four years after assuming obligations under article 2a.

Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (The Wellington Convention)

This treaty does not have either implicit or explicit irreversibility in its main text or preamble. This is likely to be due to the nature of the convention, as it does not forbid either long driftnets themselves or practice of fishing with long driftnets altogether, but rather within a specific area - the South Pacific. It also contains a withdrawal clause, but not within the main text of the treaty. Instead, it is included in Protocol 2.

Geneva Conventions

The Geneva Conventions set out the international legal standards for humanitarian treatment of people during war. The conventions consist of four treaties as well as three additional protocols. Together they outline the rights of military staff, civilians, as well as wartime prisoners. Additionally, they provide the protections for wounded and sick individuals, as well as protections for civilians who are trapped in a war-zone. These conventions are binding for its State Parties, implying an irreversible obligation unless a withdrawal option is exercised. Although there is no mention of irreversibility directly, the Conventions state that these rules apply even in the event of conflict either between two States Parties to the Conventions, or to the State Party to the Conventions if it is not in conflict with another State Party to it.

The conventions call for a prohibition of specific practices, rather than material objects. All of the treaties have denunciation clauses within them, which require a 12-month notice. Unlike most of the weapons-related treaties, there is no requirement for an explanation of reasons for withdrawal.

Conclusion

This paper has taken an initial look at irreversibility in multilateral prohibition treaties. The first section looked at the relevant scholarship and shows a significant gap on the subject, though the scholarship on norms, treaties and disarmament is relevant.

Some scholarship has, however, highlighted the ways in which withdrawal clauses and a sovereign right of withdrawal sit in tension with the idea of a 'regime of permanence' and a norm of irreversibility.

The scoping review of treaties shows that irreversibility is not mentioned in prohibition agreements other than the most recent – the TPNW. We can conjecture that States Parties *assume* irreversibility is implied in the completeness of the prohibitions set out in treaty obligations, but we can also conjecture that the tension between irreversibility and a sovereign right to withdraw mitigates against detailed consideration of irreversibility as a concept and practice. However, more attention needs to be paid to the ways in which irreversibility is *implied* in the verification regimes of prohibition treaties.

Future research recommendations

This project has shown the difficulties with defining irreversibility and applying it. The establishment and perpetuation of irreversibility as a norm in prohibition treaties needs to be investigated further. In particular, there is a gap on norm cascades in relation to nuclear disarmament processes and how it this connects to the concept of irreversibility. Next steps would also include research on: the history of negotiations to see if 'irreversibility' has been discussed at any stage; how irreversibility has been understood across a wider range of treaties; and how irreversibility has been practiced by looking at review conferences and other outcome documents. This would open up avenues for discussion and learning from other experiences.

PROJECT ON IRREVERSIBLE NUCLEAR DISARMAMENT

Working papers

Joelien Pretorius. **Staying the course: Lessons from South Africa for irreversibility of nuclear disarmament.** March 2023. York IND Working Paper#1.

Nick Ritchie. **Conditional Reversibility as a Condition of Irreversibility: The Case of the US and the End of Nuclear Testing.** March 2023. York IND Working Paper#2.

Mikhail Kupriyanov. **Prohibition Treaties and Irreversibility.** March 2023. York IND Working Paper#3.

Research Reports

Nick Ritchie. *Irreversibility and Nuclear Disarmament: Unmaking Nuclear Weapons Complexes.* March 2023. York IND Research Report#1.



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