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Law as discursive resource: the politics of the nuclear/non-nuclear distinction in the Non-Proliferation Treaty

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Abstract

Realist approaches to international law conceptualize the law as epiphenomenal to state interest, whereas liberal institutionalist approaches theorize the ability of law to curb state power. Through the example of the Treaty on the Non-Proliferation of Nuclear Weapons, this article challenges these approaches by arguing that law's power comes from its productive and constitutive effects. Despite perennial conflict, the Treaty on the Non-Proliferation of Nuclear Weapons endures because it has ordered nuclear politics by constituting a legal distinction between "nuclear weapon states" and "non-nuclear weapon states." Instead of assuming that this distinction reflects self-evident material differences, this article shows how states actively construct nuclear status through international law. The dynamics of this construction reflect significant actions on the behalf of conventionally disempowered states and not merely great powers. An analysis of the meeting documents of the Eighteen Nation Disarmament Committee finds that the participants used the forum to perform a burgeoning "non-nuclear" identity. The politics of this distinction also generated the discourse of "nuclear apartheid," which was subsequently used by states outside the Treaty on the Non-Proliferation of Nuclear Weapons regime to justify their pursuit of nuclear weapons. Taken together, the role of non-nuclear diplomacy and the discourse of nuclear apartheid demonstrate that the Treaty on the Non-Proliferation of Nuclear Weapons does not simply endure because the powerful have sanctioned it, but because it created a space for the disempowered to expand their influence from below. Though the article builds on existing sociological approaches to the law, it also moves beyond conflicts over legal and textual interpretation to demonstrate the diplomatic practices around the constitution of legal categories.

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The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) represents the major international legal mechanism that seeks to contain the spread of nuclear weapons and manage the nuclear weapons that already exist. Despite its long history and almost universal membership (India, Pakistan, and Israel are nonsignatories and North Korea withdrew in 2003), the NPT is fraught with conflict over the dual priorities of nonproliferation and disarmament. The NPT is structured along a legal separation between the "nuclear-weapon states" (NWS) and "non-nuclear weapon states" (NNWS) and the conflict tracks onto this separation—NWS conceive of the NPT as a tool of nonproliferation, whereas the NNWS see it as a means of reaching disarmament.

In spite of this conflict, the treaty endures and has a foundational influence on the constitution of the global nuclear regime. Existing explanations for the NPT's endurance map onto realist and liberal institutionalist perspectives on international law in International Relations (IR). Realists contend that international law reflects state interest and has a limited effect on state behavior (Goldsmith and Posner, 2005), whereas liberal institutionalists assume that the law can adjust state interest and theorize the attributes of law that lead to effective compliance (Abbott et al., 2000). These approaches either see the NPT as a tool of the powerful states seeking to shape the global nuclear order to suit their own interests or as an institutional limit on power politics, preventing the proliferation of nuclear weapons (Sagan, 2011).

I argue that the power of the NPT comes from the legal categories that it institutionalizes and perpetuates. This article seeks to move beyond the idea that international law either limits state power or is entirely captured by it by linking the NPT's endurance to its productive power (Barnett and Duvall, 2005). While recent constructivist and sociological scholarship has urged a shift away from the realist/institutionalist divide in the study of international law, this engagement has had less traction in the study of nuclear politics. As such, I follow recent trends in both critical legal studies (Dill, 2014; Hurd, 2017; Peevers, 2013) and the critical study of nuclear politics (Abraham, 2016; Biswas, 2014; Hecht, 2012; Jasper, 2016) to argue that the NPT endures because it ordered the global nuclear regime by constituting the distinction between "nuclear" and "non-nuclear" states. The NPT is neither a tool of power politics, conventionally understood, and nor is it a limit on state power. Rather, structuring the NPT around the legal categories of NWS and NNWS constituted both interests and identities around this separation. Moreover, these categories were predicated on the status quo of nuclear weapons possessors in 1967—Article IX.3 of the treaty only legally recognizes the United States, Russia, United Kingdom, France, and China as "NWS" by defining an NWS as a state that has "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." Thus, it leaves India, Pakistan, North Korea, and Israel in a legally and materially ambiguous position vis-à-vis the recognized NWS. The definition of an NWS is material but it is also political because it freezes material reality in a particular historical moment. In other words, the Article IX definition is not helpful if one wants to define the difference between NWS and NNWS in more abstract material terms.

