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United Nations General Assembly Open-ended Work Group on “Taking forward multilateral nuclear disarmament negotiations”, Palais des Nations, 11 May 2016

Panel V: Possible pathways to take forward multilateral nuclear disarmament negotiations

“Pathways to nuclear disarmament: delegitimising nuclear violence”

Working Paper by Dr Nick Ritchie, University of York, UK

Email: nick.ritchie@york.ac.uk

This paper explores pathways for diplomatic responses to the continuing threat of nuclear violence. It differentiates between pathways focussed on the devaluing of nuclear weapons by the nuclear-armed states and pathways focussed on delegitimising nuclear weapons by a wider community of states.

The 2016 Open Ended Working Group (OEWG) was mandated by the UN General Assembly in October 2015 to “substantively address concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons”.¹ Chair of the 2016 OEWG, Ambassador Thani Thongphakdi, summarised the purpose of the working group as follows: “The work of the Group was underpinned by deep concern over the threat to humanity posed by the existence of nuclear weapons and the catastrophic humanitarian consequences of any detonation. The risk of these catastrophic humanitarian consequences will remain as long as nuclear weapons exist. The increased awareness of and well documented presentations on the humanitarian impact of nuclear weapons compel urgent and necessary action by all States leading to a world without nuclear weapons.”²

It followed the 2013 OEWG to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons. The final report of the 2013 OEWG outlined a series of elements to be considered in taking forward multilateral nuclear disarmament negotiations, including legally binding instruments. The 2013 OEWG was itself a product of the so-called humanitarian initiative on nuclear weapons spearheaded by a group of 16 countries at the 2010 NPT Review Conference.³ The 2013 OEWG final report listed a number of measures, many of which have been developed in detail elsewhere alongside other comprehensive blueprints for nuclear disarmament, for example the 2009 final report on *Eliminating Nuclear Weapons* from the International Commission on Nuclear Non-proliferation and Disarmament.

Ireland and Switzerland submitted a working paper to the 2013 OEWG that highlighted four possibly ways forward for multilateral nuclear disarmament negotiations: 1) a single treaty such as a nuclear weapons convention; 2) a series of free-standing agreements built around the NPT; 3) a framework convention with protocols; 4) a hybrid of these three.⁴ The New Agenda Coalition developed this sketch further in a working paper on “Article VI of the Treaty on the

¹ United Nations General Assembly, “Taking forward multilateral nuclear disarmament negotiations”, A/C.1/70/L.13/Rev.1, 29 October 2015, New York.

² Ambassador Thani Thongphakdi, “Chair’s Synthesis Paper”, UN Open-ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, 21 April 2016.

³ Nick Ritchie, “The Story So Far: The Humanitarian Impact of Nuclear Weapons Initiative”, ILPI-UNIDIR Vienna Conference Series, Paper No. 1, December 2014. Available at <<http://www.unidir.org/files/publications/pdfs/the-story-so-far-en-616.pdf>>.

⁴ “Identifying the essential elements for achieving and maintaining a world without nuclear weapons”, paper submitted by Ireland and Switzerland to the *UN Open Ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons*, 19 July 2013, A/AC.281/WP.8, Geneva.

Non-Proliferation of Nuclear Weapons” submitted to the 2014 NPT Preparatory Committee. The paper reviewed the outcome of the 2013 OEWG and outlined a set of legal commitments essential to any legal instrument that might constitute the NPT Article VI’s “effective measures” to achieve nuclear disarmament.⁵ It argued that “early consideration should be given to the practical, technical, legal, financial, administrative and other arrangements required for the creation of a treaty body” to oversee such measures. It then set out a modified list of possible treaty bodies: 1) a comprehensive Nuclear Weapons Convention; 2) a Nuclear Weapons Ban Treaty; 3) a framework arrangement of mutually supporting instruments; and 4) a hybrid arrangement. Each option was discussed in further detail in the paper’s annexes.⁶

In 2016 UNIDIR and the International Law and Policy Institute (ILPI) published a report that discussed these options in more detail alongside the so-called step-by-step and ‘building blocks’ (parallel and simultaneous steps) approaches that characterise the preferences of many NPT nuclear weapon states and US treaty allies. The report labelled these options as: 1) A comprehensive approach; 2) a framework approach; 3) a step-by-step approach; and 4) a ban treaty approach. The report then discussed in detail the possible scope of a nuclear weapons ban treaty in terms of obligations and prohibitions drawing on earlier UNIDIR, ILPI, Article 36 and Reaching Critical Will reports.⁷

1. Devaluing nuclear weapons

Preferences for a particular pathway depend on understandings of the purpose and feasibility of next steps towards multilateral nuclear disarmament and the purpose of the humanitarian initiative that has precipitated the OEWG discussions. It is useful here to distinguish between a purpose of *reducing the value* of nuclear weapons and a purpose of *reducing the legitimacy* of nuclear weapons.

The post-Cold War nuclear disarmament process has generally focussed on efforts to reduce the value assigned to nuclear weapons by nuclear-armed states. Nuclear weapons remain highly valued assets for states that possess them and many of their allies. The values assigned to nuclear weapons can take different forms, but a value of security through the capacity to threaten other societies with nuclear violence is central.

The security values assigned to nuclear weapons have diminished since the end of the Cold War as the international social, economic and political landscape has changed, but this has been a limited process of what we might call ‘surface devaluing’.⁸ This refers to a number of changes that have occurred in the nuclear policies of nuclear-armed states, particularly the US and

⁵ These included: legal prohibitions against the development, testing, production, stockpiling, transfer, use and threat of use of nuclear weapons; a legally binding obligation to enter into a transparent, irreversible and verifiable process of complete nuclear disarmament; provisions for the control of fissile and other nuclear materials relevant to nuclear explosive devices; an effective means of verifying the implementation of these obligations and prohibitions, including through declarations, inspections, monitoring, cooperation, fact-finding, compliance and dispute-settlement mechanisms, etc.; national implementation measures; protection of States’ entitlement to the exclusively peaceful uses of nuclear technology, subject to safeguards. Working Paper on “Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons” submitted by the New Agenda Coalition to the Preparatory Conference for 20105 NPT Review Conference, NPT/CONF.2015/PC.III/WP.18, 2 April 2014, p. 8.

⁶ *Ibid.*, pp. 8-9.

