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Reference:

Pretorius Joelen, Sauer Tom.- When is it legitimate to abandon the NPT? Withdrawal as a political tool to move nuclear disarmament forward
Contemporary security policy - ISSN 1743-8764 - 43:1(2022), p. 161-185
Full text (Publisher's DOI): <https://doi.org/10.1080/13523260.2021.2009695>
To cite this reference: <https://hdl.handle.net/10067/1837430151162165141>

When is it legitimate to abandon the NPT? Withdrawal as a political tool to move nuclear disarmament forward

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Abstract (max 150 words)

Treaties can be denounced and withdrawn from unilaterally and collectively. We ask when it would be legitimate to abandon the NPT, a treaty that 50 years ago committed states to nuclear non-proliferation and disarmament, but still has not delivered on the latter. The end of the NPT is a taboo subject in the arms control community that sees it as the cornerstone of the nuclear order. We draw on literature on the legitimacy of and exit from international institutions. We especially explore the political substance of the discontent that the non-nuclear weapons states have expressed in and outside the NPT forum. Exiting the NPT can legitimately be used as a political tool to challenge the current status quo where five states claim a right to possess nuclear weapons based on the NPT, and to achieve a nuclear order where nuclear weapons are illegal for all.

Keywords: Treaty on the Non-Proliferation of Nuclear Weapons, legitimacy, treaty withdrawal, international institutions, Treaty on the Prohibition of Nuclear Weapons, nuclear disarmament.

Acknowledgement: Our thanks to Benoit Pelopidas for encouraging us to develop the theoretical framework for the relationship between exit from the NPT and nuclear disarmament.

Funding information (add if any)

Disclosure statement

No potential conflict of interest has been reported by the authors.

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In the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (1970) parties agree to a temporary discrimination between nuclear weapon and non-nuclear weapon states to be corrected in good faith through nuclear disarmament. However, after more than 50 years in existence, nuclear weapons remain a fixture in the nuclear weapon states' arsenals to the dismay of most non-nuclear weapon states and global public opinion. As a result, the literature on the NPT has become increasingly forewarning of the treaty's weaknesses and the consequent unraveling of the nuclear order (Carranza, 2006; Sauer, 2006; Dhanapala, 2008; Kmentt, 2013; Arbatov, 2015, Ogilvie-White, 2017; Tannenwald, 2018; Knopf, 2022; for a different view, see Horovitz, 2014; Barnum & Lo, 2020; Smetana & O'Mahoney, 2022). However, most analysts stop short of recommending that non-nuclear weapon states withdraw from the NPT; instead they are calling for reform or action to save the treaty. But, treaties sometimes do come to an end. We see this special issue that seeks to investigate the state of the NPT at its 50th anniversary as an apt moment to start a conversation about when to abandon the NPT.

We frame our investigation in terms of legitimacy. Distinguishable from self-interests, coercion, and habit, legitimacy signals normative considerations to understand why states comply with international institutions including treaties (Hurd, 1999; Thomas, 2014). Specifically, we apply Beetham's (2013) discursive structure of international legitimacy based on the criteria of legality, moral justifiability, and performative endorsement.

The object of legitimacy in our inquiry—the act of abandoning an international institution—needs clarification, because our analysis may come across as confusing this with the legitimacy of the institution itself. The legitimacy of withdrawal is linked to the legitimacy of the institution that is withdrawn from. But, we do not judge the legitimacy of withdrawal only in terms of an inverse relationship with the legitimacy of the institution. We also judge the legitimacy of withdrawal on its own terms, paying attention to its political meaning for nuclear disarmament.

The NPT's legitimacy is eroding and some states may exercise their right to withdraw from the treaty as a result. A large number of them have already pursued the NPT's disarmament goal outside this forum by establishing a treaty banning nuclear weapons. These are predictable political moves considering the NPT's performance and procedural legitimacy deficits and the fact that discontented NPT parties' voiced frustrations have met with tone-deafness and institutional blockage inside the treaty forum. Although exit weakens the NPT and may lead to its collapse, it can also lead to replacement institutions that move disarmament forward.

The article proceeds in two parts. The theoretical part shows how legitimacy is used in International Relations and expands Beetham's framework to foreground power relations when analyzing the legitimacy of abandoning international institutions, more particularly treaties. In the second and empirical part, we apply the framework to the option open to non-nuclear weapon states to withdraw from the NPT. The analysis is two-pronged, judging first the legitimacy of the NPT and then the normative considerations of such an exit move.

Legitimacy of and exit from international institutions

International institutions, such as international organizations and international law, perform a governance function at the international level. Through them actors deploy political authority and power to order an issue-area, interests get institutionalized, and winners and losers result (Hurd, 2019). Studies confirm that the lack of legitimacy of an institution can cause state exit, but their treatment of this process is often indirect (see e.g. Brölmann et al., 2018; Borzyskowski & Vabulas, 2019; Rashica, 2019). In other words, existing studies do not explain how legitimacy works to keep members engaged or how the lack thereof leads to their exit, a gap we hope to fill.

The concept legitimacy is broadly used to reflect a favorable judgment of an institution or action as within the bounds of acceptability (Mulligan, 2006; Bodansky, 2012). More narrowly legitimacy refers to “power [or rule] that is rightful, because it meets certain normative criteria about how those in power have obtained their power and how they exercise it” (Beetham, 2013, p. x). Although the question about the legitimacy of exiting an international institution leans toward the broad definition on face value, it is nevertheless bound up with “rightful rule” as we will show below.

An inquiry into legitimacy can be approached from the following three understandings of the concept legitimacy: legal, moral, and sociological (Mulligan, 2006; Beetham, 2013; Thomas, 2014). Beetham (2013), whose conceptualization we will follow, draws on all three to outline the discursive structure of international legitimacy.