The legal distinction between nuclear and non-nuclear states legitimates nuclear weapons possession for some states and not others. But it also orders the global nuclear regime—states identify as "nuclear" or "non-nuclear" states and pursue distinct interests accordingly. Contestation over the separation also gave rise to the discourse of "nuclear apartheid"—the idea that the global nuclear regime legitimates the inequity between the nuclear "haves" and "have-nots." Rather than arguing for its epiphenomenal nature or theorizing compliance, this article explores how the NPT created new contexts and discourses around which state actors ordered and defined their place in the global nuclear regime.

The study of international law and of nuclear politics are often constituted as two separate research agendas—the former being the domain of institutions and legal precepts and the latter being the domain of security issues. But diplomatic conflict in nuclear politics often revolves around which behaviors are deemed legal and illegal in the global nuclear regime and, most importantly, for *whom* these behaviors are deemed legal or illegal. For instance, much of the debate around Iran's nuclear program is structured around its purported right to enrich uranium under Article IV of the NPT, which the United States repeatedly denies (Moshirzadeh, 2007). But this debate is more than simply a difference in legal interpretation. Differences in textual interpretation reflect the underlying constitutive order put in place by international law. Iran is a "non-nuclear" state under the NPT and yet, despite this status, sees itself as having certain *nuclear* rights.

This article provides a novel approach to the productive power of international law by turning to the linguistic and historical constitution of legal categories. I track the negotiation of the legal distinction between "nuclear" and "non-nuclear" states as it was debated during the Eighteen Nation Disarmament Committee (ENDC), which took place from 1962 to 1969.[1] The ENDC was established in 1962 on an ad hoc basis, which meant that it did not have a direct link with the United Nations General Assembly (Shaker, 1980). It was tasked with negotiating an international treaty limiting the spread of nuclear weapons. ENDC negotiations reveal the origins and contingency of NPT negotiations and yet they are largely overlooked in existing studies of the NPT. Ordering the nuclear world around the distinction between nuclear and non-nuclear states had its origins in the ENDC. As such, these meeting transcripts represent a key untapped source in understanding the kinds of conflicts we continue to see in the global nuclear regime. In my analysis of these negotiations, I find that states treat the categories of "nuclear" and "non-nuclear" states like identities structured around "us v. them" language, rather than as self-evident categories based only on material differences. Indeed, many discussions throughout the ENDC focus on what constitutes the difference between these categories of states. The legal separation between nuclear and non-nuclear states also gave rise to the discourse of nuclear apartheid in the midst of NPT negotiations. I argue that nuclear apartheid, though meant to critique the unequal nature of the NPT, is perpetuated as a strategic discourse, not one that is based on a genuine desire for equality in nuclear politics. Thus, I illuminate two phenomena that do not fit neatly in either realist or institutionalist approaches: contra realist approaches, it is often "weak" states that drive the distinction between nuclear and non-nuclear states, embracing "powerless" identities; yet contra institutionalist approaches, such embraces do not advance the explicit institutional goals of the NPT and instead undermine them.

In broadening the literature on international law in nuclear proliferation, I argue that the NPT provides discursive resources to states, particularly those that are taken to be "weak." Contrary to realist expectations, I show that the "non-nuclear" states are just as instrumental as the "nuclear" in both perpetuating the distinction and shaping the terms of its contestation. I advocate a "power politics" view of international law and present a different understanding of both power and politics. International law neither curbs nor augments state power in a straightforward way. Law opens new discourses and debates and provides a language by which states understand their place in international society. Diplomacy surrounding international law provides a forum for states to shape and practice their unique identities. Being "nuclear" or "non-nuclear" is as much a matter of performance as it is about material differences. As Cynthia Weber (1998) notes, "sovereign nation-states are not pre-given subjects but subjects in process" (78). In constituting the distinction between nuclear and non-nuclear states, NPT negotiations brought nuclear and non-nuclear subjects into being.

Throughout the paper I also make use of Gabrielle Hecht's (2012) concept of *nuclearity*, which captures the performance of nuclear status and theorizes the technopolitics behind maintaining the material separation between nuclear and non-nuclear states. Hecht argues that "nuclearity is not so much an essential property *of* things as it is a *property distributed among* things": nuclear status is negotiated, even "distributed," through mechanisms like the NPT (14). Hecht theorizes nuclearity to upset the political economy of nuclear things, with a particular focus on uranium mines. But we can also think about nuclearity as a discourse that operates at the level of state identity and status, marking certain states' nuclear status as legitimate and necessary while delegitimizing others. International law represents a central mechanism of nuclearity. Being recognized as an NWS through the NPT is not simply about "having" or "possessing" nuclear weapons but rather entails a process of social and legal recognition.