⁷ John Borrie, Tim Caughley, Torbjørn Hugo Graff, Magnus Lovøld, Gru Nystuen, and Camilla Waszink, *A Prohibition on Nuclear Weapons: A Guide to the Issues* (Geneva: UNIDIR and ILPI, February 2016); Ray Acheson, Thomas Nash and Richard Moyes, “A Treaty Banning Nuclear Weapons: Developing a Legal Framework for the Prohibition and Elimination of Nuclear Weapons”, *Reaching Critical Will and Article 36*, May 2014; Torbjorn Graff Hugo, “About a Ban: Dismantling the Idea of a Ban on Nuclear Weapons”, International Law and Policy Institute, Oslo, 2013. Others have differentiated yet further. Alyn Ware, for example, outlines seven options: step-by-step; building blocks; nuclear weapons convention/hybrid framework; framework agreement; prohibition on use; ban treaty; Global Zero plan. Alyn Ware, “Advocacy Networks and a World Free of Nuclear Weapons”, in Hynek, N. and Smetana, M., *Global Nuclear Disarmament: Strategic, Political, and Regional Perspectives* (Abingdon: Routledge, 2015), pp. 122-144.

⁸ See Nick Ritchie, “Valuing and Devaluing Nuclear Weapons,” *Contemporary Security Policy*, 34: 1, 2013, pp. 146–173

Russia. They include: a general move away from nuclear defence and towards expeditionary conventional warfare; reducing the vast excesses of Cold War legacy nuclear forces; marginalising the idea of using nuclear weapons for battlefield 'war-fighting'⁹; shifting some roles previously assigned to nuclear weapons to conventional weapons (mainly in the US¹⁰); and consolidating formal declaratory policies about who might qualify for a nuclear attack and under what conditions. A good example of 'surface devaluing' is the substantial cuts to US and Russian strategic and non-strategic nuclear weapons through the reciprocal Presidential Nuclear Initiatives in 1991 and 1992. These were very important but they were a pragmatic response to geo-political, financial and technical realities rather than a sweeping away of Cold War doctrine as some argued.¹¹

All of this is welcome, but it represents only limited or partial devaluing. 'Deeper' forms of devaluing that require more explicit changes to nuclear doctrines that would restrict the practice of nuclear deterrence have been largely rejected.¹² These include measures such as a no-first use agreement (proposed initially by China), de-alerting deployed nuclear weapon systems, and legally-binding negative security assurances.¹³

Nevertheless, the NPT nuclear weapon states say this surface devaluing is excellent progress and fulfils requirements for meeting their nuclear disarmament responsibilities over the past five NPT review cycles from 1990 to 2015. In 2012 they said they had made "unprecedented progress and efforts... in nuclear arms reduction, disarmament, confidence-building and transparency." They "note with satisfaction that stocks of nuclear weapons are now at far lower levels than at any time in the past half-century" delivered through "systematic and progressive efforts" since the end of the Cold War.¹⁴

Focussing nuclear disarmament diplomacy on efforts to reduce the security value assigned to nuclear weapons by nuclear-armed states in terms of warhead numbers, types, and doctrine does a number of things:

- 1) Whilst it might accept that the risk of nuclear violence must be taken seriously, it suggests that the problem is not the weapons themselves or the practice of nuclear deterrence, but who has them, in what numbers, and how they are configured;
- 2) This diagnosis says the risk of nuclear violence can be satisfactorily managed for the foreseeable future through adjustments to nuclear posture, doctrine, consolidation of nuclear forces, and vigorous counter-proliferation;
- 3) It devolves agency for nuclear disarmament to the nuclear-armed states and their agendas and relationships; and

⁹ The US has transitioned from around 9,150 NSNW in 1991 to around 500 today. Russian has gone from around 18,900 to around 2,000 with several thousand awaiting dismantlement. Data from *Table of US Nuclear Warheads*, Natural Resources Defense Council, Washington, D.C. Available at <<http://www.nrdc.org/nuclear/nudb/datab9.asp>> and *Table of USSR/Russian Nuclear Warheads*, National Resources Defense Council, Washington, D.C. Available at <<http://www.nrdc.org/nuclear/nudb/datab10.asp>>. Hans Kristensen and Robert Norris, "US nuclear forces, 2013", *Bulletin of the Atomic Scientists*, 69: 2, 2013, p. 78; Hans Kristensen and Robert Norris, "Russian nuclear forces, 2012", *Bulletin of the Atomic Scientists*, 68: 2, 2012, pp. 89-90.

¹⁰ See Donald Rumsfeld, *Annual report to the President and the Congress*, US Department of Defense, Washington, D.C., 2002, chapter 7.

¹¹ Representative Lee Hamilton maintained that "the most astonishing aspect of the President's initiative is his call for a unilateral reduction of U.S. armaments. In one stroke, he scrapped much of the now obsolete nuclear doctrine and Cold War thinking of the past four decades. He has paved the way for a new approach". Lee Hamilton, "The President's Arms Control Speech", *Congressional Record (Extension of Remarks)*, 9 October 1991, p. E3331.

¹² See, for example, "A nuclear-weapons-free world: the need for a new agenda", Joint Declaration by the Ministers for Foreign Affairs of Brazil, Egypt, Ireland, Mexico, New Zealand, Slovenia, South Africa and Sweden, 9 June 1998.

¹³ See Nick Ritchie, "Waiting for Kant: Devaluing and Delegitimising Nuclear Weapons", *International Affairs*, 9: 3, 2014, pp. 601-623.

¹⁴ Statement by the P5, NPT Preparatory Committee, General Debate, Vienna, 3 May 2012.

- 4) It leaves the logic and practice of nuclear deterrence *and* the legitimacy of nuclear weapons relatively undisturbed as far as the nuclear-armed states and their allies are concerned.

This is evident when nuclear weapon reductions are accompanied by statements that restate an unequivocal commitment to nuclear deterrence and the necessity of nuclear weapons for national security and international order.

As the New Agenda Coalition noted in its paper to the 2013 OEWG: “despite the commitment of the NWS to further diminish the role and significance of nuclear weapons in all military and security concepts and doctrines, nuclear deterrence remains a defining feature of the national security postures of both the NWS and the military alliances in which they participate. Such developments confirm the continued reliance of NWS on nuclear weapons for their national security for the foreseeable future, at the expense of the collective security interests of all.”¹⁵

The absence of what many states consider serious movement towards nuclear disarmament and a refusal to engage in deep devaluing measures has nurtured disillusionment and cynicism over the past twenty years since the permanent extension of the NPT in 1995. It has generated deep concern about the creeping permanence of nuclear weapons 70 years into the nuclear age. As the Austrian government noted at the 2013 OEWG: “NNWS’ interpretation of credible nuclear disarmament progress... would require clearly discernible changes in the policies of nuclear weapon States and a clear direction towards nuclear disarmament and a world without nuclear weapons These changes have not happened.”¹⁶

2. Delegitimising nuclear weapons

In response, a growing number have states have shifted their focus from devaluing nuclear weapons to delegitimising, or stigmatising, *nuclear violence*. In doing so, they have challenged the *legitimacy of valuing* nuclear weapons at all, irrespective of whether a particular government values its weapons or a particular doctrine or operational posture in one way or another.

