



UNIVERSITY OF LEEDS

This is a repository copy of *Contests of legitimacy and value: the Treaty on the Prohibition of Nuclear Weapons and the logic of prohibition*.

White Rose Research Online URL for this paper:
<https://eprints.whiterose.ac.uk/146497/>

Version: Accepted Version

Article:

Considine, L orcid.org/0000-0002-6265-3168 (2019) *Contests of legitimacy and value: the Treaty on the Prohibition of Nuclear Weapons and the logic of prohibition*. *International Affairs*, 95 (5). pp. 1075-1092. ISSN 0020-5850

<https://doi.org/10.1093/ia/iiz103>

© The Author(s) 2019. Published by Oxford University Press on behalf of The Royal Institute of International Affairs. This is an author produced version of a paper published in *International Affairs*. Uploaded in accordance with the publisher's self-archiving policy.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Contests of legitimacy and value: the Treaty on the Prohibition of Nuclear Weapons and the logic of prohibition

Abstract

The recently adopted Treaty on the Prohibition of Nuclear Weapons (TPNW) has caused much controversy in global nuclear politics. Given that the stated goal of the TPNW supporters (states and NGOs alike) is to embed the treaty in the structures of nuclear governance and to strengthen its normative power, how likely is the TPNW to achieve these objectives? The article argues that the unique structures of legitimacy and value within which nuclear weapons are enmeshed place particular complications on the normative force of the TPNW as compared to previous humanitarian arms control initiatives, which has implications for the way in which the TPNW can function to consolidate a prohibitory norm on nuclear weapons possession. The article uses the framing of legitimacy to analyse the complex structures within which the TPNW was adopted and within which it will enter into force, particularly focusing on the TPNW's relationship to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The article concludes that consolidation may require a further challenge to the existing structures of nuclear order than state actors have, so far, been willing to make. This work is based on first-hand observations from the TPNW negotiations and interviews with civil society actors at the United Nations in New York in June/July 2017.

Introduction

The Treaty on the Prohibition of Nuclear Weapons (TPNW) opened for signature on 20 September 2017 after adoption at the UN in July 2017, and will enter into force after 50 states have ratified.¹ The treaty is an outcome of the Humanitarian Impact of Nuclear Weapons initiative (HINW), a decade-long movement to reframe nuclear weapons in terms of the humanitarian consequences of their use, based on the contention that nuclear weapons are inherently inhumane and thus incompatible with principles of international humanitarian law (IHL).² While it is clear that nuclear-armed states and their allies will not sign up to a ban initially, proponents of the TPNW argue that its success will flow from the development of a norm of unacceptability of nuclear weapons possession that will become stronger as more states

¹ To date, 70 states have signed the treaty and 23 have ratified it.

² See Tom Sauer and Joellen Pretorius, 'Nuclear weapons and the humanitarian approach', *Global Change, Peace and Security* 26: 3, 2014, pp. 233–50; Rebecca Davis Gibbons, 'The humanitarian turn in nuclear disarmament and the Treaty on the Prohibition of Nuclear Weapons', *The Nonproliferation Review* 25: 1–2, 2018, pp. 11–36.

sign and ratify the treaty. By creating an international legal prohibition that will place normative political pressure on nuclear-armed states and their allies and stigmatize nuclear weapons, non-nuclear-weapon states and civil society actors can redefine the boundaries of nuclear weapons politics and the type of actor that has the power to act in this realm, and push for disarmament outside the traditional international forums.

There are two central ideas running through the logic of prohibition as a means to nuclear disarmament. These are: first, that it is the weapons themselves that are the problem, and so the solution should be one that focuses on the problematic object of the weapon; and second, that the way to deal with the problem of the weapon as object is to intersubjectively change our understandings of its value—for, as the Director of the International Campaign to Abolish Nuclear Weapons (ICAN) asserts, ‘[a]s long as nuclear weapons continue to be valued as strategic assets necessary for security, significant nuclear disarmament will be extremely difficult, if not impossible’.³ This approach locates the prohibition logic of the ban within a broadly constructivist understanding of international politics in which the social world can be understood in terms of how ideas and identities shape interests. It fits within a history of managing nuclear weapons through the creation of norms, such as the non-proliferation norm and the ‘nuclear taboo’.⁴ A nuclear prohibition norm also follows a path laid down by humanitarian arms control (HAC) campaigns that have resulted in treaties prohibiting the use of weapons such as anti-personnel (AP) landmines and cluster munitions. Using the framing of legitimacy, this article analyses the normative potential of the TPNW and asks: given the stated goal of TPNW supporters to embed the treaty in the structures of nuclear governance and strengthen its normative power, how likely is the TPNW to achieve these objectives? The article argues that the treaty’s process of reframing nuclear narratives to delegitimize nuclear possession requires a stronger challenge to the existing ideational structures of nuclear legitimacy and the institutions of nuclear governance than its supporters have, so far, been willing to mount.

³ Beatrice Fihn, ‘The logic of banning nuclear weapons’, *Survival* 59: 1, 2017, p. 45. ICAN is a coalition of international NGOs formed in 2007 to build support for the abolition of nuclear weapons, inspired by earlier humanitarian campaigns such as the International Campaign to Ban Landmines.

⁴ Nina Tannenwald, *The nuclear taboo: the United States and the non-use of nuclear weapons since 1945* (Cambridge, UK: Cambridge University Press, 2007).

Establishing a norm against possession of nuclear weapons has met with resistance from the nuclear-armed states and their allies. Critics have labelled the treaty as ‘divisive’, and reservations have been expressed about the damage it could do to the stability of the global nuclear order, the potential for a prohibition norm to undermine the norm against the *use* of nuclear weapons, and the lack of consideration for states’ security concerns.⁵ The normative change accomplished by other HAC movements is one of stigmatizing and delegitimizing weapons previously seen as relatively unproblematic. The TPNW attempts a similar feat in changing the meaning of nuclear arms from that of a provider of security and stability to the international arena and of status to its possessors to that of an illegitimate and inhumane weapon. Yet the legitimacy of the nuclear weapon as a stigmatized object is not directly related either to its value as a tool of statecraft or to the legitimacy of its possession, given the existence of already established normative regimes, most notably the Treaty on the Non-Proliferation of Nuclear Weapons (the Non-Proliferation Treaty or NPT). The efficacy of any attempt to delegitimize nuclear possession will therefore rest not only on the ability of campaigners and state proponents to increase the stigma attaching to the object of the nuclear weapon, but also on their willingness to challenge the established legitimizing structures within which the stigmatized weapon exists. In this way, the normative contest to come will be fought not over the status and legitimacy of nuclear weapons, but over the status and legitimacy of the TPNW itself—which, this article argues, sits in tension with the legitimacy of the existing structures of nuclear governance.

This analysis is based on fieldwork undertaken at the second negotiating session of the TPNW at the UN in New York in June and July 2017, during which I conducted interviews with civil society actors and observed open negotiation sessions and side events. The TPNW negotiations provide a useful case through which to improve understanding of the complicated processes of nuclear legitimacy implicated in the promotion of a prohibition norm. Framing an analysis of the TPNW through the lens of legitimacy provides a way of thinking about the treaty’s potential and its place in the complex institutions of nuclear governance.

⁵ Scott D. Sagan and Benjamin A. Valentino, ‘The nuclear weapons ban treaty: opportunities lost’, *Bulletin of the Atomic Scientists*, 16 July 2017, <https://thebulletin.org/nuclear-weapons-ban-treaty-opportunities-lost10955>; Heather Williams, ‘Why a nuclear weapons ban is unethical (for now): NATO and the Humanitarian Impacts of Nuclear Weapons initiative’, *RUSI Journal* 161: 2, 2016, pp. 38–47. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 9 May 2019).