To summarise, international institutions, their officials and outcomes are accorded legitimacy to the extent that they conform to the legal requirements set out in their founding treaties as authorised by member states (legality, authorisation). At the normative level there is an expectation that they should perform effectively in fulfilling the common purposes for which they were established, and that they should do so according to procedures accepted as fair (normative justifiability). Finally, legitimacy is confirmed to the extent that states comply with decisional outcomes, or refrain from acting in ways which manifestly flaunt the institution’s rules (performative endorsement). (Beetham, 2013, pp. 271-272)

The framework looks at three levels (rules, justification in terms of beliefs, and actions) to judge if legitimacy is present. It also outlines what non-legitimacy (or the opposite of legitimacy) looks like at each level, namely illegitimacy, legitimacy deficit, and delegitimation (see table 1).

Table 1: The three dimensions of legitimacy (Beetham, 2013, p. 20)

Criteria of legitimacy	Form of non-legitimate power
i. Conformity to rules (legal validity)	Illegitimacy (breach of rules)
ii. Justifiability of rules in terms of shared beliefs	Legitimacy deficit (discrepancy between rules and supporting beliefs, absence of shared beliefs)
iii. Legitimation through expressed consent	Delegitimation (withdrawal of consent)

We explain the framework below, situating it in the literature on the legitimacy of international institutions generally, and supplementing it for our purposes with a focus on power relations (Hurd, 2019; Hanson, 2022) and exit from treaties.

Beetham’s discursive structure of legitimacy

Legal legitimacy is sometimes equated with legal validity when the acquisition and exercise of power conforms to established law (Beetham, 2013). If an act is not legal, it is simply illegitimate—power is acquired or exercised in a way that contravenes the rules, like breaching a treaty. Legal validity does not exhaust the concept of legal legitimacy, though. The legitimacy of law also relates to the quality of moral obligation that law *should* have (Thomas, 2014). It is not just about the legality of what someone can do or have, but about the justifiability of the law itself in terms of rational moral and political principles (Beetham, 2013). In the absence of an ultimate interpreter of law at the international level, Beetham (2013) argues that normative justifiability has even more weight, because “[a]t the heart of all international treaties lies the norm of international cooperation and common interests in the realisation of specific benefits which states could never achieve on their own” (p. 272). Pertinent to our investigation and related to the consensual nature of international institutions is the constitutive and productive nature of law (Hamidi, 2020). Law constitutes and sustains power relations of domination and

subordination, which needs justification to be legitimate, which brings us to the second level of Beetham's structure.

The considerations around the moral grounds on which law itself is deemed rightful overlaps legal legitimacy with moral legitimacy, and is sometimes exclusively associated with the way political philosophers approach legitimacy (Steffek, 2003). On this view the *normative dimension of legitimacy* pertains to “whether a claim of authority is well founded—whether it is justified in some objective sense” (Bodansky, 1999, p. 601; Steffek, 2003). An institution or act's legitimacy is evaluated in an “objective sense” by positing some ideal criteria or grounds for determining whether an institution is worthy of support.

Contrary to moral legitimacy sociological legitimacy investigates the normative grounds of rightful rule in context and with respect to actual, rather than ideal social relations (Strange, 2016). Some scholars in the sociological tradition, like Tallberg and Zürn (2019), follow Weber (1978) by equating the legitimacy of an institution with “actors' perception of an institution's authority as appropriately exercised” (p. 583), also referred to as legitimacy beliefs about the institution. Hurd (2019) states:

Because [international organizations] do not have the tools to coerce governments into following their rules, they must instead cultivate a belief in their appropriateness among those who they aspire to govern. This belief is called legitimacy and the process by which it is created is legitimation. (p. 719)

The equation of the legitimacy of an institution with legitimacy beliefs allows for the behavioral study of legitimacy and legitimation. The analyst can “objectively” report on what the subjects of legitimacy believe or what legitimating actors are doing to boost these beliefs, describing as opposed to prescribing (Steffek, 2003).

That said, despite the importance of legitimacy beliefs and legitimations in the study of legitimacy, legitimacy is not reducible to legitimacy beliefs and the way that the powerful justify their rule. Beetham (2013) explains that as outside observers: “We are making an assessment of the degree of congruence, or lack of it, between a given system of power and the beliefs and expectations that provide its justification. We are not making a report on people’s ‘belief in its legitimacy’” (p. 11). We do not survey the beliefs of non-nuclear weapon states about the NPT’s legitimacy and from that conclude whether the NPT is legitimate or not. To judge the criterion of moral justifiability, we will instead assess to which extent the NPT is delivering on the non-nuclear weapon states’ expectations of this institution and the extent to which parties to the NPT share beliefs about what they signed up for, especially with regards to nuclear disarmament.

Hurd’s (1999) definition of legitimacy as “the normative belief by an actor that a rule or institution ought to be obeyed...a subjective quality, relational between actor and institution, and defined by the actor’s perception of the institution” (p. 381) aligns with the sociological approach. But, he too objects to a sharp distinction between normative and descriptive approaches in a way that dovetails with Beetham’s objection and augments the framing we have in mind. Hurd (1999) notes that an actor’s perception of an institution’s authority derives from its substance or from the procedure or source by which it was constituted. A conviction to continue membership of an institution can therefore also be studied as a function of whether a member state believes that an institution is meeting the objectives that were agreed to (performance) and has confidence in the procedures through which decisions are made (Tallberg & Zürn, 2019; Dellmuth et al, 2019). Performance and procedure should be viewed in the context of the normative reasoning that states consented to when they joined the organization (Steffek, 2003). An institution will “only remain legitimate as long as there is

agreement on the values to be realized, the means to be employed and the procedures to be followed” (Steffek, 2003, p. 264).