This has been a core purpose of the humanitarian initiative. The Ireland-Switzerland paper to the 2013 OEWG, for example, specifically asked how the working group “might consider how best the non-nuclear-weapon States can advance the process of stigmatizing nuclear weapons” on the basis that “actions directed at further stigmatizing nuclear weapons could significantly take forward the case for greater progress on nuclear disarmament.”¹⁷ This was cemented in the Austrian government’s pledge issued at the 2014 Humanitarian Impact of Nuclear Weapons conference to “stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks”. The pledge that has now been formally endorsed by 127 governments and was adopted as a UN General Assembly resolution in December 2015.¹⁸

¹⁵ Working submitted by the New Agenda Coalition (Brazil, Ireland, Mexico, Egypt, New Zealand and South Africa) to the UN Open Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, A/AC.281/WP.10, 20 August 2013, p. 2.

¹⁶ Working Paper on “Perceptions and View on Nuclear Disarmament” submitted to the UN Open Ended Working Group to Develop Proposals to Take Forward Multilateral Nuclear Disarmament Negotiations for the Achievement and Maintenance of a World without Nuclear Weapons, 21 May 2013, A/AC.281/WP.1, p.5

¹⁷ “Identifying the essential elements for achieving and maintaining a world without nuclear weapons”, paper submitted by Ireland and Switzerland to the *UN Open Ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons*, 19 July 2013, A/AC.281/WP.8, Geneva, p. 2.

¹⁸ United Nations General Assembly, “Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons”, A/RES/70/48, 7 December 2015.

The humanitarian initiative argues that nuclear weapons are illegitimate because of the appalling and unacceptable humanitarian consequences of any use under any circumstances.¹⁹ This focus on humanitarian impacts is not a new phenomenon but it has taken on new salience as nuclear disarmament processes have slowed and concern at the permanence of nuclear weapons has increased. The unacceptability of humanitarian consequences rests on a collective moral revulsion and rejection of particular categories of violence, especially massive, inhumane and indiscriminate forms of violence. This has been progressively codified in legal rules and normative principles governing the conduct of war, in particular international humanitarian law applicable in armed conflict but also international environmental law and international human rights law, in particular the non-derogable right to life.²⁰

These rules and norms have already led international society to stigmatise and prohibit chemical and biological weapons, as well as other types of weapons. They have been developed in large part over the past century, not least in response to the carnage of the two World Wars. They have been crafted by an expanding international society of states after successive waves of decolonisation. The legitimacy and authority of these norms and rules rests on their universality. According to these norms and rules, and by focusing on what nuclear weapons are rather than what purpose they are meant to serve, nuclear weapons are the worst of all because of their capacity for massive and indiscriminate violence.²¹ The ICRC noted in 2011 “The incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use.” Consequently, it “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.”²²

This is compounded by the permanent risk of nuclear violence as long as nuclear weapons exist. The current global nuclear system of interacting national nuclear weapon complexes, fissile material production enterprises, command and control systems, nuclear alliances, antagonistic relationships involving nuclear-armed states, supplemented by non-state actors with nuclear ambitions, carries an inherent systemic risk of the use of nuclear weapons. Nuclear war planning suggests that nuclear weapons would not be used in ones or twos in a conflict. Instead, the decision to escalate a conflict to the use of nuclear weapons would likely involve tens, and potentially hundreds or even thousands of nuclear weapons. The constancy of this risk was exemplified in concerns at the prospect of Republican presidential nominee Donald Trump having a figurative ‘finger on the button’.²³ This highlighted the capacity for individual leaders to initiate nuclear conflict at very short notice on an ongoing basis. Daniel Deudney describes this concentration of destructive power in the executive as ‘nuclear despotism’.

New research has demonstrated the terrible human, environmental and inter-generational effects of tens of nuclear warhead detonations, let alone the detonation of hundreds or

¹⁹ Nuclear weapons can be used in very low numbers and in circumstances that could conceivably cause only limited loss of life, suffering and environmental damage, for example against an enemy flotilla on the high seas. Nevertheless, as, Borrie *et al* (2016, p. 27) note, in negotiations on the Anti-Personnel Land Mine Convention and Convention on Cluster Munitions the actual use of these weapons was generally contrary to International Humanitarian Law. As such, the point of legally-binding comprehensive prohibition of these weapons “was to outlaw *all* usage, irrespective of the (limited) potential for law-abiding usage”.

²⁰ Tim Wright, “Do Nuclear Weapons Violate the Right to Life under International Law?”, *Australian Journal of Peace Studies*, Vol. 3, 2008, pp. 99-119; Randy Rydell, “The United Nations and a Humanitarian Approach to Nuclear Disarmament” in *Nuclear Abolition Forum*, No. 1, October 2011.

²¹ The extreme and incontestable level of violence that would accompany a nuclear attack is, conversely, a framed as source of legitimacy for some advocates of nuclear deterrence insofar as it generates a deterrent effect that induces caution and therefore stability and security.

²² ‘Working Towards the Elimination of Nuclear Weapons’, Draft Resolution and Background Document CD/11/4.1, Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, 26 September 2011, p. 10.

²³ Bruce Blair, “What Exactly Would It Mean to Have Trump’s Finger on the Nuclear Button?”, *Politico*, 11 June 2016.

thousands. This literature has examined nuclear near misses, the risk of nuclear weapons use, and nuclear weapons accidents that undermines the idea of nuclear deterrence as a safe and stable system of managing adversarial relations.²⁴ It has studied the gendered impact of nuclear weapons in terms of differing effects of ionizing radiation from nuclear detonations on male and female bodies and differentiated vulnerabilities after major catastrophes.²⁵ It has produced peer-reviewed studies that show a nuclear conflict involving the use of 100 Hiroshima-sized nuclear weapons would have a catastrophic impact on the global climate caused by the tremendous amount of smoke released into the atmosphere.²⁶ It has also led to new research by UNIDIR on the unmanageability of a nuclear detonation in a populated area for the UN-led humanitarian response and disaster management system.²⁷ The limits of response are exacerbated by a global context of cascading natural disaster, population movements, and humanitarian emergencies fueled by climate change with which the international response system is already struggling to cope.²⁸ Given that the probability of nuclear use in a nuclear-armed world remains greater than zero (there is no basis upon which the probability of use can be definitively fixed at zero) and given the very grave consequences of use, even a very small probability produces a high risk. Given the uniquely destructive effects of nuclear violence, the risk of use is widely considered to be unacceptable.