This article focuses on two specific debates that occurred during the treaty negotiations—on the withdrawal clause and on the TPNW’s relationship to the NPT—and identifies the way in which these debates reflect extant legitimacy contests. These two debates were not the only contentious issues during negotiations: the relationship with NATO member states, the question of safeguards and the acceptance of the NPT Additional Protocol were also divisive. The debates over the withdrawal clause and the relationship with the NPT nonetheless highlight the challenge of delegitimizing nuclear weapons while retaining the existing legitimizing structures of nuclear governance and the dominant ideational framing of the relations between nuclear weapons, states and security. These two fundamental questions of nuclear legitimacy are central to the normative potential of the TPNW.

The TPNW and the logic of prohibition

The adoption of the TPNW was the outcome of over a decade of action driven by an ‘extreme frustration with slow disarmament progress in the post-Cold-War era and a loss of faith in pursuing disarmament through traditional channels’.⁶ A mixture of the frustration of several non-nuclear states and the arrival in the HINW of experienced campaigners from prior HAC efforts provided renewed impetus towards nuclear disarmament. This combined with the increased focus of the International Committee of the Red Cross (ICRC) on nuclear disarmament and high-profile statements from establishment figures, such as President Barack Obama’s speech in Prague in 2009.⁷ In 2010, for the first time, the final document of the NPT Review Conference made reference to the humanitarian consequences of any use of nuclear weapons; and in 2013–2014 the HINW held three international conferences on the humanitarian consequences of nuclear weapons, in Oslo (2013), Nayarit (2014) and Vienna (2014). One outcome of the Vienna conference was the ‘Austrian Pledge’, which stated ‘that no national or international response capacity exists that would adequately respond to the human suffering and humanitarian harm that would result from a nuclear weapon explosion in a populated area’ and pledged to work to ‘stigmatise, prohibit and eliminate nuclear weapons’.⁸

⁶ Davis Gibbons, ‘The humanitarian turn’, p. 12.

⁷ Barack Obama, ‘Remarks By President Barack Obama In Prague As Delivered’, 5 April 2009. Available at: <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-prague-delivered>

⁸ ‘Humanitarian Pledge’. Available at: [http://www.icanw.org/wp-](http://www.icanw.org/wp-content/uploads/2015/03/HINW14vienna_Pledge_Document.pdf)

content/uploads/2015/03/HINW14vienna_Pledge_Document.pdf For research on nuclear risks and dangers, see John Borrie and Tim Caughley, *An illusion of safety: challenges of nuclear weapon detonations for United*

This statement was later renamed the Humanitarian Pledge and endorsed by 127 countries. Through such statements the HINW began to challenge the dominant deterrence logic of nuclear weapons politics with a powerful humanitarian logic as a step towards nuclear disarmament.

That the growth of the humanitarian agenda ultimately resulted in the TPNW is a result of how both civil society actors and states linked the humanitarian logic underlying the movement's ethos with a prohibition logic as a means of the realization of its aims. Over the years preceding the treaty's formulation, civil society actors such as ICAN had moved towards the prohibition-based approach and away from the goal of a comprehensive nuclear weapons convention.⁹ For campaigners, the purpose of a new prohibition treaty would be not to create a detailed technical convention, but to function as a normative tool 'that casts as pariahs those who continue to deploy, stockpile and defend the persistence of nuclear weapons'.¹⁰ This would graft a 'prohibitory norm' against nuclear weapons possession onto longer-standing norms of international humanitarian and human rights law.¹¹

The political activism behind the civil society aspect of the movement to ban nuclear weapons is grounded in experience gained from the prior campaigns to establish prohibitory norms against other inhumane weapons, for example AP landmines and cluster munitions, and there are clear similarities between the nuclear ban and these previous campaigns that make a comparison useful.¹² In his study of the campaign to prohibit AP landmines, which resulted in

Nations humanitarian coordination and response (Geneva: United Nations Institute for Disarmament Research (UNIDIR), 2014).

⁹ Davis Gibbons, 'The humanitarian turn'.

¹⁰ Beatrice Fihn, Matthew Bolton and Elizabeth Minor, 'How we persuaded 122 countries to ban nuclear weapons', *Just Security*, 24 Oct. 2017, <https://www.justsecurity.org/46249/persuaded-122-countries-ban-nuclear-weapons/>.

¹¹ Richard Price and Nina Tannenwald, 'Norms and deterrence: the nuclear and chemical weapons taboos', in Peter J. Katzenstein, ed., *The culture of national security: norms and identity in world politics* (New York: Columbia University Press, 1996), p. 125.

¹² Matthew Bolton and Elizabeth Minor, 'The discursive turn arrives in Turtle Bay: the international campaign to abolish nuclear weapons' operationalization of critical IR theories', *Global Policy* 7: 3, 2016, pp. 385–395; John Borrie and Tim Caughley, eds, *Viewing nuclear weapons through a humanitarian lens* (Geneva: UNIDIR, 2013); John Borrie and Vanessa Martin Randin, eds, *Disarmament as humanitarian action: from perspective to practice* (Geneva: UNIDIR, 2006). Borrie also illustrates the differences between the MBT and the Convention

the 1997 Mine Ban Treaty (MBT), Richard Price sets out the successful ways in which transnational civil society actors encouraged normative movement on the issue.¹³ Adam Bower has since assessed the extent to which the MBT succeeded in promoting a prohibitory norm against landmines, and used the ‘robust stigma engendered by the mine ban movement and resulting treaty’ to claim that multilateral treaties can create changed social expectations of behaviour and so successfully promote new international norms and institutions, even when not supported by Great Powers.¹⁴ The 32 UN member states that have not signed up to the MBT include China, Russia and the United States, yet Bower makes a strong argument about the social power of international law and non-Great Power diplomacy by showing how these powerful non-signatories have nonetheless adapted both their behaviour and the way in which it is justified with reference to the normative ban regime. In respect of what had been seen as an unexceptional and unproblematic weapon of war, the MBT has introduced ‘a new international social expectation concerning the special status of AP mines’.¹⁵ This assignment of special status to the weapon in question as inherently inhumane in order to proscribe it is the mechanism of change within the logic of prohibition.

By 2014, campaigners and several states were advocating a prohibition approach to nuclear weapons, and the HINW discourse reflected and reinforced this trend. In 2016, the report of the 2016 UN Open-ended Working Group (OEWG) on progress in multilateral nuclear disarmament, and the subsequent General Assembly Resolution 71/258 to convene a conference to negotiate a legally binding prohibition on nuclear weapons, marked progress in the institutionalization of the logic of prohibition by states.¹⁶ During OEWG meetings, participating states (none of the nuclear-armed states took part) proposed several approaches

on Cluster Munitions (CCM) regarding the nature and extent of use, and the existing political process of talks in the case of the CCM under the UN Convention on Certain Conventional Weapons: John Borrie, ‘Humanitarian reframing of nuclear weapons and the logic of a ban’, *International Affairs* 90: 3, May 2014, pp. 625–46.

¹³ Richard Price, ‘Reversing the gun sights: transnational civil society targets land mines’, *International Organization* 52: 3, 1998, p. 617. For how ban treaty campaigners used these techniques, see Nick Ritchie and Kjølsv Egeland, ‘The diplomacy of resistance: power, hegemony and nuclear disarmament’, *Global Change Peace & Security*, 30: 2, 2018, pp. 121-141; Fihn et al., ‘How we persuaded 122 countries’.