The relational aspect between the institution and member states allows for an understanding of an institution’s legitimacy in terms of power relations. Hurd (2019) criticizes Tallberg and Zürn’s (2019) assertion that the absence of contestation in and around an institution is a proxy for legitimacy. Like Hurd, we make a case for foregrounding power relations. If legitimacy is measured simply by the absence of discontent, then those who disagree with the institution are easily seen from the view of the institution’s supporters as obstacles, and particularly in terms of international institutions, as obstacles to achieving collective goals and global order (Hurd, 2019). The focus is then on how the institution can regain legitimacy and survive, rather than on what the political substance of the discontent is in the first place. Hurd (2019) warns that “the politics of legitimation looks different from above and from below: to the governor, legitimation is a helpful device to lower the costs of governing; to the governed, it means acquiescing to rules that force you to do something you don’t want to do” (p. 719).

Situating legitimacy in the context of power relations helps us to see legitimation as “the application of power in defense of the status quo” (Hurd, 2019, p. 728). The legitimacy of abandoning an institution relates to the tradeoffs that actors, especially the less powerful, are asked to accept if they stay. In other words, the question is whether discontent in the institution really has been addressed, or is acquiescence to the status quo achieved in other ways, for example through coercion, self-interest or habit? These tradeoffs reflect and impact on member states’ interests, values and the world they desire. Non-legitimacy at this level, when rules cannot be justified in terms of shared beliefs, is referred to as legitimacy deficit (Beetham, 2013). The moral authority of the institution declines if it does not deliver what member states expect or if the expectation on which the institutions’ moral authority rests has changed. They

may continue following the rules for other reasons (like coercion, self-interests, or habit), but the rules will not be normatively valid anymore.

A Weberian understanding that legitimacy equals people's belief in legitimacy ignores important elements of legitimacy other than beliefs, in particular legality (discussed above) and consent through action (Beetham 2013). The latter is also referred to as *performative endorsement*, Beetham's third criterion in his structure of international legitimacy, to which we now turn.

Consent expressed through the public and ceremonial actions of the community involved confers legitimacy symbolically and normatively. Symbolically, such actions publicly acknowledge authority, and in turn, such acknowledgments can be used to legitimate a power arrangement. Normatively, even if consent is given purely for self-interested reasons, it gives a moral dimension to a relationship through the obligations that follow from this acknowledgement of authority for ruler and ruled (Beetham, 2013). When states refuse to cooperate, or engage in passive or open resistance, or militant opposition, legitimacy erodes. The extent of erosion depends on the intensity of opposition and the number of members engaging in these actions. Withdrawal or refusal of consent delegitimizes an institution and is the way non-legitimacy manifests at this level. Withdrawal is therefore not simply a result of non-legitimacy, but performatively constitutes it.

Beetham's structure provides a framework for judging the legitimacy of the NPT and how withdrawal is related to it, but as explained in the introduction, judging when withdrawal is legitimate needs further elaboration.

The normative considerations of treaty exit

Since 1945, 200 states that were part of an international organization decided at a certain point to leave it, despite the advantages of membership and the reputational cost of withdrawal (Borzyskowski & Vabulas, 2019). To further develop a framework that explains how legitimacy works when it comes to abandoning an institution, Hirschman's (1970) linked concepts of loyalty, exit and voice prove useful. Hirschman (1970) observed that actors have the choice to simply quit an organization to avoid undesirable consequences of inadequate performance (i.e. exit) or to stay and express their dissatisfaction and try to change the consequences (i.e. voice). In each case, the "management" can respond by addressing discontent and stave off decline. Exit and voice are not a binary choice; rather actors may mix exit and voice responses (Lavelle, 2007). Moreover, in cases where there are barriers to exit and voice, for example when exit is too costly and expression of discontent blocked, exit and voice responses may acquire pseudo forms, such as psychological exit and passive or symbolic resistance (Keeley & Graham, 1991).

Exit from an international institution refers to states' decisions to leave an organization or a treaty. As long as members find the order that an international institution creates or upholds in congruence with their interests and values, there will be no or little discontent and they will act loyal to the institution. If discontent rises, it could either be seen as a signal that the organization has not done enough legitimation, or alternatively "as evidence of substantive grievances over how power and wealth are apportioned" (Hurd, 2019, p. 721). Those who prefer to keep the institution have an interest to shape the feelings of those who have grievances to prevent them from leaving the institution (legitimation) or to accommodate their demands. In this case contestation can strengthen the institution, because popular legitimacy results in a more stable and effective regime (Bodansky, 1999). The corollary is that if this process of legitimation fails or if the grievances are not sufficiently accommodated, the discontented parties may indeed abandon the institution physically or in pseudo fashion. If enough or key states abandon the institution it may lead to dysfunctionality, eventually demise and perhaps replacement.

One third of all international organizations established since 1815 are no longer in existence (Eilstrup-Sangiovanni, 2020). Many of these terminated through dissolution when members dissolved or withdrew from them. Others disappeared through desuetude, fading away because members stopped complying (Glennon, 2005). Some were absorbed by or merged with other organizations to create new ones, and a significant number of these were replaced by successors that took over some or all of their functions. Debre and Dijkstra (2021) find that relations between member states are important predictors for replacements, which should be regarded as a very different failure event than institutional demise. Conflict between members can lead to growth for international organizations, because: “Where preferences diverge, member states might in fact be required to renegotiate treaties to account for previous failures and restart cooperation under a new institutional heading” (Debre & Dijkstra, 2021, p. 333).