3. Delegitimising nuclear weapons through prohibition

The legitimacy of a particular practice such as possessing or using nuclear weapons tends to rest on four broad factors: legal validity; the justifiability of prevailing rules that permit the practice; popular consent; and equality or non-discrimination.²⁹ Delegitimising nuclear weapons therefore suggests a set of processes that: 1) undermine claims to legal validity; 2) demonstrate withdrawal of consent for practices that legitimise nuclear weapons; 3) highlight the discriminatory character of the nuclear weapons control regime under the NPT; and 4) challenge the justifiability of the rules that serve as a source of legitimacy for nuclear weapons.

On the last point, the humanitarian initiative challenges the legitimacy of valuing nuclear weapons as an essential source of state security by invoking a different set of rules about nuclear weapons based on international humanitarian and environmental law. This is a broadly cosmopolitan set of rules that says “all people have equal moral standing...that the claims that are advanced in the interests of humanity may have greater ethical force than appeals that are

²⁴ Patricia Lewis, Heather Williams, Benoît Pelopidas and Sasan Aghlani, “Too Close for Comfort Cases of Near Nuclear Use and Options for Policy”, Chatham House Report, Royal Institute for International Affairs, April 2014; Eric Schlosser, *Command and Control: Nuclear Weapons, the Damascus Accident, and the Illusion of Control* (New York: Penguin Books, 2013); Nick Ritchie, “Nuclear Risk: The British Case”, Article 36 briefing paper, October 2014; John Borrie, “A Limit to Safety: Risk, ‘Normal Accidents’, and Nuclear Weapons”, ILPI-UNIDIR Vienna Conference Series Paper No. 3, December 2014; Carl Lundgren, ‘What are the Odds? Assessing the Probability of a Nuclear War’, *The Nonproliferation Review*, 20: 2, 2013, pp. 361-74.

²⁵ See, for example, “Sex-specific differences in radiation sensitivity – epidemiological, clinical and biological studies”, German Commission on Radiological Protection, September 2009, and Mary Olsen, “Disproportionate Impacts of Ionizing Radiation”, Nuclear Information and Resource Service, March 2012. Available at <<http://www.nirs.org/radiation/radiationharm2pg.pdf>>.

²⁶ For example, Owen Toon, Alan Robock and Richard Turco, “Environmental Consequences of Nuclear War”, *Physics Today*, December 2008, pp. 37-42; Matt Mills, Owen Toon, Richard Turco, D. Kinnison, and R. Garcia, “Massive Global Ozone Loss Predicted Following Regional Nuclear Conflict”, *Proceedings of the National Academy of Sciences*, 105: 14, 2008, pp. 5307-12. For an overview and further references see Steven Starr, “Catastrophic Climatic Consequences of Nuclear Conflict”, research paper commissioned by the Independent Commission on Nuclear Non-Proliferation and Disarmament, October 2009.

²⁷ John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for United Nations Humanitarian Coordination and Response* (Geneva: UNIDIR, 2014).

²⁸ Sam Jones, “World Heading for Catastrophe over Natural Disasters, Risk Expert Warns”, *The Observer*, 24 April 2016.

²⁹ I explore this further in “Legitimising and Delegitimising Nuclear Weapons”, in Borrie, J. and Caughley, T. *Viewing Nuclear Weapons Through a Humanitarian Lens* (Geneva: UNIDIR, 2014). It draws on David Beetham, *The Legitimation of Power* (Basingstoke, Macmillan, 1991) and Nina Rathbun, “The Role of Legitimacy in Strengthening the Nuclear Non-Proliferation Regime”, *The Nonproliferation Review*, 13: 2, 2006, pp. 227-252.

designed to promote the welfare of any particular nation-state; and the idea that such moral commitments should not just influence the conduct of state, international governmental and non-governmental organisation, and 'world citizens' but be embodied in global institutions".³⁰ David Held argues that this is not a utopian ideal but "at the centre of significant post-Second World War legal and political developments".³¹

An obvious way of maximising the delegitimation of nuclear weapons is therefore through a comprehensive, non-discriminatory and unequivocal legal prohibition, one based on an alternative set of justifiable rules to govern nuclear weapons rooted in international humanitarian law rather than rules that permit the selective possession of nuclear weapons and the practice of nuclear deterrence. This would undermine existing claims for the legal validity of possessing and using nuclear weapons. It would address the inequality of the NPT's discriminatory nuclear weapons control regime. It would represent a withdrawal of consent by signatory governments for current practices and pathways that are judged to legitimise nuclear weapons, though only if it gathered significant majority support. It would also diminish nuclear weapons as a tacit 'currency of power' in the international system.³²

Nadelman's study of global prohibition regimes observes that they "tend to involve moral and emotional considerations more so than most other laws and regimes", such as the regimes prohibiting piracy and slavery.³³ He also notes that these regimes are an innately cosmopolitan enterprise in that the moral views underpinning a prohibition are concerned not with how states treat each other but "with how states and individuals treat individual human beings. Therein lies their power, for where the 'state' both politicizes and dehumanizes the outsider, as evidenced by its capacity to decriminalize violence against individuals during wartime, 'cosmopolitan' moral views transcend the state, thereby politicizing the individual and emphasising the existence of an international society of human beings sharing moral bonds".³⁴ Prohibition regimes tend to be mobilised by transnational moral entrepreneurs that successfully reframe a practice as morally unacceptable through "strategic social construction".³⁵ They tend to reflect a deontological ethical conviction that a particular activity, such as torture, is unacceptable, even evil, in and of itself and must be banned irrespective of the perceived efficacy or value of the activity.³⁶

A key difference between multilateral disarmament processes that focus on delegitimising nuclear weapons and a focus on measures by nuclear-armed states to reduce the value assigned to their nuclear weapons, is that the problem for the former is explicitly the weapon rather than specific nuclear practices or specific actors. The threat to peace and security in this framing is not nuclear proliferation (a term that confines danger to the acquisition of nuclear weapons by additional states or non-state actors) but the existence of the weapons themselves, irrespective of the possessor. Nuclear weapons become a collective international liability rather than an individual national asset.

³⁰ Andrew Linklater, "The Global Civilising Role of Cosmopolitanism", in Gerard Delanty (ed), *Routledge Handbook of Cosmopolitanism Studies* (Abingdon: Routledge, 2012), p. 60.

³¹ David Held, "Restructuring Global Governance: Cosmopolitanism, Democracy and the Global Order", *Millennium*, 37: 3, 2009, p. 537.

³² Anne Harrington, "Nuclear Weapons as the Currency of Power: Deconstructing the Fetishism of Force", *The Nonproliferation Review*, 16: 3, 2009.