The article proceeds by examining existing approaches to international law in nonproliferation studies while focusing in on specific views on the NPT. Realist and institutionalist approaches are limited in their ability to understand the power of the NPT because of an exclusive focus on material power politics or on compliance. I draw on existing discursive and linguistic approaches to international law to argue that the legal force of the NPT comes from its ability to order the nuclear world through the distinction between nuclear and non-nuclear states. The NPT, through legal injunction of which states do and do not count as nuclear, institutionalizes a particular way of *doing* nuclear politics in which the categories themselves become sites of contestation. Even states that are materially powerful in the global nuclear hierarchy negotiate their nuclear status through the medium of international law. As such, my focus is less on what the NPT *says it does* and more on *what it actually does*. A closer examination of the history and framework of the treaty will demonstrate that the process of nuclear negotiation defies expectations of both IR realists, who have a particularly reductive idea of the power of international law, and IR institutionalists, who assert the normative power of international law to constrain states. Both of these perspectives obscure the kind of order the NPT institutionalizes and embeds in the global nuclear regime.

I then turn to the legal text of the NPT and the "grand bargain" between the "NWS" and "NNWS." While these categories are often taken for granted in the language of contemporary

nuclear politics, they come from a particular historical context in which the Cold War politics of the United States and Russia were colliding with the emergence of post-colonial state identities. This particular history plays out in NPT negotiations, especially as it pertains to the role of the non-nuclear states. Examining these categories within the meeting transcripts of NPT negotiations reveals the underlying stakes for states as they debated and contested these categories. Non-nuclearity was not just meant to be about distinction but also about empowerment. Thus, the non-nuclear states used ENDC negotiations to ensure that non-nuclear state status had meaning beyond the negation of nuclear status. But this process had the unintended consequence of reaffirming the NPT's underlying hierarchy. These performative dynamics are key to understanding the power and endurance of the NPT, but are also key to understanding the role of international law in international security institutions more broadly. The intersection of international law and security requires a methodological shift to the underlying concepts and categories of international treaties where the constitution of political order is itself at stake.

Realist and institutionalist visions of the NPT

When international legal scholars encounter questions of international politics, the debate tends to focus on the legality of specific state behaviors and practices. Rather than exploring the politics undergirding international law, legal scholars tend to focus on questions of legal interpretation where the goal is to determine whether or not a particular state behavior is legal or constitutes a breach of international law (Joyner, 2011). As Oscar Schachter (1999) notes, "lawyers tend to be ambivalent about power [. . .] and see power as antithetical to law" (200). There are certainly legal scholars who do explore the relationship between power politics and international law (Franck, 2006; Johnstone, 2011; Kennedy, 2016; Koskenniemi, 1990), but often the primary concern is on determining legality. Rajkovic et al. (2016) refer to this process as "legal epistemology" where the question is "what is the 'correct' reading of the law and to what extent should that reading be supplemented with extra-legal knowledge or expertise?" (20). In the realm of nonproliferation, legal epistemology focuses on assessing the legality of nuclear weapons along with other technical practices such as uranium enrichment or weapons testing (Falk, 1997; Falk and Krieger, 2015; Joyner, 2016; Schwarzenberger, 1958).

IR scholars, however, see the law through the lens of existing theories of IR. Realists interpret international law as epiphenomenal to pre-existing state interests (Goldsmith and Posner, 2005; Mearsheimer, 1994). Law itself is deemed epiphenomenal to the broader dictates of the balance of power, alliance formation, deterrence, and so on. Richard Betts (2000) notes that "as useful as treaties are, it is a misconception to see them as a solution. They are effects of nonproliferation, not causes of it" (69). Realists, thus, take nonproliferation as a goal that precedes the NPT; in this view, the treaty merely reflects preexisting interests rather than being an institution that shapes the goals of nonproliferation. Realists take the law to be an instrumental mechanism toward the achievement of state interests and in turn undermine what Pierre Bourdieu (1987) refers to as "the *structure* of symbolic systems" and "the specific *form* of juridical discourse" in which the law exercises its power (815). In this critique of realism, the law constitutes an entire social field, which is reflective of instrumental concerns but not entirely determined by them.