We have largely treated international institutions as a general category, but authority dynamics are not necessarily the same for treaties like the NPT as for international organizations (Brölmann et al., 2018; Bodansky, 1999). We therefore hone in on treaties in the next paragraphs to refine our framework for application to the NPT.

Although the Vienna Convention on the Law of Treaties (VCLT) states that every treaty in force “is binding upon the parties to it and must be performed by them in good faith,” also termed *pacta sunt servanda* (1969, Art. 26), international law provides for termination of a treaty in two regards. States can abrogate their treaty obligations in response to a breach by other treaty parties, or by using unilateral exit (withdrawal and denunciation) clauses. In the first instance, a material breach entitles parties to suspend a treaty in whole or in part or to terminate it by unanimous agreement between themselves and the defaulting party, or for all parties (VCLT, 1969).

Termination based on reciprocity is an important provision in arms control treaties as states retain the option of withdrawal when they feel that other members are not implementing their

commitments (Coppen, 2014). However, to avoid tit-for-tat breaches and suspensions that could unravel international cooperation only material breaches are included. They are circumscribed to repudiation of the treaty or violation of a provision deemed essential to accomplish the object or purpose of the treaty (VCLT, 1969). In fact, international law directs states to negotiate with treaty partners rather than act unilaterally. These collaborative efforts may lead to the treaty's temporary suspension, to its amendment, or to mutually agreeing its end with or without new commitments (Helfer, 2005).

Despite the emphasis on collaboration, most treaties have a withdrawal clause that makes it possible for states to unilaterally denounce the treaty without prior violation of the treaty by another party. Withdrawal clauses help states to manage risk in a lawful and transparent way by affording members some flexibility to adapt or reject rules in the face of unforeseen developments over the treaty's lifespan, especially an indefinite one (Coppen, 2014). Helfer (2005) also highlights that the public nature of such an exit provides "a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minded states" (p.1579). States can therefore use withdrawal or the threat thereof "to challenge or revise disfavored legal norms or institutions...Exit thus sits at a critical intersection of law and power in international relations" (Helfer, 2005, p. 1579).

Legitimacy of and exit from the NPT

In the introduction we noted that judging whether it is legitimate for non-nuclear weapon states, especially those not allied to nuclear weapons states, to abandon the NPT is a two-pronged process that relates firstly to the legitimacy of the NPT and secondly to the normative consequences of an exit move for nuclear disarmament. It has become arms control common

sense to call the NPT “the cornerstone” of the nuclear order. This designation suggests an acceptance of the NPT’s legitimacy and by extension the illegitimacy of an exit move, but our approach goes beyond legitimacy beliefs, as stated before. Below we explore the sources of the NPT’s legitimacy according to Beetham’s criteria. However, for reasons of chronological narration, we start with the moral context in which states negotiated the NPT (i.e. normative justifiability) instead of addressing legality first. We then outline the rules (legality) that came to constitute the NPT regime, and how states have consented to the NPT (performative endorsement). We highlight the power relations embedded in this regime throughout, before outlining how the NPT’s legitimacy is eroding for the non-nuclear weapon states in terms of each criterion. Finally, we move on to the second part of our empirical investigation—the normative considerations of an exit move.

Sources of legitimacy of the NPT

The scale of destruction after the Hiroshima and Nagasaki bombings resulted in an unprecedented ordering imperative at the international level (Walker, 2000). Nuclear warfare was unlike any other the world had known in terms of its totality. Nuclear victory is pyrrhic in light of the destruction wrought (Brodie, 1946). The United States’ Baruch Plan and the Soviet Gromyko Plan were two attempts at ordering through international control of nuclear weapons, which would see nuclear weapons eliminated and nuclear technology directed to peaceful uses only under an international body (Rydell, 2006). Both proposals failed, but they revealed the normative basis for nuclear abolition incarnated by the first United Nations General Assembly (UNGA) resolution (Res. 1(1)) to be adopted, which focused on “the elimination from national armaments of atomic weapons and all other major weapons adaptable to mass destruction.”

By 1958 the nuclear arms race between the two superpowers and the efforts of other states to acquire nuclear weapons motivated the Irish government to draft an UNGA resolution that stated: “the danger now exists that an increase in the number of States possessing nuclear weapons may occur, aggravating international tension and the difficulty of maintaining world peace, and thus rendering more difficult the attainment of general disarmament agreement...” (as cited in Shaker, 1979, p. 4). The resolution—supported by the United States and the Soviet Union—triggered the negotiation of the NPT with the intent to keep the nuclear club as small as possible, a situation that would reduce the risk of nuclear war and keep disarmament negotiations viable (Burr, 2018).

Nuclear non-proliferation as an answer to the ordering imperative of nuclear weapons faced “profound questions of legitimacy [that] had to be addressed before an effective nuclear order could be instituted” (Walker, 2000, p. 706). Encoded in the NPT, the concept would make a distinction between five states that could sign up as nuclear weapon states (because they had exploded a nuclear device before 1967) and all other states that had to sign up as non-nuclear weapon states. The latter had to promise never to acquire nuclear weapons. Shaker (1979, p. 29) in his seminal work on the NPT argues that all the problems that the non-proliferation concept confronted during the NPT’s negotiation and after its entry into force were the result of the “inescapable” distinction between states that have nuclear weapons and states that do not. In Walker’s (2000) words it raised the following questions of legitimacy: “Why should certain states, and only those states, have rights to defend themselves with nuclear weapons and to inflict final destruction? ... How could their possession by the few be squared with the egalitarian principles enshrined in the UN Charter?” (p. 706).