¹⁴ Adam Bower, ‘Norms without the Great Powers: international law, nested social structures, and the ban on antipersonnel mines’, *International Studies Review* 17: 3, 2015, p. 356. The MBT was signed by 122 states in Dec. 1997 and entered into force in March 1999.

¹⁵ Bower, ‘Norms without the Great Powers’, p. 365.

¹⁶ This was the second of two OEWGs on the issue: the first was set up in 2013.

to disarmament. Alternatives to a legal prohibition included a nuclear weapons convention that would ‘set out general obligations, prohibitions and practical arrangements for time-bound, irreversible and verifiable nuclear disarmament’, a framework approach that would include a series of interacting instruments, and a ‘hybrid approach’ with an immediate prohibition treaty complemented by a set of protocols and a verification regime.¹⁷ A group of 21 states, including allies of nuclear powers and states protected by the nuclear ‘umbrella’, proposed a ‘progressive approach’ with a series of ‘building block’¹⁸ measures that would generally fit within and reinforce the existing disarmament frameworks, reflecting the preferences of nuclear weapon states (NWS).¹⁹ The OEWG report ultimately recommended that the UN General Assembly convene a conference in 2017 ‘to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination’; this recommendation was subsequently passed by the Assembly.

Adopting the logic of prohibition as the mechanism through which to pursue nuclear disarmament means that the success of the TPNW rests on its ability to shape global political structures through reconstructing the meaning of the nuclear weapon. A central mechanism of the logic of prohibition is that of stigmatization and delegitimization. The aim of the TPNW is ‘to delegitimise nuclear weapons by challenging and transforming the established nuclear discourse’,²⁰ and to do so without the participation of the Great Powers, in the same way Bowers has argued the MBT has done for landmines. The process of changing nuclear discourse to enable political progress has been previously explored using various terms, including ideas of delegitimizing, marginalizing, stigmatizing and devaluing; while each of these terms can carry a different emphasis, they are often used together or at times interchangeably. Nick Ritchie has argued that devaluing can be understood as a broad umbrella

¹⁷ *Report of the Open-ended Working Group taking forward multilateral nuclear disarmament negotiations* (New York: UN, 2016). The TPNW does contain elements of a framework approach, as details of any future disarmament verification can be added through additional protocols agreed with disarming states. The text also contains some provisions on safeguards and steps towards disarmament in Articles III and IV, but these are preliminary and minimal. The prohibition function is the core of the treaty.

¹⁸ *Report of the Open-ended Working Group*.

¹⁹ UNIDIR, *Taking forward multilateral nuclear disarmament negotiations: the 2016 Open-ended Working Group* (Geneva, 2016), <http://www.unidir.org/files/publications/pdfs/the-2016-open-ended-working-group-en-660.pdf>.

²⁰ Ritchie and Egeland, ‘The diplomacy of resistance’, p. 129.

term that encompasses all of these dynamics.²¹ He defines ‘devaluing’ as reducing ‘the shared value(s) assigned to nuclear weapons within a polity, notably its defence and security elite’,²² and sets out useful distinctions between different types of devaluing, from surface-level reductions in the numbers and roles of weapons, through deeper changes (including policies such as no-first-use and negative security assurances) to a more ideational devaluing, delegitimizing and stigmatizing that fundamentally challenges the legitimacy and status of nuclear weapons. The normative persuasion central to the success of the TPNW rests on this third process of delegitimization of the nuclear weapon.²³

Concentrating on the nuclear weapon as the problematic object, through a prohibition logic, treats nuclear weapons as ‘a bounded problem that can be solved through a singular solution’.²⁴ Activists have connected structures of nuclear domination to other forms of structural violence based on gender, race and colonialism in their campaigning, and have worked tirelessly to expand the range of actors permitted to speak authoritatively on nuclear weapons and the issues that are deemed important.²⁵ Nevertheless, the articulation of the nature of the nuclear problem that is the core feature of this movement necessarily separates the weapon as a problem out from its connection to these wider hierarchies. This is because that connection exists not just in the object of the weapon but in nuclear practices within which the weapon is embedded; yet the prohibition logic requires that ‘the problem is explicitly the weapon rather than specific nuclear practices or specific nuclear actors’.²⁶ It is not that campaigners do not engage with

²¹ Nick Ritchie, ‘Waiting for Kant: devaluing and delegitimizing nuclear weapons’, *International Affairs* 90: 3, May 2014, pp. 601–623; Nick Ritchie, ‘Valuing and devaluing nuclear weapons’, *Contemporary Security Policy* 34: 1, 2013, pp. 146–73. Stigmatization has also been characterized as carrying specific connotations of shame: see Patricia Shamai, ‘Name and shame: unravelling the stigmatization of weapons of mass destruction’, *Contemporary Security Policy* 36: 1, 2015, pp. 104–22.

²² Ritchie, ‘Waiting for Kant’, p. 602.

²³ Legitimacy is understood here as ‘a multidimensional concept, comprising rules, normative beliefs and appropriate actions’: David Beetham, *The legitimation of power* (London: Palgrave Macmillan, 1991) p. xiv.

²⁴ Bolton and Minor, ‘The discursive turn’, p. 389.

²⁵ The HINW has also placed emphasis on the voices of those excluded from standard debates on this issue, such as indigenous peoples, who have disproportionately been victims of nuclear testing and production.

²⁶ Nick Ritchie, ‘The Treaty on the Prohibition of Nuclear Weapons: delegitimising unacceptable weapons’, in Shatabhisha Shetty and Denitsa Raynova, eds, *Breakthrough or breakpoint? Global perspectives on the nuclear ban treaty*, European Leadership Network Global Security special report, Dec. 2017, p.46.

other issues, but that the means of prohibition itself requires a specific understanding of nuclear politics that places the object at the centre of the problem. This approach follows prior humanitarian campaigns in which the weapons to be prohibited ‘represent special, distinct, categories of defence equipment (or rather distinct categories of a distinct category of technology) whose characteristics mean they are either inherently inhumane or particularly lend themselves to the prosecution of inhumane violence’.²⁷ The weapon is the problem, and the problem can be resolved by stigmatizing and prohibiting the weapon in order to remove it from the world. In separating out the weapon as the problematic object from the broader social structures within which it might otherwise gain meaning, meaning becomes dependent on an aggregate of individual acts of interpretation; so that, to paraphrase Alexander Wendt, nuclear weapons are what states make of them.²⁸ Or, in the words of ICAN: ‘We humans made nuclear weapons. We assigned meaning to them. We have the power to change that meaning.’²⁹

Placing the illegitimacy of the nuclear weapon itself at the heart of the issue has many benefits and has been an effective approach to date. Focusing on the weapons negates any argument of fitness or responsibility to possess these weapons; there are no legitimate or illegitimate nuclear states (contrary to claims made by nuclear-armed states to justify the pursuit of counter-proliferation efforts while simultaneously maintaining their own large nuclear arsenals), because the weapon itself is inherently illegitimate. Several campaigners have articulated this approach by citing the comment of the then UN Secretary-General Ban Ki-moon that there are ‘no right hands that can handle these wrong weapons’.³⁰

Consolidating the process of delegitimizing the nuclear weapon poses unique challenges. Acceptance of the prohibitory norm against nuclear weapons is at an earlier and more

<https://www.europeanleadershipnetwork.org/report/breakthrough-or-breakpoint-global-perspectives-on-the-nuclear-ban-treaty/>.