For liberal institutionalists, international law can create real and lasting limitations on the practice of naked self-interest. Institutionalists attempt to discern the conditions under which international law can constrain state power. Here the power of international law is a function of states' compliance with it. Low rates of compliance signify weakness of legal institutions. In contrast to IR realists, institutionalists contend that the law can limit state power under the correct conditions (Abbott et al., 2000), affirming Louis Henkin's statement that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin, 1979). Abbot et al.'s legalization framework tracks onto Pierre Bourdieu's description of legal formalists who see the law "as an autonomous and closed system" (814) but is also relevant for describing the goal of legal scholars who are focused on issues of legality and illegality. For institutionalists, international law can be enforced through rationalist mechanisms like domestic pressure and reputational consequences (Dai, 2007; Guzman, 2008) but also through appropriate norms of behavior created by international law (Slaughter, 1995). In the context of the NPT, institutional perspectives point to the NPT's ability to create trusting relationships between NWS and NNWS. Jan Ruzicka and Nicholas Wheeler (2010) argue that "all states that are party to the NPT, irrespective of their nuclear status, enter into a trusting relationship with each other" (76). Legal institutions, from this perspective, can lessen conflict by converging different state interests and sustaining trusting relationships between states.

Social constructivists in IR challenge both of these perspectives on international law, turning instead to the role of language and legitimacy in order to understand law's empirical effect in the world (Hurd, 2017). Similarly, critical legal scholars also examine the social and political practices that undergird legal and textual interpretation (Bianchi et al., 2015). In the study of nuclear politics, both Gabrielle Hecht's concept of nuclearity along with Gregoire Mallard's (2014) investigation of legal ambiguity and transparency represent a promising shift in the intersection of law and security studies. Mallard theorizes legal interpretation by arguing that ambiguity and transparency are themselves interpretive tactics deployed by diplomats to yield particular treaty outcomes. Importantly this means that there are "some differences in the degree to which legal texts are open to multiple interpretations" (20). This view is different from the more instrumentalist view to legal interpretation reflected in the work of scholars such as Ian Hurd (2017) where even transparent language can open itself up to political manipulation. But in opposition to realists, Hurd conceptualizes international law as power*ful* not power*less* due to its instrumental use. The exploration of practices surrounding the legal interpretation and textual ambiguity certainly moves beyond the realist/institutionalist divide to refocus on the politics of law. But beyond textual and interpretive debates, the law can also constitute and empower political actors that may not have been empowered otherwise, or even have seen themselves as a constitutive actor.

To be sure, the constitution of nuclear and non-nuclear states is linked with technological and textual ambiguities that are a part of the NPT's text, as I will discuss later. But the diplomatic negotiations surrounding international law also give rise to new social groupings and categories. And the law is particularly powerful in constituting political actors because legality is the currency of legitimacy—what is legal is often taken to be legitimate. Law of course can be and is contested by all kinds of actors but legal

categorizations have a major effect on what states take to be material reality. By enacting and performing nuclearity through NPT negotiations, states attempted to order the world around what appeared to be a natural distinction between nuclear and non-nuclear states. But these negotiations were themselves solidified and embedded these categories into nuclear discourse. Rather than being a pre-existing ordering, the distinction between nuclear and non-nuclear states was also a *product* of NPT negotiations.

A potential criticism of this approach is that it is yet another outgrowth of the realist approach to international law. The recent growth in the literature on "lawfare," for instance, is an example of the instrumentality of law that seems to approximate the claims of the realist camp in IR. But legal language creates conditions of possibility in which new identities, interests, and preferences can form. As I discuss later, the role of "non-nuclear" states in perpetuating the distinction between nuclear and non-nuclear states serves as an example. The power politics of international law do not always follow a specific, discernable pattern predicted by realism.

Realist and institutionalist paradigms place less emphasis on the constructed nature of state identifications in global politics. States are "strong," "weak," "democratic," "revisionist," "status quo," to name a few different identifications typically taken for granted in IR. The constitution and internalization of these identities can occur through the medium of international legal institutions, and the NPT's distinction between nuclear and non-nuclear states presents a fruitful way to understand this constitutive process.