The distinction between a small club of “haves” that required a very large group of “have nots” to accept sacrifices that the latter were not willing to accept themselves was unsustainable; a “grand bargain” was struck to get non-nuclear states to the table. In article VI of the NPT

nuclear weapon states promised to “pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.” The text of article VI can be interpreted in different ways: The nuclear weapon states can argue that they did not promise to eliminate their nuclear weapons as such (and certainly not before any date), but only to start negotiations in this regard. The non-nuclear weapon states can and most of them do argue that the nuclear weapon states have promised to disarm their nuclear weapons as part of the deal.

Article II and III of the NPT, other elements of the grand bargain, provides for control over peaceful nuclear technology to prevent its militarization, but raised concerns among non-nuclear weapon states that their access to knowledge and technology will be curtailed and inspections used for industrial espionage. The treaty would place them at the mercy of nuclear weapon states (Shaker 1979, p. 274). Article IV was the result of much deliberation, pushed by non-nuclear weapon states. It establishes the “inalienable right” to “to develop research, production and use of nuclear energy for peaceful purposes without discrimination” and “the right to participate in the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy” (NPT, 1968, Article IV par 1 & 2).

Article X of the NPT included the right of withdrawal. Coppen (2014) argues that negotiators saw a withdrawal clause as an effective instrument to pressure the nuclear powers to comply with their disarmament obligation. “Even the US [...] had to concede that the draft NPT took into account the concerns of the NNWS that ‘a treaty of this importance should be open to termination in due course if its wider purposes, including the need for further disarmament measures, are not being achieved’” (Coppen, 2014, pp. 27-28). The NPT’s negotiators went further and included an additional clause under article X, namely to review the treaty after 25

years and to decide by majority whether it should be indefinitely extended or extended for an additional fixed period or periods. The explicit link between the withdrawal clause and the extension of the treaty added leverage for non-nuclear weapon states to hold nuclear weapon states to their end of the bargain.

Despite these efforts during the negotiation process to address legitimacy concerns, there remained significant misgivings and hesitation around the NPT. A fourth of all UN members rejected the treaty or abstained when it was put to a vote in 1968 (Duarte, 2019). Over time, the treaty gained more traction, especially at the end of the Cold War when a spate of accessions occurred (Rauf & Johnson, 1995). Only Israel, India, and Pakistan remained outside the treaty. North Korea joined and then quit the NPT in 2003, accusing the United States of threatening it with nuclear war and the International Atomic Energy Agency (IAEA) of biased behavior. However, North Korea acquired nuclear weapons after leaving, despite assurances not to do so in its withdrawal notification statement to the UN Security Council (UNSC). Consequently, its exit is widely interpreted as self-interested, rather than based on legitimacy concerns around the NPT (Bunn & Rhineland, 2005).

The 1995 Review and Extension Conference deserves particular attention as an act of performative endorsement by states, because it was an opportunity to hold nuclear weapon states to their article VI obligations by threatening not to extend the treaty or at least to vote in favor of periodic rolling extensions and use those to extract concessions on disarmament (Sauer, 1995). The NPT was indefinitely extended by consensus, which on face value suggests absence of contestation and signals legitimacy in the form of consent. However, a deeper analysis of what transpired prior, during and after this conference paints a different picture and brings the symbolic and normative dimensions of performative endorsement into contrast. Gibbons (2016) attributes indefinite extension to American pressure—coercion indeed—placed on states that did not support this option and intense lobbying by the nuclear weapon states for months before

the conference started. At the time the newcomer to the NPT, South Africa, was roped in to persuade members of the Non Aligned Movement (NAM), who strongly opposed indefinite extension. A high-level bi-national commission with then vice presidents Al Gore and Thabo Mbeki was used to change the position for limited extension that South African diplomats were crafting up to two weeks before the Review Conference to one of indefinite extension in exchange for a package deal (Onderco & Van Wyk, 2019).

The normative discomfort with indefinite extension is reflected in this package deal that contained three formal elements and a resolution with respect to establishing a weapons of mass destruction free zone in the Middle East: 1) the extension of the NPT for an indefinite period; 2) a document titled “Principles and Objectives for Nuclear Nonproliferation and Disarmament,” and 3) the reinforcement of the review mechanism of the NPT. Although only the first element is legally binding, Dhanapala—the chairman of the 1995 NPT conference—considers the extension as indefinite but conditional (Dhanapala, 1996). The second element contained the following aspects: 1) the conclusion of a comprehensive test ban treaty (CTBT) “no later than 1996,” and the nuclear weapon states would in the meantime exercise “utmost restraint” in this regard; 2) the conclusion of a convention that prohibits the production of fissile materials for military purposes; and 3) “the determined pursuit by the nuclear weapon states of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons...” (NPT, 1995).

In hindsight, the non-nuclear weapon states gave up an important instrument of leverage (Johnson, 1999; Leith & Pretorius, 2009). As the NPT does not contain a deadline for nuclear disarmament and as the treaty was indefinitely extended, the nuclear weapon states were freed of any immediate pressure to disarm. In practice, the NPT became a status quo treaty, while the nuclear weapon states used the symbolism of indefinite extension to legitimate their continued possession of nuclear weapons and sloughed the 1995 deal (Pretorius & Sauer, 2021). The result

is that non-nuclear weapon states see a widening gap between what they agree to in the NPT and what is being delivered. We explore this incongruence below finding signs of non-legitimacy (illegitimacy, legitimacy deficit and delegitimation) at each level of Beetham's discursive structure with respect to the NPT.

Eroding legitimacy of the NPT

Since the late 1990s, member states and analysts are increasingly questioning whether the NPT is still fit for purpose affirming that its poor performance, discord over its interpretation, and inability to resolve discontent through the treaty's review mechanism are eroding its legitimacy (Duarte, 2019).