²⁷ Neil Cooper, ‘Humanitarian arms control and processes of securitization: moving weapons along the security continuum’, *Contemporary Security Policy* 32: 1, 2011, p. 139.

²⁸ Alexander Wendt, ‘Anarchy is what states make of it: the social construction of power politics’, *International Organization* 46: 2, 1992, pp. 391–425. For further discussion of the ‘individualism’ of this type of constructivism, which space does not allow here, see Ronen Palan, ‘A world of their making: an evaluation of the constructivist critique in International Relations’, *Review of International Studies* 26: 4, 2000, pp. 575–98.

²⁹ Fihn et al, ‘How we persuaded 122 countries’.

³⁰ Author’s interviews, New York, July 2017.

widely contested stage than that relating to other HAC treaties. For example, while several states did not sign up to the MBT, they did not challenge the ban process itself or make a case for the legitimacy of AP landmines; thus they contributed by omission to the movement towards the weapon's unacceptability.³¹ In contrast to this largely—albeit tacitly—acknowledged good of a ban on AP landmines even by non-signatories, nuclear-armed states such as the United States and the United Kingdom, which as liberal democracies are potentially more susceptible to this type of normative pressure, have been vocal in their contestation of the fundamental normative argument of the TPNW.³² These states not only declined to engage in the negotiations but also strongly denounced the process as divisive and irresponsible. For example, after the adoption of the TPNW, France, the United Kingdom and the United States released a joint statement unequivocally asserting that they would not 'sign, ratify or ever become party to it'.³³ The statement also declared that the TPNW 'risks undermining the existing international security architecture which contributes to the maintenance of international peace and security'. Work by Price and Bower on landmines shows a relatively straightforward relationship between the legitimacy of the landmine as a weapon of war and the acceptability of its possession, and thus its value. However, while the MBT required a process of normative change, to make exceptional what were previously unexceptional weapons, nuclear weapons are already involved in complex structures of legitimacy, and as a result there is no straightforward relationship between the legitimacy of the weapon as object and the legitimacy and value of its possession.

Ritchie has outlined out three existing 'primary sources' of legitimacy for nuclear-armed states: the NPT, the state system and what he terms 'hegemonic moral certitude'.³⁴ First, the

³¹ Price, 'Reversing the gun sights', p. 636. The TPNW was adopted in July 2017 by 122 states—the same number that signed the MBT on its opening in 1997.

³² Though responses from nuclear-armed states have not been uniform, China has been less publicly antagonistic and was the only NWS not to vote in the General Assembly against beginning treaty negotiations. For a discussion of how several nuclear states and allies have reacted, see Shetty and Raynova, eds, *Breakthrough or breakpoint?*.

³³ 'Joint press statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France following the adoption of a treaty banning nuclear weapons', 7 July 2017, <https://usun.state.gov/remarks/7892>.

³⁴ Nick Ritchie, 'Legitimizing and delegitimizing nuclear weapons', in John Borrie and Tim Caughley, eds, *Viewing nuclear weapons through a humanitarian lens* (Geneva: UNIDIR, 2013), pp. 44–78.

five nuclear-armed states claim that the NPT provides for the legal and therefore legitimate continued possession by them of nuclear weapons. Though this interpretation is contested, it is strengthened by the breadth of NPT membership and the indefinite extension of the treaty in 1995. Second, Ritchie cites the acceptance of the legitimacy of acquiring nuclear weapons as a form of state military power in an anarchical and uncertain international system. According to this logic, nuclear weapons ‘are a necessary and therefore legitimate sovereign response to acute military insecurity generated by actual or potential belligerent states’, and deterrence is the legitimate means through which to mitigate state insecurity and instability.³⁵ Third, he identifies the ‘liberal exceptionalism’ underpinning post-Cold War international order and the moral certitude of a form of mainly western nuclear exceptionalism, in which certain states claim moral fitness to possess these weapons. These three sources of legitimacy are not exhaustive, they overlap, and they are contested through different practices of and claims to nuclear legitimacy. The remainder of this article will analyse the normative potential of the TPNW using the first two of Ritchie’s three sources of legitimacy—the NPT and the state system—and will provide examples from the treaty negotiations to illustrate the continuing contests over these sources of legitimacy.³⁶ The article will thus assess the implications for the future normative power of the TPNW as a process of persuasion based on delegitimization of the nuclear weapon.

The prohibition norm and the NPT

No movement towards normative change exists in a vacuum, and there is nothing unusual about challenges to and deviations from the progression of a norm that develops through ‘norm entrepreneurs’ such as ICAN.³⁷ However, both the legislative and the normative context into which the TPNW has entered are particularly complex, and campaigners have mentioned this

³⁵ Ritchie, ‘Legitimizing and delegitimizing’, p. 50.

³⁶ The article uses only the first two sources as they are more useful to the analytical focus on structures of legitimacy. I do not discount the role of dominant accounts of selective moral authority; these are implicitly included as constituting and maintained by the NPT and the state system.

³⁷ Martha Finnemore and Kathryn Sikkink, ‘International norm dynamics and political change’, *International Organization* 52: 4, 1998, pp. 887–917. For work on nuclear norms, see Tannenwald, *The nuclear taboo*; Maria Rost Rublee, *Nonproliferation Norms: Why States Choose Nuclear Restraint* (Athens/London: The University of Georgia Press, 2009); Contemporary Security Policy 39: 3, 2018 Special issue: Nuclear norms in global governance

as a specific challenge.³⁸ The TPNW has emerged into a world teeming with prior multilateral and bilateral nuclear agreements at various stage of negotiation, implementation and alleged violation, most notably the NPT. As Ritchie has shown, the legitimacy of the continued (though ostensibly temporary) possession of nuclear weapons by a small group of states partly relies on the legitimacy of the NPT, which codifies and legalizes nuclear weapons possession and maintains a series of nuclear norms. The NPT as an existing legitimizing structure complicates the potential for the TPNW to gain leverage by becoming embedded within existing and widely accepted ‘foundational principles, norms, rules, and organizational forms’, in the way that Bower has shown the MBT to have effectively accomplished.³⁹ Civil society campaigners have linked the prohibition of nuclear weapons to a longer process of prohibiting inhumane weapons, making the case that nuclear weapons are the only weapons of mass destruction not to have been banned, and creating images in campaign materials using timelines of the prior conventions banning chemical and biological weapons, landmines and cluster munitions, set out in a fashion showing a direct progression towards a nuclear weapons ban.⁴⁰ This presentation ties the nuclear ban into a ‘nested international legal and social system’ of the conduct of war and humanitarian law.⁴¹ However, the NPT and its associated institutions, practices and norms provide another normatively charged and ‘highly resonant shared legal heritage’ for the TPNW.⁴²

Lawrence Freedman’s examination of nuclear norms illustrates the complexity of the normative field. Freedman contends that the disarmament norm (with its embedded goal of eliminating nuclear weapons) is not an end in itself, but rather a means to the end of preventing nuclear war—and end that can also be, and has been, served by other norms of non-use, non-proliferation and deterrence.⁴³ Freedman’s claim is not that these norms are invulnerable to challenge and rejection,⁴⁴ but rather that a disarmament norm needs to be evaluated against

³⁸ Author’s interviews, New York, July 2017.

³⁹ Bower, ‘Norms without the Great Powers’, p. 351-2.