Existing approaches to nuclear status

The distinction between nuclear and non-nuclear states is largely taken to be indicative of differences in capability between states. Scholars have attempted to settle the distinction using material indicators such as advancements in uranium enrichment or the conduct of a nuclear missile test. Recent trends in "nuclear latency" theorize the "supply side" of the nuclear fuel cycle, thereby "solving" the problem of nuclear status by creating a potential new category of "latent states" (Fuhrmann, 2009; Jo and Gartzke, 2007; Kroenig, 2009). The debate over when a state is rightly called a "nuclear-weapon state" is in part a function of technology. Jacques Hymans (2010) considers both the nuclear test and the possession of significant quantities of fissile materials as alternative material indicators. He concludes that both indicators have problems but the nuclear test is ultimately the best indicator for "nuclear weapon stateness," particularly if the state's incentives for conducting a nuclear test are taken into consideration (176). Material processes are certainly not irrelevant to social construction. Problematizing what scholars and policymakers take to be a clear distinction between nuclear and non-nuclear status starts from asking basic questions about what states have and how they can use it. Still, in asking "when" a state becomes an NWS, the foregoing analysis obscures the process of *how* it comes to be recognized as one. As an alternative, Hecht's (2014) exploration of International Atomic Energy Agency (IAEA) negotiations, for instance, show how uranium ore was seen as "nuclear" in certain security contexts but was "denuclearized" in order to become a banal commodity around which to construct a market (35). The material consequences of uranium mining are not undermined but actually enhanced when focusing on the discursive strategies that make the material meaningful.

Two recent studies of the NPT and its categories complicate the taken-for-granted nature of the distinction between nuclear and non-nuclear states. Both Ursula Jasper (2016) and Itty Abraham (2016) explore nuclear and non-nuclear status, though Jasper's intervention is indirect while Abraham explicitly complicates our understanding of NWS by focusing on states that are not typically thought of as NWS. Jasper (2016) focuses specifically on NPT politics and credits the treaty's endurance to its resemblance to a "religious field": "the majority of the NPT member states—like laypeople in a church—willingly accept the rule of the five nuclear weapon states and regard this hierarchy as given" (47). This view, however, overlooks the historical record in which the non-nuclear states perpetuate their non-nuclearity as a means of establishing an identity around this category. For Jasper, these states unwittingly become subjects of a global hierarchy but ENDC documents reveal a more complicated process. Non-nuclear status presented a way to perform a burgeoning post-colonial identity for states, the consequence being that the existence of "non-nuclear" states perpetuated the hierarchy between nuclear and non-nuclear states. I turn to the historical record to demonstrate that non-nuclear states attempted to instill the category with meaning, paradoxically advancing hierarchical relations early on. Moreover, I argue that the hierarchy of the NPT's categories gave a language of dissent to those states that are not party to the NPT through the discourse of "nuclear apartheid." Non-nuclear states see themselves as "non-nuclear" and so reinforce the hierarchy of the NPT while states like India, Pakistan, and North Korea who are not legally, and thus legitimately, "nuclear" use the treaty as a discursive resource in their dissent.

Nuclear and non-nuclear states are not simply categories in need of measurement but subjects constituted through diplomatic practice. The distinction between nuclear and non-nuclear states presents a "hard case" for social construction—if these seemingly material categories are constructed through social and political negotiation, then there is much that scholars cannot take for granted in the study of nuclear politics, and international politics more broadly. In the next section I turn to NPT negotiations to explore the origins of the nuclear/non-nuclear distinction and the role of non-nuclear states in perpetuating this distinction. Did states themselves see these categories as self-evident?

The productive power of the NPT

The NPT is often referred to as the "grand bargain" between the NWS and the NNWS (Weiss, 2003). The treaty was negotiated in Geneva from 1962 to 1969 and was conducted in two concurrent forums (Shaker, 1980). The Soviet Union and United States worked through a framework that would reflect their competing interests, while the specific terms of the treaty were negotiated in the ENDC.[2] These two fora combined the will of the great powers along with the more contingent negotiations of the ENDC.