³³ Ethan Nadelman, "Global Prohibition Regimes: The Evolution of Norms in International Society", *International Organization*, 44: 4, 1990, p. 480.

³⁴ *Ibid*, p. 484.

³⁵ Finnemore, M. and Sikkink, K. "International Norm Dynamics and Political Change", *International Organization*, 52: 4, 1998, p. 888. On reframing see Borrie, J. "Humanitarian Reframing of Nuclear Weapons and the Logic of a Ban", *International Affairs*, 90: 3, 2014.

³⁶ Nobuo Hayashi, "On the Ethics of Nuclear Weapons: Framing a Political Consensus on the Unacceptability of Nuclear Weapons", ILPI-UNIDIR NPT Review Conference Series Paper No. 2, February 2015.

Emphasising the delegitimation of nuclear weapons through a prohibition shifts the direction of disarmament diplomacy away from an exclusive focus on trying to change the policies of the nuclear-armed states and towards changing the normative international environment in which nuclear weapons and nuclear-armed states are embedded. It reorients the locus of power in nuclear disarmament diplomacy away from the agency of nuclear-armed states, their relationships with each other, and their capacities to resist changes to their nuclear arsenals, doctrines and postures. Instead, it empowers a much broader community of states to change the international social structure of nuclear legitimacy and illegitimacy and the relationship between nuclear-armed and non-nuclear-armed states. This is because legitimacy is not something an actor can unilaterally claim or insist upon. It is a quality that society collectively “ascribes to an actor’s identity, interests, or practices, or to an institution’s norms, rules, and principles”.³⁷

Delegitimising nuclear weapons is therefore about challenging the social acceptability of valuing ‘the Bomb’. It is a process of widening and deepening a collective normative censure of nuclear weapons and codifying that censure in a legal form to maximize its authority and normative power. It is an approach that acknowledges extant sources of nuclear legitimacy and seeks to diminish and disrupt them. It recognises that legitimacy is an attribute ascribed to nuclear weapons by international society in which non-nuclear-armed states actively participate and can therefore affect through their collective agency. A nuclear weapons prohibition treaty would perform that role. It would constitute an unequivocal delegitimation through a legal instrument that categorically prohibits the possession or use of nuclear weapons based on cosmopolitan principles of unacceptable harm.

The desired political effect is the stigmatisation of nuclear weapons as a means of generating change in understandings of acceptable nuclear practices, though this would not be automatic or assured. When a society collectively labels a practice (such as the possession and use of nuclear weapons) as illegitimate it moves it beyond the realm of ‘normal’ and acceptable behaviour within that society. When illegitimacy is rooted in moral revulsion then that practice can become stigmatised. This is a process of separation, one that discriminates between those actors that engage in unacceptable behaviour and those that do not.³⁸ Nonconformity is punished by shaming, moral opprobrium, sanction, and exclusion insofar as this is possible. A stigma constitutes a prohibitory norm. It cannot *prevent* perpetration of a prohibited act if the means remain available, but it can mobilise and legitimise sustained opposition and restrain behaviour. But a stigma also does more than this: it shapes actors’ identities in terms of whether they are the sort of actor that accepts or conforms to prohibitory norms and therefore what counts as appropriate behaviour in relation to that identity, or whether they are an actor that does not. Stigmas also impose and legitimise a particular version of social reality, i.e. one in which practice ‘X’ is impermissible.³⁹

4. Delegitimising nuclear weapons and the NPT

From this standpoint, the NPT is problematic because of how it is interpreted by the NPT nuclear-weapon states, and this justifies exploring measures outside but complementary to the NPT. The NPT formally recognises five states as nuclear weapon states. This has been interpreted by NWS as recognition in international law that they, and only they, are permitted to possess and deploy nuclear weapons. Their nuclear discourse moves easily from this position to the language of entitlement, legal rights, and enduring legitimacy. The NPT therefore constitutes a set of rules that legally codify the possession of nuclear weapons for certain states. As a result, the NPT is, in fact, unable to unequivocally delegitimise nuclear weapons and the

³⁷ Christian Reus-Smit, “International Crises of Legitimacy”, *International Politics*, 44: 1, 2007, p. 159.

³⁸ Rebecca Adler-Nissen, “Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society”, *International Organization*, 68: 1, 2014, pp. 147-176.

³⁹ Richard Price, “A Genealogy of the Chemical Weapons Taboo”, *International Organization*, 49: 1, 1995, p. 87.

practice of nuclear deterrence given the discrimination between nuclear and non-nuclear states parties and the political space that discrimination provides for ascribing legitimacy to the possession of nuclear weapons for a select few. The legitimacy of nuclear weapons is contested under the NPT (and the NPT nuclear-weapon states seem content with that limited contestation) but the treaty does not categorically delegitimise nuclear weapons (and the nuclear-weapon states would not allow it to).⁴⁰

The near-universal membership of the treaty adds further legitimacy by providing tacit consent for the rules of a global nuclear order that allow for the continued existence of nuclear weapons. This was compounded by the consensus decision reached by states parties at the 1995 NPT Review and Extension Conference to extend the duration of the treaty indefinitely beyond its initial 25-year timeframe. This refreshed the legitimacy of nuclear weapons for the NPT nuclear weapon states with a post-Cold War permanence. There are very good reasons for supporting the NPT and for its extension in 1995. As John Duncan, the UK's Ambassador for Multilateral Arms Control and Disarmament who led the UK delegation to the 2010 NPT Review Conference, observed in 2008, "the NPT remains the foundation stone of international non-proliferation architecture. If it didn't exist, the world would be a much more dangerous place, and we would assuredly need to re-invent it".⁴¹ That is no doubt true, but the legitimisation of the selective possession of nuclear weapons through tacit consent is an unfortunate by-product.

Moreover, the legitimisation of nuclear weapons for some inside the treaty establishes a set of rules that legitimise those same weapons for states outside it. The NPT nuclear-weapon states argue that their nuclear weapons are an essential means of ensuring national survival, influence, and autonomy in an international system characterised by dangerous and irresolvable uncertainty and security competition between states. It is necessary to possess nuclear weapons by virtue of being a state in a dangerous inter-state system. However, they argue that they, and only they, are allowed to appropriate this logic of nuclear deterrence based on the NPT's legal codification of historical circumstance. Yet this logic as an abstract process of strategic reasoning can be objectively applied to and appropriated by any state that feels sufficiently threatened by virtue of being a state.