⁴⁰ See e.g. the timeline on the ICAN website: <http://www.icanw.org/why-a-ban/the-case-for-a-ban-treaty/>.

⁴¹ Bower, ‘Norms without the Great Powers’, p. 367.

⁴² Bower, ‘Norms without the Great Powers’, p. 367.

⁴³ Lawrence Freedman, ‘Disarmament and other nuclear norms’, *Washington Quarterly* 36: 2, 2013, pp. 93-108.

⁴⁴ For example, the expansion of nuclear use scenarios in the US 2018 Nuclear Posture Review. See Nina Tannenwald, ‘The great unravelling: the future of the nuclear normative order’, in Nina Tannenwald and James M. Acton, *Meeting the challenges of the new nuclear age: emerging risks and declining norms in the age of*

these alternative sources of nuclear restraint. Freedman is speaking more generally of disarmament movements; the specific case of the TPNW is also complicated by the fact that the contestation around the treaty is taking place not only within the context of the other nuclear norms identified by Freedman, such as those of non-use and non-proliferation, but also within that of other approaches to disarmament, such as the step-by-step approaches long propounded by nuclear-armed states. According to this account of nuclear norms, the legitimacy at stake in the prohibition norm is to a large extent not that of the weapon itself but of the TPNW as the best way to prevent the catastrophic occurrence of nuclear war. From this perspective, the legitimacy question at issue is not whether nuclear weapons are an appropriate weapon of war or a stigmatized object, as has been the case in previous cases of HAC, but what is the most appropriate way in which to address their present existence.

Those resisting the TPNW have frequently placed it in opposition to the NPT and argued that it could undermine the earlier treaty and is therefore an inappropriate way to address the existence of nuclear weapons. Critics have focused on the potential for the TPNW to weaken the norm of nuclear non-proliferation by undermining the status of the NPT and encouraging ‘forum shopping’.⁴⁵ That is, they suggest that because the TPNW does not require membership of the NPT as a condition, states could use adherence to the newer treaty as a legitimation for withdrawing from the NPT, thereby undermining the established non-proliferation regime. State opponents to the TPNW have also focused on the importance of the NPT and what they argue is its incompatibility with the new treaty as legitimating grounds for not engaging in the process. This can be seen, for example, in the statement of the United Kingdom upon the adoption of the TPNW, which asserted that the treaty ‘risks undermining and weakening the Nuclear Non Proliferation Treaty, which has played an unparalleled role in curtailing the nuclear arms race’.⁴⁶ NATO’s statements on the TPNW have also framed it as in opposition to

technological innovation and changing nuclear doctrines, occasional paper (Cambridge, MA: American Academy of Arts and Sciences, 2018).

⁴⁵ Adam Mount and Richard Nephew, ‘A nuclear weapons ban should first do no harm to the NPT’, *Bulletin of the Atomic Scientists*, 7 March 2017, <https://thebulletin.org/nuclear-weapons-ban-should-first-do-no-harm-npt10599>.

⁴⁶ UK Foreign and Commonwealth Office, ‘UK statement on treaty prohibiting nuclear weapons’, <https://www.gov.uk/government/news/uk-statement-on-treaty-prohibiting-nuclear-weapons>. See also the statement from Russia in April 2018 that the TPNW ‘can cause irreparable damage to the integrity and sustainability of the established nuclear non-proliferation system based on the NPT’: Ministry of Foreign Affairs

the existing order, stating for example that the ‘ban treaty is at odds with the existing non-proliferation and disarmament architecture. This risks undermining the NPT, which has been at the heart of global non-proliferation and disarmament efforts for almost 50 years.’⁴⁷ In all of these instances, the challenge concerns not the legitimacy of nuclear weapons as objects or of nuclear disarmament as a goal, but the legitimacy of the ban treaty as a means towards the agreed-upon end of a nuclear-free world.

As Egeland and colleagues have shown, and as many TPNW-supporting states have argued, there is nothing within the legal provisions of the new treaty that undermines or subverts the NPT, and in fact the TPNW can be understood as complementing the existing norm of disarmament within the NPT by acting as one of the ‘effective measures’ relating to disarmament referred to in Article VI.⁴⁸ Yet Egeland and colleagues also acknowledge that from a political perspective it might be seen differently, and if one understands the TPNW as a vehicle for the total delegitimization of nuclear possession, it becomes clear that there is a tension between the TPNW and NPT. If what is delegitimized by a prohibition norm is not the weapon itself but the toleration of nuclear possession as legitimized through the existing order, then that norm is in conflict with the legitimacy awarded by NWS status. The relative significance of the non-proliferation and disarmament features of the NPT has always been contested, with persistent conflicts and contradictions between the three norms of non-proliferation, peaceful use and disarmament.⁴⁹ Nonetheless, there is a clear obligation on states, supported by the 1996 ruling of the International Court of Justice, to pursue disarmament within the NPT. Yet in practice, it is clear that the NPT provides a level of international legitimacy to

of the Russian Federation, ‘Statement by the delegation of the Russian Federation on nuclear disarmament at the second session of the Preparatory Committee for the 2020 Review Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons’, Geneva, 26 April 2018,

http://www.mid.ru/en_GB/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3195373.

⁴⁷ NATO, ‘North Atlantic Council statement on the Treaty on the Prohibition of Nuclear Weapons’, 20 Sept. 2017, https://www.nato.int/cps/en/natohq/news_146954.htm?selectedLocale=en

⁴⁸ Kjølsv Egeland, Torbjørn Graff Hugo, Magnus Løvold and Gro Nystuen, ‘The nuclear weapons ban treaty and the non-proliferation regime’, *Medicine, Conflict and Survival*, 34: 2, 2018, pp. 74-94. Advocates often make this point and assert the legitimacy of the TPNW as a means through which states can perform their NPT Article VI obligations.

⁴⁹ Knopf, ‘After diffusion’.

nuclear possession, at the very least according to the NWS.⁵⁰ As the centre of the order that codifies and legitimizes the toleration of nuclear difference, it is therefore ‘structurally unable to categorically delegitimize nuclear weapons and the practice of nuclear deterrence’.⁵¹

The tension between the legitimacy of the TPNW and that of the NPT can be seen in the negotiation process of the TPNW, during which the language on the treaty’s relationship to the NPT changed and was the subject of considerable debate. The TPNW preamble reaffirms the role of the NPT in typical language as ‘the cornerstone of the nuclear disarmament and non-proliferation regime’. Its relationship to the NPT is covered under the ‘Relations with other agreements’ article. In the conference president’s treaty draft released on 22 May 2017 after the first round of negotiations, the text of the relevant article (at that point Article 19) read: ‘This Convention does not affect the rights and obligations of the States Parties under the Treaty on the Non-Proliferation of Nuclear Weapons.’⁵² During the read-through of the text, it became clear that the language of rights and obligations was problematic for several states, which argued that it could establish the precedence of the NPT over the new treaty.⁵³ In the final treaty draft, the language of what was now Article 18 had been changed to state: ‘The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty.’⁵⁴ This new text was based on the suggestion of Malaysia that the relevant language be taken from the Arms Trade Treaty. Yet the new formulation was also not supported by several states, which, in the final treaty read-through on 5 July, objected in particular to the last eight words: ‘where those obligations are consistent with the Treaty’ as

⁵⁰ An example would be the repudiation by nuclear-armed states of any challenge to the legitimacy of their possession of nuclear weapons by the TPNW because of pre-existing law. See Russia’s statement to the General Assembly in 2016 that ‘under the NPT the nuclear weapons of the five nuclear powers are considered to be legitimate weapons’, cited in

Paul Meyer and Nick Ritchie, *The NPT and the Prohibition Negotiation: Scope for Bridge-building* (Geneva: UNIDIR, 2017) p. 13.