The legal and normative elements of non-legitimacy are so intertwined that we deal with them together in this section. As noted above, legitimacy deficits often relate to performance deficits, that is incongruence between what is expected and what is delivered. Amongst the NPT's performance deficits, the lack of nuclear disarmament stands out (Meyer, 2017; Brown & Potter, 2019; Rauf, 2020; Robinson, 2019). The stark evidence is that nuclear weapon states act as if the NPT has no bearing on their nuclear decisions. Key arms control treaties between the United States and Russia have been terminated and there are also significant modernization activities going on that suggest these states have no intention to give up their nuclear weapons any time soon (Pretorius & Sauer, 2021).

For many observers and non-nuclear weapon states these vertical proliferation activities are akin to the nuclear arms race of the Cold War and contradict the good faith principle with respect to nuclear disarmament in article VI of the NPT (Miller, 2020). The principle of good faith explicitly referred to here has limited direct legal effect, but frames political debates on the implementation of nuclear disarmament. If enough member states consistently agree what

“in good faith” means in terms of article VI, matched by practice, that interpretation can become legally authoritative for behavior to be judged “in bad faith” (Coppen, 2014).

Another performance deficit relates to non-proliferation. The NPT has helped to contain but not freeze the number of nuclear armed states. Since 1967, four new nuclear armed states arose: Israel, India, Pakistan, and North Korea. As a result, one third of all nuclear armed states do not belong to the NPT. Pakistan is known to have helped the spread of nuclear weapons technology to countries like North Korea, Iran, and Libya. Israel, in turn, helped apartheid South Africa’s nuclear weapons program along (Polakow-Suransky, 2010; Cohen & Burr, 2020).

The example of the five nuclear weapon states arguably promotes proliferation (Pretorius, 2013; Noda, 2022). As Falk (1977) argues: “There is no basic reason why those who want nuclear weapons should reject them, so long as some states insist upon their right to retain both the weapons themselves and broad discretion as to their use” (p. 84). North Korea justified its proliferation in these terms. The exclusivity of the nuclear club, compounded by the link that is made between nuclear weapons possession and a permanent UNSC seat, symbolizes power and prestige that other states may want too. India’s acquisition of nuclear weapons had much to do with its pursuit of great power status, including a permanent seat on the UNSC (Carpes, 2013). Hamidi (2020) further explains that the NPT’s categories of nuclear and non-nuclear weapon states give a language of dissent to non-NPT nuclear armed states to justify their nuclear weapons through the discourse of “nuclear apartheid.”

It did not help that the United States signed a deal with India, not an NPT member, in 2005 to provide it with civilian nuclear technology. The deal resulted in more nuclear know-how and materials for both its civilian and military program (Etzioni, 2015). The deal constitutes a violation of Article III of the NPT that holds only states with an IAEA safeguards agreement are entitled to receive civilian nuclear technology from NPT members.

The elements of illegitimacy and legitimacy deficit (non-implementation of article VI and violation of article III) based on the NPT's performance are also linked to its procedural problems. More of the five-yearly Review Conferences have failed than have succeeded to adopt a consensus document. Those Review Conferences that succeeded contained promises that were not implemented, in particular elements of the 1995 package deal, the 13 arms control and disarmament steps agreed at the 2000 Review Conference, as well as the 64 steps agreed upon in 2010. At times, the nuclear weapon states questioned the steps that had been promised at the Review Conferences or defended themselves by saying that more time is needed for their implementation. They refer to their preferred step-by-step approach that sees nuclear disarmament happening over time in the form of arms control. The slow pace of nuclear disarmament is attributed to the world not being safe for the elimination of nuclear weapons at the present time (Pretorius & Sauer, 2019). The U.S. initiative, Creating an Environment for Nuclear Disarmament (CEND), extends this logic so far that it even puts the step-by-step approach on the backburner (Meyer, 2019). Some states, such as South Africa, and scholars denounce CEND as just another excuse to delay nuclear disarmament by postulating unachievable prerequisites for its implementation (Rauf, 2019; Pretorius & Sauer, 2021).

The non-nuclear weapon states' frustration with the blockage in the NPT forum became evident when they joined civil society actors outside the NPT to voice their discontent through the Humanitarian Initiative that led to the Treaty on the Prohibition of Nuclear Weapons (TPNW), informally known as the Ban Treaty. We explore this process in some detail, because it reflects a form of delegitimation by the non-nuclear weapon states of "what the NPT does, rather than what it says" by mixing voice and exit (Hirschman's lens) (Hamidi, 2020, p. 548).

In 2007 a coalition of civil society organizations working to reframe the nuclear disarmament debate to focus on humanitarian principles rather than national security, founded the International Coalition to Abolish Nuclear Weapons (ICAN). Some non-nuclear weapon states

collaborated on this initiative and in 2010 got the NPT Review Conference document to express deep concern over the “catastrophic humanitarian consequences that would result from the use of nuclear weapons.” The initiative gained further momentum when Norway, Mexico and Austria each organized a Conference on the Humanitarian Impact of Nuclear Weapons with between 120 to 150 states attending. The nuclear weapon states boycotted the first two Humanitarian Conferences, arguing that the Initiative is a distraction from and undermines the NPT. They assumed that their absence would make the initiative a futile exercise that would fizzle out, but instead their absence made the kind of debate about nuclear disarmament possible that is usually stifled in other forums. Austrian Ambassador Kmentt (2015, n.p.) writes that the “nuclear weapon states’ dismissive attitude actually provided further impetus to this non-nuclear weapon state-driven initiative.”