The nuclear weapon states act *as if* the logic of nuclear deterrence is not applicable to non-nuclear weapon states *because* they have accepted the legal designation of non-nuclear weapon states. They feel free to extol the supposed virtues of nuclear deterrence seemingly secure in the knowledge that this has no adverse persuasive effect on other states because the logic of nuclear deterrence cannot be appropriated by them. The problem is that extolling the virtues of nuclear deterrence *does* have a persuasive effect precisely because the logic is universally applicable on its own strategic political-military terms, demonstrated by its appropriation by India, Pakistan, North Korea and more surreptitiously by Israel. Non-nuclear weapon states recognise the logical destination of the non-discriminatory application of this logic is a world of many nuclear-armed states with all the risks of nuclear violence this entails.⁴² It was just such a prospect that motivated states to negotiate the NPT in the 1960s. As UN High Representative for Disarmament Affairs, Angela Kane, observed in 2015: "If nuclear-weapon States continue to impose conditions—such as the need to retain a nuclear deterrent until global conditions are safer and strategic stability is ensured before engaging in good faith multilateral disarmament negotiations—then they must accept that other states will also accept the false logic of this

⁴⁰ See Nick Ritchie "Legitimising and Delegitimising Nuclear Weapons" in Borrie, J. and Caughley, T. (eds) *Viewing Nuclear Weapons Through a Humanitarian Lens* (Geneva: UNIDIR, 2013).

⁴¹ John Duncan, "UK General Statement to the 2008 Non-Proliferation Treaty Preparatory Committee", 28 April 2008, United Kingdom Permanent Representation to the Conference on Disarmament, Vienna.

⁴² On the logic of nuclear deterrence carried to its logical conclusion see Kenneth Waltz, *The Spread of Nuclear Weapons: More May Better*, Adelphi Paper 171 (London: International Institute for Strategic Studies, 1981).

security chimera. The risk of proliferation grows every additional day that states insist the doctrine of nuclear deterrence is essential for their security.”⁴³

5. Prohibition vs. regulation or prohibition *and* regulation?

Based on the foregoing, one can differentiate between two broad approaches to nuclear disarmament negotiations: First, a disarmament process guided by the subjective assessments of the nuclear-armed states about the relative value of their nuclear weapons in different and evolving security contexts. Second, a process that delegitimises nuclear weapons by undermining the legitimacy of valuing them irrespective of their perceived utility by possessor states.

Advocates of a ‘step-by-step’ and ‘building blocks’ approach to nuclear disarmament privilege the first approach. In doing so, they have suggested that a new legal instrument to prohibit nuclear weapons is either an unnecessary distraction from other important measures such as a Fissile Material (Cut-off) Treaty, a diplomatic insurgency that will imperil the NPT, or a deliberately divisive, exclusive and therefore invalid diplomatic process.⁴⁴ Nothing about a prohibition is incompatible with a step-by-step or buildings blocks approach. It is not exclusive or in tension with the NPT as whole. A prohibition and other important measures such as entry into force of the CTBT, negotiation of an FM(C)T, nuclear stockpile reductions, de-alerting, nuclear disarmament verification research, and other ‘building blocks’ are not mutually exclusive. Political work is required on both physical constraints (on stockpiles, testing, fissile material production, deployments) *and* normative and legal constraints (on declaratory policy, use, possession).

A prohibition would inevitably establish a firm connection with the NPT by rooting its legitimacy in part on the Article VI commitment to pursue negotiations on effective measures relating to nuclear disarmament. There does not appear to be any need, desire or intent to set a prohibition *against* the NPT but rather as a de facto extension of it. In that way it would support and advance the NPT as a nuclear weapons control regime just as other NPT-related agreements have done, such as the CTBT, IAEA Additional Protocol, New START, and nuclear weapon-free zone treaties. As Article 36 rightly observed in 2015: “Embarking on a process to develop a treaty banning nuclear weapons would not preclude work continuing on other aspects of the established disarmament and arms control agenda such as a fissile material ban treaty or work on the prevention of an arms race in outer space. Indeed, negotiations on a treaty banning nuclear weapons could even help to unlock some of the impasses that have appeared so intractable in the recent past by motivating states to take action and demonstrating that progress is in fact possible.”⁴⁵

Focussing on delegitimising nuclear weapons does not diminish the importance of efforts to reduce nuclear stockpiles and change nuclear doctrines, but neither does it restrict “effective measures” to the agency of the nuclear-armed. Delegitimising nuclear weapons would certainly change the context of future ‘steps’ and ‘building blocks’, indeed that would be the point, but it is not incompatible with them. Arguments about mutual exclusivity seem to mask a deeper opposition to the delegitimation of nuclear weapons because those weapons and the practice of nuclear deterrence are accepted as legitimate. It is resistance to a process of delegitimation that appears to have led nuclear weapon states to largely exclude themselves from the humanitarian impact of nuclear weapons conferences and the 2013 and 2016 OEWGs. As noted above, a ban

⁴³ Angela Kane, “The Home Stretch: Looking for Common Ground ahead of the 2015 NPT Review Conference”, Annecy, France, 13 March 2015.

⁴⁴ See, for example, “Is there a ‘Legal Gap for the elimination and prohibition of nuclear weapons?’” submitted by Canada to the 2016 UN Open Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, Geneva, A/AC.286/WP.20/Rev.1, 27 April 2016.

⁴⁵ Article 36, “Banning Nuclear Weapons: Responses to Ten Criticisms”, Briefing Paper, December 2013.

treaty would clearly challenge the discourses and practices that use the NPT to legitimise nuclear weapons but it would not challenge the NPT itself. It would, in effect, recognise the inability of the NPT to categorically delegitimise nuclear weapons and provide an appropriate solution that would constitute an “effective measure” under its Article VI.

Advocates of a building blocks approach frame their agenda as “concrete and practical” steps despite the absence of any appreciable movement on these steps for many years.⁴⁶ A ban treaty *would* be a concrete and practical step – not a panacea, which no one claims, but an important step. Advocates of a building blocks approach urge other states to take into account the prevailing international environment. The so-called humanitarian initiative seems to have taken the prevailing international environment into account, found it wanting, and sought to change it through concrete and practical steps to delegitimise nuclear weapons.

With that in mind, the OEWG and its community of participating states does face a choice. It is a choice defined by preferred pathways for social change rather than one discrete step over another. If the preference of states is to privilege limited and possibly ‘deep’ devaluing measures by the nuclear-armed states, to privilege their disarmament agency and therefore their disarmament agenda as the outcome of this working group, then a step-by-step or building blocks process is likely the most appropriate approach despite the lack of discernible progress. If the preference is to privilege delegitimising nuclear weapons, then a prohibition process of some form catalysed by the collective agency of the non-nuclear armed is likely the most appropriate approach.