⁵¹ Ritchie ‘Waiting for Kant’, p. 621.

⁵² *Draft Convention on the Prohibition of Nuclear Weapons Submitted by the President of the Conference 22 May 2017*, <http://fissilematerials.org/library/un17.pdf>

⁵³ Objections were expressed by Brazil, Ecuador, Indonesia, Mexico and Nigeria. Further information can be found in the *Reaching Critical Will Nuclear Ban Daily 2*: 6, 22 June 2017. The title was changed from a convention to treaty in a subsequent redraft.

⁵⁴ The treaty text, 7 July 2017, is available at <http://undocs.org/A/CONF.229/2017/8>

potentially placing the new TPNW above the NPT. They argued that the words should be deleted.⁵⁵ Austria, Brazil and South Africa, three key drivers of the ban process, strongly objected to deleting the eight words, insisted on the complementarity of the treaty text and aims to those of the NPT, and reiterated in their statements the great care the drafters had taken that the ban treaty would complement rather than challenge the NPT.

The difference of opinion on the appropriate terms in which to set out the TPNW's relationship to the NPT illustrates the divergence in interests and commitments between states on this issue.⁵⁶ However, across this difference was the unvarying commitment to the performative enhancement of the legitimacy of the NPT through the reaffirmation of its continuing normative validity and status. Whatever the individual motivations of states, the debate over the text of the TPNW and its complementarity to the NPT, as well as TPNW supporters' consistent framing of the relationship between the two as fundamentally compatible, highlights the extent to which the legitimacy of the TPNW is performed within the context of the NPT regime.⁵⁷

According to David Beetham, there are several facets of the legitimacy of any power such as the NPT regime.⁵⁸ One is 'normative validity', denoting the exercise of power grounded in the normative beliefs of those involved regarding the legitimacy of the means through which power is authorized, and the way in which it is exercised, the latter of which Beetham labels 'due performance'.⁵⁹ Deviation from normative validity leads to a 'legitimacy deficit'. Another aspect of legitimacy is 'performative acts', namely the appropriate actions of relevant groups that endorse the authority of a power-holder through acknowledgement and recognition. The NPT is in a legitimacy deficit in that the NWS have deviated from the socially expected due

⁵⁵ This proposal was supported by Argentina, Singapore, Sweden and Switzerland, with the Netherlands also expressing strong reservations that the treaty in current form superseded the NPT.

⁵⁶ As noted by Borrie et al., 'there was no core group of states driving progress on the treaty text as had been the case in previous HAC negotiations. John Borrie, Michael Spies & Wilfred Wan 'Obstacles to understanding the emergence and significance of the treaty on the prohibition of nuclear weapons', *Global Change, Peace & Security*, 30: 2, 2018, pp. 95-119.

⁵⁷ William C. Potter, 'Disarmament diplomacy and the nuclear ban treaty', *Survival, Global Politics and Strategy* 59: 4, 2017, pp. 75-108; Egeland et al. 'The nuclear weapons ban treaty'.

⁵⁸ Beetham, *The legitimation of power*, pp. 15-25.

⁵⁹ Beetham, *The legitimation of power*, p. xiv.

performance of their Article VI obligations, and their failure to do so has undermined the normative validity of the regime.⁶⁰ Thomas Doyle has argued that the NPT is, in fact, facing a ‘legitimation crisis’ because its ‘subversion’ by the NWS ‘has led to the strict and narrow enforcement of non-proliferation requirements while permitting the NWS to avoid their nuclear disarmament commitments’.⁶¹ Yet despite such criticism and increasing frustration on the part of many non-nuclear-weapon states, so far NPT signatories continue to engage in the ‘performative acts’ that maintain the legitimacy of a power through acts of acknowledgement and recognition, rather than engaging in public acts of opposition that would delegitimize the regime. One could argue that the act of negotiating the TPNW is itself a public act of opposition to the legitimacy of the NPT regime, but this is claimed only by those who oppose the TPNW, as a means to undermine it, not by its advocates, who have been at pains to publicly refute this suggestion. The continuing performance of legitimizing acts is therefore at odds with the stated normative goal of the TPNW as ‘an unequivocal delegitimation’⁶² of nuclear weapons possession.

Nuclear exceptionalism and the TPNW withdrawal clause

The second means by which, Ritchie claims, actors maintain the legitimacy of nuclear weapons is by asserting the imperatives of the state system. Nuclear weapons provide security in an anarchical and insecure world through the practice of deterrence and are thus valued possessions. The view that a state’s security is uniquely served by nuclear weapons is an example of what authors such as Gabrielle Hecht have called nuclear exceptionalism: the received wisdom that realm of the nuclear is fundamentally different from that of the non-nuclear.⁶³ Both advocates and opponents of nuclear weaponry have traditionally supported this distinction, drawing a clear ontological line between the nuclear and the non-nuclear, in which the exceptional characteristics of the nuclear convey exceptional power and danger. Nuclear exceptionalism is embedded in, and sustains, the paradoxical political status of nuclear

⁶⁰ Ramesh Thakur, ‘The nuclear ban treaty: recasting a normative framework for disarmament’, *The Washington Quarterly* 40: 4, 2017, pp. 71–95.

⁶¹ Thomas Doyle, ‘A moral argument for the mass defection of non-nuclear-weapon states from the nuclear nonproliferation treaty regime’, *Global Governance* 23: 1, 2017, p. 15.

⁶² Ritchie, ‘Waiting for Kant’, p. 621

⁶³ Gabrielle Hecht, *Being nuclear: Africans and the global uranium trade* (Cambridge, MA: MIT Press, 2014); Gabrielle Hecht, ‘The power of nuclear things’, *Technology and Culture* 51: 1, Jan. 2010, pp.1-30; Gabrielle Hecht, ‘Nuclear ontologies’, *Constellations* 13: 3, 2006, pp. 320–31.

weapons: they are at once deeply political, as the ultimate tool of state politics, and essentially depoliticized, in that their development and maintenance are taken out of common political processes. An acceptance of nuclear exceptionalism also obscures the complex material, political and social effects of the growth of a global nuclear weapons production infrastructure. Understanding nuclear weapons as exceptional, and their use as unthinkable, has led to a normalization of nuclear weapons in everyday life.⁶⁴ Hecht argues against the idea of an exceptional nuclear realm, claiming instead that what she terms ‘nuclearity’ (the extent to which something is nuclear) is not a simple binary distinction but instead ‘a technopolitical spectrum that shifts in time and space’.⁶⁵ Hecht’s challenge to the acceptance of nuclear exceptionalism has been complemented by work on nuclear weapons as fetish objects, in which authors such as Anne Harrington de Santana and Shampa Biswas have deconstructed the social relations that produce nuclear weapons as the embodiment of international power and value.⁶⁶ The process of nuclear fetishization they describe imbues the physical form of the object of the nuclear weapon with exceptional value, and then understands this value as inherent and separate from the social conditions of the conferral of that valuation.