Using the UNGA first committee, instead of the Conference on Disarmament that has been in stalemate since the mid-1990s, non-nuclear weapon states got a UN mandate for the negotiation of a treaty to ban nuclear weapons. The negotiations concluded on July 7, 2017: 122 states voted in favor of the TPNW. It outlaws the development, acquisition, possession, transfer, use and threat of use of nuclear weapons for all states, without any discrimination. For the non-nuclear weapon states most invested in the Humanitarian Initiative, the Ban is not only complimentary to the NPT, but also firmly rooted within the NPT, especially article VI, and “fully consistent with their own objective of trying to promote a strong and credible NPT” (Kmentt, 2015). As such, these states find the nuclear weapon states’ claim that the TPNW is incompatible with the NPT especially confrontational. For them, the Humanitarian Initiative reflects an expression of discontent (voice), following on from the New Agenda Coalition (NAC) in the 1990s, and the Non-Aligned Movement (NAM) before the NAC. This time, though, 120-plus non-allied non-nuclear weapon states successfully used the power of their number to push *their* interpretation of the NPT.

According to our framework, international institutions' survival correlates with their legitimacy, partly a function of the congruence between what members expect and what the institution delivers, as well as the beliefs that they share in this regard. Contestation within international institutions is not abnormal, but the way it is handled will determine whether the legitimacy of the institution—the NPT in this case—is restored or further weakened. If the voices raising discontent are not listened to, the possibility exists that “voice” becomes “exit” in the end. In this case, the nuclear weapon states indeed tried to stifle the voices of discontent. Together with their allies, they refused to attend the TPNW negotiations, on its conclusion the United States, the United Kingdom, and France declared that they will “never” sign the treaty, and before it entered into force, the United States pressured states to “un-sign” the treaty (P3, 2017; Columbia Broadcasting System, 2020).

Establishing the TPNW suggests that non-nuclear weapon states will find and create other forums to enact the NPT's disarmament objectives. Even though non-nuclear weapon states were at pains to affirm their allegiance to the NPT, going outside the NPT forum, and specifically outside the hierarchy between nuclear and non-nuclear weapons states that it sets up, delegitimated the NPT regime. It is performatively suggestive of partially withdrawing consent from the NPT, a form of exit without exiting. Egeland (2021) explains:

The subversive potential of the TPNW owes to the ban movement's deliberate clash with these unwritten, deeper rules of nuclear order. Not only did the movement contest the major powers' supposed entitlement to possess nuclear weapons, it also contested their right to determine how and when treaties are negotiated (p. 20).

This brings us to the second part of the question that the article set out to answer, namely the normative consideration of abandoning the NPT as a way for non-nuclear weapon states to move nuclear disarmament forward.

The legitimacy of withdrawal as a political tool to further nuclear disarmament

Some experts have proposed a revolt by the non-nuclear weapon states in the form of quitting the NPT (Blackaby, 1997). Doyle (2009) also argues that non-nuclear weapon states can withdraw using article X to avoid being complicit in subverting the general will of member states embedded in the NPT at its negotiation. Mian and Ramana (1999) view exit as justified if parties do not amend the NPT to close what is often termed the “loophole” in article VI, the lack of a date for (the negotiation of) nuclear disarmament, which has not happened.

The literature on state exit from international institutions reveals that states sometimes abandon treaties. From Hirschman’s framework, we know that actors may choose exit as an option when an institution does not perform and they have limited voice to reform the institution. The indefinite extension of the NPT raised the stakes in existential terms for the NPT. It escalated withdrawal from the NPT as a political option for non-nuclear weapon states to exercise some kind of leverage over nuclear weapon states, especially in terms of disarmament. It is therefore not unthinkable that non-nuclear weapon states may consider formal withdrawal as an option in light of the NPT’s legitimacy problems (see Goldschmidt, 2020).

Below we ask the following questions about the legitimacy of exit as a political tool to further nuclear disarmament: Is it legal? Is it normatively justifiable? What does it signify in terms of performative endorsement? These questions are not exhaustive, but rather aimed at starting a conversation about the end of the NPT.

With respect to the legality of exit, as stated before, the VCLT (1969) provides two possibilities for treaty exit: either after a material breach by a party, or by unilateral withdrawal based on national security interests. Whether the slow pace of nuclear disarmament and the modernization of nuclear arsenals can be defined as a material breach on behalf of the nuclear

weapon states depends on the point of view of the observer: The nuclear weapon states will argue that their goal remains a world without nuclear weapons and that they are fulfilling their obligations. After all, the numbers of nuclear weapons have come down substantially, although the rate of disarmament of deployed arsenals has nearly come to a halt since 2010. In contrast, most non-nuclear weapon states will argue that the size of the remaining arsenals, their modernization, and a renewed arms race do indeed correspond to a material breach of article VI.

Despite its legality, withdrawal is not a step that states will take lightly. The United States has pushed for penalties to deter withdrawal, such as restrictions on nuclear supplies, requiring the return of past nuclear sales and Security Council sanctions (Nuclear Threat Initiative, 2007). Goldschmidt (2020) proposes even harsher measures to dissuade withdrawal including irreversible safeguards, but Falk and Krieger (2021) argue that “an American-led geopolitical regime of ‘enforcement’ that denies certain states their Article X right of withdrawal [...] constitute unlawful threats and uses of force ...” As is the case with North Korea, it serves as a stigmatizing strategy to frame withdrawal from the NPT as a rogue act.