6. A ban treaty or a ‘ban-plus’ framework for legal prohibition?

The UNIDIR-ILPI study mentioned at the outset has explored elements of a legal prohibition. Reports by Reaching Critical Will and Article 36 have elaborated possible principles and obligations of a specific ban treaty. These elements have also been catalogued in working papers submitted by states to the 2016 OEWG.⁴⁷ There is no need to repeat their analysis here. However, it is important to think through the relationship between a ban treaty, a framework agreement, and the NPT in the context of the foregoing on delegitimising nuclear weapons.

Prioritising the delegitimation of nuclear weapons privileges a prohibition-then-elimination over an elimination-then-prohibition pathway for multilateral nuclear disarmament negotiations. Of the four options outlined in the UNIDIR-ILPI study (comprehensive, step-by-step, framework, and ban treaty), a ban treaty with or without nuclear-armed states would be the most unequivocal legal instrument for delegitimising and stigmatising the possession of nuclear weapons based on the unacceptable humanitarian impact of their use. As Costa Rica and Malaysia argue in their working paper: “the experience with biological weapons and anti-personnel landmines suggests that even a treaty with limited membership and little content beyond a straightforward prohibition could be highly effective in developing and strengthening norms against nuclear weapons. The fact that some nuclear-armed States explicitly oppose such a treaty is further evidence of its likely effectiveness as a means of norm-building.”⁴⁸ Nevertheless, as noted above, an authoritative and therefore effective prohibition regime will

⁴⁶ John Borrie and Tim Caughley, “After Oslo: Humanitarian Perspective and the Changing Nuclear Weapons Discourse”, Humanitarian Impact of Nuclear Weapons project Paper No. 3, Geneva, UNIDIR, 2013;

⁴⁷ See, for example, “Addressing nuclear disarmament: Recommendations from the perspective of nuclear-weapon-free zones” submitted by Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Indonesia, Malaysia, Mexico and Zambia to the 2016 UN Open Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, Geneva, A/AC.286/WP.34, 28 April 2016; Article 36, “Victim Assistance’ in a Treaty Banning Nuclear Weapons”, briefing paper, January 2015.

⁴⁸ “Developing and strengthening norms for attaining and maintaining a world without nuclear weapons” submitted by Costa Rica and Malaysia to the 2016 UN Open Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, Geneva, A/AC.286/WP.13, 26 February 2016, p. 4.

need to be legally binding, rest on justifiable rules (in this case cosmopolitan principles of acceptable state behaviour towards individuals and other states), be comprehensive and non-discriminatory, and enjoy popular consent evidenced in a significant number of signatories.

Questions arise on verifying the legal obligations of a nuclear-armed state that decided to accede to a ban treaty.⁴⁹ There are many challenges associated with effective verification of the dismantlement and disposition of nuclear warheads and components. These would need to be addressed and codified through a further instrument most likely in close collaboration with the IAEA. This could take the form of a verification protocol to a ban treaty, which opens the possibility of effecting a legally-binding prohibition on nuclear weapons through a framework convention-protocol approach.

The idea of a framework has been invoked in a number of recent analyses as well as NPT and OEWG working papers.⁵⁰ The term 'framework' has been used loosely in recent discussions of next steps on nuclear disarmament, but it is worth entertaining a particular form – the framework convention-protocol model. Framework conventions are generally supplemented by substantive protocols. The expectation is that the convention establishes broad commitments and objectives and a general governance framework for an issue area with more substantive obligations negotiated through protocols to the parent instrument. In doing so it establishes general guidelines and principles rather than substantive regulation. This can make framework conventions a flexible and adaptive instrument for structuring an issue in order to realise a specific set of political and technical objectives, which can be open-ended or time-bound.⁵¹ The limited substantive commitments in the parent framework can also serve to widen participation. The framework approach also allows for discussions to commence without waiting for consensus and allows for the postponement of substantive negotiations if consensus cannot be achieved without sacrificing the basic principles and objectives embodied in the framework.⁵² As Bodansky notes, "states tend to join framework conventions because they do not entail significant commitments but they can take on a momentum of their own and become focal points for forums for discussion, international public opinion, negotiation, and confidence building".⁵³

Framework conventions have primarily been used in the field of International Environmental Law, including the the 1979 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution under the auspices of UN Environmental Programme, the 1985 Vienna Convention for the Protection of the Ozone Layer with its 1987 Montreal Protocol, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the 1992 Framework Convention on Climate Change and its 1997 Kyoto Protocol. Other examples include the 2003 Framework Convention on Tobacco Control and its 2010 Protocol to Eliminate Illicit Trade in Tobacco Products and the 1980 Convention on Certain Conventional Weapons and its five protocols, the first three of which were adopted with the convention.

There are many variations on this theme. Most framework conventions include a statement of objectives, guiding principles, basic obligations, and national measures. They often establish

⁴⁹ See Torbjorn Graff Hugo, "About a Ban: Dismantling the Idea of a Ban on Nuclear Weapons", International Law and Policy Institute, Oslo, 2013, p. 8.

⁵⁰ See Tim Caughley, "Analysing Effective Measures: Options for Multilateral Nuclear Disarmament and Implementation of NPT Article VI", ILPI-UNIDIR NPT Review Conference Series Paper No. 3, February 2015.

⁵¹ Kenneth W. Abbott, Gary E. Marchant, and Douglas J. Sylvester, "A Framework Convention for Nanotechnology?", *Environmental Law Institute Analysis*, 36, 2006, p. 2.

⁵² Nele Matz-Luck, "Framework Conventions as Regulatory Tools", *Goettingen Journal of International Law*, 1: 3, 2009, pp. 439-458.

⁵³ Daniel Bodansky, "The Framework Convention/Protocol Approach", Framework Convention on Tobacco Control Technical Briefing Series No. 1, WHO/NCD/TFI/99.1, World Health Organisation, 1999, p. 18.

permanent institutions to provide ongoing governance of the issue area.⁵⁴ This can include a secretariat to administer the convention and monitor compliance, a plenary decision-making body in the form of a Conference of the Parties (COP) or Meeting of the Parties (MOP), and financial mechanisms to assist implementation.⁵⁵ They also include mechanisms to review implementation, promote compliance, resolve disputes, and specify processes for adopting additional specific commitments through protocols. Protocols can be comprehensive or specific according to the needs of the convention, its objectives and core principles.⁵⁶

Most framework conventions also involve processes for generating and sharing data on an issue. This can involve experts from governments, industry, academia, research institutes, and NGOs. Framework conventions can establish scientific advisory bodies to generate, analyse and peer review data and facilitate scientific cooperation. They can also involve national reporting requirements and national regulatory measures as well as education, training and public awareness programmes.⁵⁷