The premise of disarmament through prohibition is that delegitimizing the nuclear weapon as object will lead to the delegitimization of its possession: if these weapons are bad, then having them is unacceptable. However, a continuing acceptance of nuclear exceptionalism and its expression in the logic of deterrence renders this relationship less straightforward. As Ritchie has pointed out, ‘delegitimizing nuclear weapons does not mean stripping nuclear weapons of all value if possessor states still imbue considerable value irrespective of widely accepted and codified illegitimacy’.⁶⁷ Nuclear weapons are already stigmatized objects: the NPT, for example is based on the spread of the norm of nuclear non-proliferation;⁶⁸ and Nina

⁶⁴ Joseph Masco, *The nuclear borderlands: the Manhattan Project in post-Cold War New Mexico* (Princeton: Princeton University Press, 2006).

⁶⁵ Hecht, ‘Nuclear ontologies’, p. 322.

⁶⁶ Anne Harrington de Santana, ‘Nuclear weapons as the currency of power’, *The Nonproliferation Review* 16: 3, 2009, pp. 325–45; Shampa Biswas, *Nuclear desire: power and the postcolonial nuclear order* (Minneapolis: University of Minnesota Press, 2014).

⁶⁷ Ritchie, ‘Valuing and Devaluing Nuclear Weapons’, pp. 149–50.

⁶⁸ Jenny Nielsen and Marianne Hanson, *The European Union and the Humanitarian Initiative in the 2015 Non-Proliferation Treaty review cycle*, EU Non-Proliferation Consortium Non-Proliferation paper no. 41 (Stockholm: SIPRI, Dec. 2014).

Tannenwald has written of the normative ‘taboo’ against the use of nuclear weapons and asserted various taboos of use, possession and proliferation that operate simultaneously among different actors.⁶⁹ Previously banned weapons such as landmines and cluster munitions, and even chemical weapons, have often been seen as (in varying degrees) more usable weapons and as ‘weapons of the weak’,⁷⁰ and their prohibition and exceptions to it have been linked to wider understandings of ‘civilized’ versus ‘uncivilized’ international actors and behaviours. Prohibitions have therefore rested on reshaping the discourse on what is accepted as ‘civilized’ behaviour. As Harrington de Santana has argued, however, previous proscriptions of nuclear weapons possession, for example through the hierarchical non-proliferation regime, have often reproduced the connection between the nuclear weapon and state power.⁷¹ This means that nuclear weapons can hardly be described as ‘weapons of the weak’. Instead, they have been fetishized as the definitive symbol of state power and status. The illegitimacy of nuclear weapons as actual weapons of war does not necessarily undermine this status. The relationship between legitimacy of nuclear possession and of use is codified and asserted through the logic of deterrence. As Biswas asserts, deterrence is ‘the language through which nuclear weapons speak to communicate their potency but by suggesting their unusability’.⁷² Tannenwald claims that the stigmatization of nuclear *use* is one way in which the exceptionalism of nuclear weapons is reinforced, thereby stabilizing and legitimizing continued *possession* through the acceptance of the practices of nuclear deterrence as stable and stabilizing.⁷³

The framing of nuclear weapons possession and use in discourses of ‘civilized’ and ‘uncivilized’ behaviour does not adequately capture either the sources of or justifications for nuclear restraint that are embedded in processes of nuclear legitimacy and illegitimacy. Tannenwald’s explanation of a stigma-based taboo has been challenged by T. V. Paul, who has argued instead for the effects of what he terms a ‘tradition’ of non-use in which a normative

⁶⁹ Tannenwald, *The nuclear taboo*.

⁷⁰ Price and Tannenwald, ‘Norms and deterrence’, p. 130.

⁷¹ Harrington de Santana, ‘Nuclear weapons as the currency of power’, pp. 340–1. This is not to say that the mechanism of the TPNW works in the same way; it actually challenges these hierarchies. The point is simply that stigmatization already functions here in multiple ways.

⁷² Biswas, *Nuclear desire*, p. 122.

⁷³ Tannenwald, ‘The great unravelling’ p. 15.

prohibition applies but not to the same internalized degree.⁷⁴ In the face of the unknowable consequences of breaking this tradition, the issue of nuclear use is not about ‘civilized’ versus ‘uncivilized’ behaviour to the same extent as other banned weapons, but about the nature of a future beyond nuclear first use: a world beyond the nuclear taboo. It is, as Freedman asserts, about ‘basic prudence as well as moral inhibition’.⁷⁵ There is a perceived uncertainty about what happens after the nuclear taboo is broken: the consequences are not just those of shame and stigma, but those of a potentially ‘transformational event representing a turning point in international history’.⁷⁶ The nuclear exceptionalism that underpins and is reinforced by the illegitimacy of nuclear use is not tied exclusively to understandings of appropriate or ‘civilized’ behaviour, and as such has not undermined the value of nuclear weapons as possessions even though (or possibly because) the stigma attached to their use has persisted.

An examination of the TPNW withdrawal clause and its negotiation illustrates the manner in which nuclear weapons could undergo processes of delegitimization while at the same time remaining valued as providers of security within the state system. Article 17 of the treaty addresses the issues of duration (established as unlimited in Article 17.1), and withdrawal (in Articles 17.2 and 17.3). The final adopted text on withdrawal states in Article 17.2 that 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 the Treaty have jeopardized the supreme interests of its country’. This language of ‘extraordinary events’ and ‘supreme interests’ as justification for treaty withdrawal is not unique to the TPNW but is carried over from the language of the chemical and biological weapons conventions. There are not, however, any similar references to extraordinary events jeopardizing supreme interests in the more recent texts banning AP landmines and cluster munitions, and the sustained debate on this clause during the final review of the treaty text at the second session of the UN negotiations provides a revealing example of how stigma and value coexist in this realm.⁷⁷

⁷⁴ T. V. Paul, *The tradition of non-use of nuclear weapons* (Stanford, CA: Stanford University Press, 2009) pp. 22–5.

⁷⁵ Freedman, ‘Disarmament and other nuclear norms’, p. 97.

⁷⁶ Freedman, ‘Disarmament and other nuclear norms’, p. 97.

⁷⁷ The information on the negotiating process is from the author’s observation notes made at the second session of TPNW negotiations at the UN in New York, June–July 2017.

During the open session on 5 July 2017, much of the discussion focused on the text of Article 17. Several participants, including Chile, Ecuador, Ghana, Palestine and South Africa, advocated deletion of clauses 17.2 and 17.3, leaving any consideration of withdrawal to the jurisdiction of the Vienna Convention on the Law of Treaties. Their objections reflected, as noted by Guatemala, the contradiction between the language of the withdrawal clause and the very purpose of the treaty. The implication of this clause, which is that under certain circumstances the prohibition on nuclear weapons would not apply, undermines the core normative thrust of the treaty: that nuclear weapons are unacceptable and illegitimate under any circumstances, and as such have no value. Despite apparent majority support for this position in the room, objections from states including Algeria, Egypt, Iran, the Philippines and Sweden led to a compromise in which the withdrawal clause with the draft language was retained in the final text.⁷⁸

The withdrawal clause in the TPNW places a relatively strong set of restrictions on withdrawal, with a longer notice time than similar treaties, and was not unacceptable to some civil society actors from a strictly legal perspective.⁷⁹ However, objections to the text reflected concerns about the implications of the wording of the withdrawal clause for the broader credibility of the treaty.⁸⁰ As noted by Palestine, the language of ‘supreme interests’ as the justification for withdrawal is similar to that which is used to justify continued possession by nuclear-armed states. The reasoning of the states that objected to the removal of the withdrawal language was also expressed in terms of preserving their sovereign rights,⁸¹ thus implicitly reasserting the sovereign right to possess nuclear weapons in certain extreme circumstances and therefore their value as a means of protecting state interests. These different positions on what lies at the heart of the normative contest around the TPNW—nuclear weapons as either guarantors of state security or inhumane and illegitimate weapons—provide a useful initial insight into how they can actually be both at once and, as such, illuminates the intricacies of the relationship between the legitimacy of nuclear weapons and their value. The debate over the withdrawal clause also illuminates the challenge of pursuing disarmament through the specific process of

⁷⁸ It should be noted that compromise in multilateral treaties is typical; there is no implication here that such compromise reveals a particular weakness in the TPNW. What is interesting is the form that such compromises take and what this reveals about the structures of meaning and power in which the treaty is being negotiated.