However, if a large group of states in good standing with their IAEA safeguard agreements, who are members of the TPNW and/or Nuclear Weapons Free Zone treaties, walk away on the grounds that article VI of the NPT is being undermined, the stigmatizing effect will be reversed and come to bear on the nuclear armed states (Sauer & Reveraert, 2018; Robinson, 2019; Pretorius & Sauer, 2021). Such a move will also reduce the cost of withdrawal for other states, because adherence to the norm against nuclear weapons remains intact. Such an exit move, in contrast to the North Korean case, can be viewed as justified non-compliance akin to “disarmament-related civil disobedience,” using moral suasion to encourage nuclear weapon states to comply with their nuclear disarmament obligations in the NPT (Doyle, 2009).

Some argue that states that withdraw from the NPT give up the only leverage—the legal commitment in article VI to nuclear disarmament—they have vis-à-vis nuclear weapon states, especially if a cascade of withdrawals leads to the NPT’s collapse (Duarte, 2019). But, this loss of leverage must be weighed against the idea that continuing to be members of the treaty unintentionally legitimates the nuclear weapon states’ nuclear weapons and their interpretation of the NPT through performative endorsement (Hamidi, 2020). We agree with Doyle (2009) who states that the continued failure of the nuclear weapon states to act in line with the general will expressed in the NPT [i.e. securing mankind against the effects of nuclear war, as stated in the NPT preamble], “it falls to the non-nuclear weapon states to do what they can to avoid complicity in any (continued) subversion of the NPT regime” p. 147).

A further normative consideration is the impact that exit from the NPT and its possible collapse as a result will have on proliferation (Duarte, 2019). In our estimation, the majority of non-nuclear weapon states will not change their nuclear status, but likely are already or will become members of the TPNW. Their safeguard agreements can be transferred from the NPT as the referring legal instrument to the TPNW or another instrument. Kmentt (2021) explains that the TPNW’s safeguards and verification system is more robust and comprehensive than what is required under the NPT. There may be states that acquire nuclear weapons after withdrawal, but this kind of proliferation must be seen in the context of the erosion of the NPT’s legitimacy, rather than as a result of exit.

A crisis between members of an international institution, as Debre and Dijkstra (2021) note, can lead to the replacement of the institution. In the NPT’s case, the TPNW can be such a replacement if the nuclear weapon states dismantle their nuclear weapons and accede to it. A regime based on the TPNW would resolve the legitimacy issues associated with the discriminatory nature of the NPT. It would create an order in which all states are equal with respect to the possession of nuclear weapons. It would also resolve the disarmament loophole

in article VI; and will align the different interpretations of the nuclear weapon states' disarmament obligation. In turn this will leave non-NPT nuclear armed states without justification for their nuclear weapons, strengthening the prohibition norm.

Furthermore, in terms of performative endorsement, Considine (2019, p. 1092) concludes that to strengthen the prohibition norm, TPNW supporters will have to withdraw performative acts that sustains the current regime, thereby delegitimizing the current nuclear status quo. In case the NPT collapses and the nuclear weapon states and their allies do not join the TPNW, they will need to re-think their strategy because the NPT will no longer be there to legitimate their nuclear weapons and they will be seen as nuclear rogues. It is likely that the end of the NPT will create a schism between and inside the nuclear weapon states and their allies. The pressure of the states that call for change will grow as more states, spurred on by their domestic constituents, join the group of non-nuclear weapon states (Sauer & Reveraert, 2018; for more skeptical voices, see Harries, 2021; Scheinman, 2019). The end result may be that all states join the TPNW or a newly negotiated Nuclear Weapons Convention for the elimination of nuclear weapons.

Conclusion

We set out to determine when it is legitimate for non-allied non-nuclear weapon states to abandon the NPT. Following Beetham (2013), we framed our analysis by linking exit from international institutions to the legitimacy criteria of legality, normative justifiability and performative endorsement, and their non-legitimacy forms of illegitimacy, legitimacy deficit, and delegitimation. The beliefs by actors that an institution is worth supporting are influenced by the performance and procedural characteristics of the institution formed in a normative context about the appropriate exercise of authority and influenced by power relations in the

institution, which we foreground in our empirical analysis of the NPT. Incongruence between what parties believe was promised and what is being delivered and absence of shared beliefs amongst parties diminish the institution's moral authority.

The value of the NPT, as is the case with consensual governance arrangements like treaties, is linked to all parties playing by the rules and following through on commitments agreed to when they joined. The do-as-we-say-and-not-as-we-do approach of the nuclear weapon states when it comes to nuclear disarmament is undermining the NPT's performance and procedural legitimacy. As the literature on the demise of international institutions show, there comes a point where the lack of and skewed implementation of a treaty does not warrant its continuation for discontented member states. We conclude that the NPT is at that point. The negotiation of the TPNW is indicative that after more than 50 years of the NPT's existence and 25 years since its indefinite extension many non-nuclear weapon states and a broad civil society coalition do not see the NPT regime resulting in a world without nuclear weapons.

Just as conviction about the legitimacy of a norm can lead to insubordination to the exercise of authority that undermines such a norm, member states may be motivated to exit an institution that has not delivered on agreed outcomes and where power relations procedurally inhibit reform. Exit can undermine the authority of an international institution, eventually leading to its collapse and replacement by another institution. Our analysis suggests that exit can be a legitimate form of political leverage for states marginalized in an international institution.

Although non-nuclear weapon states delegitimated the NPT's status quo by establishing the TPNW, at this point there is little official support for formal withdrawal. The fear that exit from and possible collapse of the NPT may lead to proliferation inhibits a frank conversation about the end of the NPT and its replacement with institutions more suited to nuclear disarmament. However, the risk of proliferation in our estimation is limited and must be weighed against the fact that the NPT's legitimacy deficits are implicated in proliferation risks. Our analysis offers

a way to think about the legitimacy of exit from the NPT as a political tool for the non-allied non-nuclear weapon states to further the normative imperative that led to the NPT's negotiation in the first place—nuclear disarmament.

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