Framework conventions can specify the protocols that will have to be negotiated. Sometimes protocols are negotiated in parallel with the convention and adopted concurrently. Some are negotiated subsequently, although there is no guarantee that anticipated protocols will be negotiated at all. Some have mandatory protocols, whilst others are optional. The 1973 Convention for the Prevention of Pollution from Ships (the MARPOL) and its 1978 Protocol negotiated under the auspices of the International Maritime Organisation, for example, has six comprehensive annexes, two of which are compulsory.⁵⁸ Entry into force requirements for protocols can also vary. For example, Article 15 of the UNFCCC states that the Conference of Parties (COP) may adopt an amendment/protocol to the Convention (other than an annex) by a three-quarters majority vote if consensus cannot be reached. Once in force, an amendment binds only those parties that have accepted it, and applies only as between those parties. A series of amendments can sometimes be packaged together and adopted as a single instrument to prevent a la carte accession.⁵⁹

In some cases a framework convention *does* include specific obligations and substantive regulation in the parent agreement leaving much less to specify in subsequent protocols, such as the 1992 Convention on Biological Diversity and its 2003 Cartagena Protocol and 2010 Nagoya Protocol.⁶⁰ Others, such as the European Framework Convention for the Protection of National Minorities, provide significant latitude for state implementation of legally binding guidance for national regulation. Luck notes that “the framework serves as an umbrella setting the general objectives and main principles while allowing each party sufficient room to take national particularities into account...that permits parties a great deal of leeway at the implementation level.”⁶¹

Framework conventions and protocols can also establish working groups to consider further measures to fulfil the framework’s obligations based on its agreed principles. For example, the 2005 Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was established to consider Annex I commitments beyond the initial commitment period up to 2012.⁶² A standalone ban treaty could include many of these

⁵⁴ Bodansky, “The Framework Convention/Protocol Approach”, p. 25.

⁵⁵ Matz-Luck, “Framework Conventions as Regulatory Tools”.

⁵⁶ Bodansky, “The Framework Convention/Protocol Approach”, p. 11.

⁵⁷ Abbott, *et al*, “A Framework Convention for Nanotechnology?”, p. 2.

⁵⁸ Annexes I and II, governing oil and chemicals are compulsory but annexes III, IV, V and VI on packaged materials, sewage, garbage and air pollution are optional.

⁵⁹ Daniel Bodansky, “Legal Form of a New Climate Agreement: Avenues and Options”, Pew Center on Global Climate Change, April 2009.

⁶⁰ Bodansky, “The Framework Convention/Protocol Approach”.

⁶¹ Matz-Luck, “Framework Conventions as Regulatory Tools”.

⁶² Bodansky, “Legal Form of a New Climate Agreement”, 2009.

functions. It could establish a secretariat, Conference of the Parties, financial mechanisms for implementation assistance, data generation and information sharing, national reporting measures, and national regulatory requirements. Such measures would address what a number of states consider shortcomings with the NPT, in particular the absence of a secretariat, obligatory reporting, and a culture of accountability and transparency. It could establish law-making processes for adopting protocols and establishing additional institutions, notably on verification but also on additional complementary measures such as divestment from entities engaged in nuclear weapons development and support.⁶³

Where a framework approach differs is in the potential to provide a general governance framework for nuclear disarmament based on core principles and objectives. These principles and objectives could elaborate specific or broad “effective measures” to be negotiated relating to nuclear disarmament beyond a prohibition and thereby constitute a more comprehensive development of the NPT’s Article VI commitment. This would go beyond the NPT’s preambular principles and objectives and Article VI obligation to pursue and conclude nuclear disarmament negotiations. There is a substantial institutionalised governance framework for nuclear non-proliferation and peaceful uses of nuclear energy, but governance for the process of nuclear disarmament is less developed. This is reflected in the strength of the NPT’s norm against nuclear proliferation and its codification in a range of legal instruments, compared to its weaker norm of expectation of progress towards nuclear disarmament that is subject to far less legal codification (nuclear weapon-free zone treaties and the legal and technical modalities of US-Russia nuclear arms reduction and elimination being important constituent parts).

A framework approach could therefore be attractive, but it would need to be a ‘ban-plus’ framework. It would need to include either specific prohibition obligations and substantive associated commitments in the parent agreement rather than the more usual general guidelines, or a general framework together with a mandatory prohibition protocol negotiated in parallel and adopted concurrently. A framework approach that did not incorporate a prohibition from the outset would risk diluting the delegitimation of nuclear weapons as a core purpose. It would risk codifying a set of open-ended disarmament aspirations similar to those contained in the 2000 ‘13 steps’ and 2010 64-point Action Plan that have to date been largely ineffective.

7. Conclusion

The humanitarian initiative on nuclear weapons was born out of the exasperation of a small coalition of states, inter-governmental organisations, and civil society groups with the slow pace of nuclear disarmament, the continuing dangers of a nuclear-armed world, and a seemingly implacable commitment to the logic of nuclear deterrence by the nuclear-armed. The initiative rapidly gained impressive momentum and support from 2010. Its core theme of delegitimising nuclear weapons has coalesced around the idea of a nuclear ban treaty. Nuclear disarmament diplomacy as now arrived at a ‘stick or twist’ moment: stick with the prevailing pathway of step-by-step or building blocks that cedes disarmament agency to the nuclear-armed, or twist and pursue a pathway of delegitimation alongside other traditional steps. Momentum is building for a decisive ‘twist’ to challenge and destabilise the acceptability of nuclear weapons and nuclear violence and thereby precipitate change in the nuclear policies and practices of the nuclear-armed and their nuclear supporters, change that otherwise does not seem forthcoming.

The purpose of a delegitimising strategy appears to be to generate a “crisis of legitimacy” for the possession of nuclear weapons through stigmatisation that could prompt behavioural adjustment over a period of time. Chris Reus-Smit defines this thus: “An actor or institution

⁶³ See Susi Snyder, Wilbert van der Zeijden, and Maaike Beenes, “Don’t Bank on the Bomb: A Global Report on the Financing of Nuclear Weapons Producers”, PAX, the Netherlands, and ICAN, November 2015.

experiences a crisis of legitimacy, it is argued, when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where it must either adapt (by reconstituting or recalibrating the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment.”⁶⁴ Non-nuclear-weapon states and civil society organisations are looking for adaptation by nuclear-armed states to an evolving normative consensus in which the legitimacy of nuclear violence has been extinguished, or at least greatly diminished; one in which the costs and challenges of sustaining the legitimacy of nuclear weapons becomes increasingly problematic.

⁶⁴ Christian Reus-Smit, “International Crises of Legitimacy”, *International Politics*, 44: 1, 2007, p. 157.