⁷⁹ This was the view expressed by the ICRC representative in an interview with the author in July 2017.

⁸⁰ As asserted by Austria during the debate as well as by several civil society groups.

⁸¹ As by Egypt, Iran and Sweden.

normative change that is based on the weapon as an illegitimate object, while remaining within current dominant understandings of state 'supreme interests'.

Conclusion

This article has used the framing of legitimacy to examine the potential for the TPNW to establish a prohibitory norm on nuclear weapons. It has combined recourse to the literature on the HINW and other HAC movements to date with an analysis of the TPNW process, focusing particularly on two contested aspects of the treaty negotiations, to highlight the challenges of pursuing normative change within the existing structures of nuclear governance and dominant nuclear understandings. Every new process of normative development enters into a world of already existing and sometimes contradictory normative pressures. The political contests examined in this article show clearly the contingent, contradictory and fractured nature of the structures of legitimacy and illegitimacy in which nuclear politics are embedded.⁸² Those campaigning for the normative prohibition of nuclear weapons already work within and through the fractures and contradictions of global nuclear politics. While earlier generations of anti-nuclear campaigns relied on and reinforced the exceptionalism of nuclear weapons, actors within the HINW have attempted to undermine the nuclear exceptionalism that they understand confers status on the weapons and to treat them as just another type of inhumane weapon that should be banned. Yet their campaigning often relies on that very exceptionalism by highlighting the unique violence that nuclear weapons inflict and the way in which this makes them morally distinct from other weapons. They thus deny their exceptional political and military status while attributing to them an exceptional harm and illegitimacy. This process characterizes nuclear weapons as at once normal and exceptional, and bears similarities to that which Neil Cooper has described, through the framing of securitization, as occurring in the case of landmines, in which 'the same issue or object can be simultaneously securitized and (relatively) desecuritized in relation to different referent objects (the state and the human)'.⁸³

⁸² See Maja Zehfuss, *Constructivism in International Relations: the politics of reality* (Cambridge, UK: Cambridge University Press, 2009).

⁸³ Cooper, 'Humanitarian arms control', p.140. See also Margarita H. Petrova, 'Weapons prohibitions through immanent critique: NGOs as emancipatory and (de)securitising actors in security governance', *Review of International Studies* 44: 4, 2018, pp. 619-653.

Where the process of accomplishing this simultaneous normalization and exceptionalism differs from prior instances of HAC is in the legitimacy practices already embedded within global nuclear politics that enable states to accept the delegitimization of the weapon as an object without necessarily delegitimizing its continued possession. Bower has shown through the example of the MBT how the ‘prior acceptance of logically connected institutions—such as the laws of war or human rights principles—places important constraints on [materially powerful states’] ability to effectively contest new legal developments not to their liking’.⁸⁴ By bringing nuclear weapons into the realm of visible and contestable politics in the context of the institutions of IHL, campaigners are attempting to expose the ‘dissonance between the claims of states and their actual behaviour by focusing on the humanitarian risks and consequences of nuclear weapon detonations’.⁸⁵ Yet the widespread acceptance of a parallel set of connected institutions serves as a means to overcome this dissonance. Opponents of the TPNW are therefore attempting to situate the treaty, not within IHL, but within the existing institutions of nuclear governance, most notably the NPT, as a means of contesting its legitimacy.

In an article that advances several valuable questions about the ban’s development and potential, Borrie and colleagues ask what is needed ‘to embed and consolidate the nuclear ban’.⁸⁶ If one considers the nuclear ban not just as an expression of frustration from a group of states at the pace of disarmament but, as proponents claim, as a normative movement towards the delegitimization of both the weapon as object and the value and acceptability of its possession, then consolidation may require a further challenge to the structures of nuclear politics through which the weapon and its possession are currently legitimized. While the NPT is certainly in a legitimacy deficit, even those states that have been most active within the ban movement have not been willing to withdraw the performative acts that continue to legitimize the regime. Indeed, as Nystuen and colleagues have shown, participation in the preparatory meetings for the five-yearly NPT Review Conference has actually increased since the emergence of the TPNW.⁸⁷ Insistence on the complementarity of the TPNW to the NPT reinforces the latter’s centrality and legitimacy and situates the ban treaty, not within the

⁸⁴ Bower, ‘Norms without the Great Powers’, pp. 353–4.

⁸⁵ Borrie, ‘Humanitarian reframing’, p. 644.

⁸⁶ Borrie et al., ‘Obstacles to understanding’, p. 98.

⁸⁷ Gro Nystuen, Kjølsv Egeland and Torbjørn Graff Hugo, *The TPNW: setting the record straight* (Oslo: Norwegian Academy of International Law, Oct. 2018), <http://intl.no/wp-content/uploads/2018/10/TPNW-Setting-the-record-straight-Oct-2018-WEB.pdf>.

institutions of IHL, but within the institutions of disarmament and non-proliferation that can be used to contest the consolidation of the prohibition norm. Given the conclusion of this article that further embedding the ban treaty requires greater challenges to the legitimacy of the nuclear status quo, TPNW supporters should consider the extent to which they are willing to withdraw the performative acts of legitimation that uphold the current regime in order to consolidate an emerging prohibition norm.

Doyle has argued that the ‘subversion’ of the NPT has ‘virtually eliminated nuclear disarmament as one of the regime’s key missions’, and that in consequence, non-nuclear-weapon states parties are morally justified in mass defection from the regime.⁸⁸ This would be an extreme move. Alternative means to NPT withdrawal could include concerted disruptive action at the next NPT Review Conference or simply bolder declaratory challenges to the centrality of the NPT than have previously been made, lessening participation in NPT Review Conferences and preparatory meetings and reducing declaratory support for the regime in other nuclear forums. Williams proposes a more cooperative approach in which ban treaty advocates and opponents could engage in a process of ‘bridge-building’ to identify areas of common interest in order to reduce polarization and rebuild trust.⁸⁹ Issues such as nuclear risk reduction and education could provide areas in which to foster cooperation; but growing polarization makes this increasingly difficult, and nuclear-armed states should consider the extent to which their hostile reception of the TPNW inhibits any such bridge-building activities.⁹⁰

⁸⁸ Doyle, ‘A moral argument’, p. 24; see also Ramesh Thakur, Jane Boulden and Thomas G. Weiss, *Can the NPT regime be fixed or should it be abandoned?*, Dialogue on Globalization occasional paper no. 40 (New York: Oct. 2008).

⁸⁹ Heather Williams, ‘A nuclear babel: narratives around the Treaty on the Prohibition of Nuclear Weapons’, *The Nonproliferation Review* 25: 1–2, 2018, pp. 51-63.

⁹⁰ The recent UK House of Lords Select Committee on International Relations report has acknowledged this and advised that ‘the Government should adopt a less aggressive tone towards the treaty and its supporters’: *Rising nuclear risk, disarmament and the Nuclear Non- Proliferation Treaty*, HL paper no. 338 (London: House of Lords, 2019).