The NPT is divided into eleven different articles and focuses on three primary goals: (1) the nonproliferation of nuclear weapons; (2) the disarmament of existing NWS; and (3) the peaceful transfer and use of nuclear energy. In fact, the name of the treaty ("Treaty on the Non-Proliferation of Nuclear Weapons") itself is a rhetorical injunction meant to prioritize one purpose over the others. It sustains the understanding that the NPT is about nonproliferation as opposed to disarmament or peaceful transfer. Articles I and II set out

the responsibilities of NWS and NNWS. NWS agree that they will neither transfer any nuclear weapons or explosive devices to NNWS nor encourage NNWS to obtain weapons. NNWS agree to accept IAEA safeguards and not to provide fissionable material or equipment for the production of nuclear energy, unless this transfer is specified as acceptable under IAEA guidelines. Article IV makes the pursuit of nuclear energy for peaceful purposes into an "inalienable" right for all states. Article V goes even further to ensure that "under the appropriate international observation, potential benefits from any peaceful applications of nuclear explosions *will be made available* [emphasis mine] to NNWS party to the treaty." The commitment to disarmament is enshrined in Article VI, which is written in a particularly vague manner. Article VI states that "each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament [. . .]." While Article VI presents a commitment to eventual disarmament, it does not call for a specific timeline in which NWS are asked to disarm or specify if the goal is complete or partial disarmament, which supports the view that the treaty supports a global hierarchy. Articles IV and VI remain two of the most controversial throughout the history of the NPT.

Examining the text of the NPT reveals its ambiguous and vague language. Take the example of Article II of the treaty, which prohibits the "manufacture" of nuclear weapons and nuclear devices by NNWS. The term "manufacture" presents a puzzle for discerning the underlying intention of the treaty when it comes to the activities that constitute the manufacturing of nuclear weapons (Jonas, 2014). What does it mean to manufacture nuclear weapons? Does it refer to a complete nuclear weapon or to other bomb components? And what about nuclear fuel? One can certainly attempt to answer these questions from a technical or material perspective. Article II can be applied narrowly to mean the conduct of a public nuclear test or broadly to mean all kinds of activities, including uranium enrichment, that are a part of the nuclear fuel cycle. A narrow interpretation of the term "manufacture" supports the way that the NPT defines a nuclear state as one that has exploded a nuclear device prior to January 1967. Because the term "manufacture" is never defined throughout the treaty it is clear that states can manipulate what it means to be in violation of Article II.

But the conflicts generated by the NPT go beyond textual interpretation and manipulation. The treaty's defining feature is the separation between NWS and NNWS and this separation had, and continues to have, a foundational effect on how states understand their place in the global nuclear regime. In other words, the politics of the NPT cannot simply be captured through its textual ambiguity. Rather, the structure of the treaty necessitates an analysis of its constitutive categories. The very act of categorizing and defining sets in motion entrenched understandings that get replayed throughout diplomatic conflicts. To make sense of a newly nuclear world, states engaged in what Bowker and Starr (1999) call the process of "sorting things out." As ENDC members found in their negotiations, classifying states into nuclear and non-nuclear appears to be a useful way to discern legal responsibilities and obligations but the classification process leads to a politics of its own.

ENDC meeting transcripts are useful precisely because they capture the way states thought both of their place in the burgeoning nuclear regime and also their place in

broader international society. These transcripts are rarely utilized in the study of nuclear politics, with many scholars choosing to focus instead on NPT Review Conference Documents. ENDC documents trace the origins of the NPT regime and, most importantly, predict its pathologies. I find that ENDC participants are aware of and regularly discuss the technological ambiguities between nuclear and non-nuclear states. But despite this knowledge, ENDC participants still chose to organize the treaty around these categories. I argue that the "non-nuclear" states are key for understanding this tension as they linked their non-nuclearity with a post-colonial, nonaligned, and developmental identity. I then turn to the discourse of "nuclear apartheid," which is an enduring discourse of nuclear politics and rose out of the legal distinction between NWS and NNWS.

Taken together, the diplomatic role of the non-nuclear states along with the discourse of nuclear apartheid both end up reinforcing the NPT's hierarchical structure from below. NPT negotiations constitute an important discursive resource for the "non-nuclear" to define their non-nuclearity but also in contesting the hierarchy of the NPT, states that are not legitimately recognized as "nuclear weapon states" reinforce the power of the NPT to render their nuclear pursuits legitimate.

Technological and political ambiguities and nuclear status

Throughout ENDC negotiations, participants called attention to the dual-use nature of nuclear technology, which would ultimately lead to technological ambiguities between nuclear and non-nuclear states. A statement by Mr Zelleke, the Ethiopian representative, summarizes this potential tension:

> It is ironical that nuclear technology for weapon purposes and the technology for nuclear devices for peaceful purposes are one and the same thing. We have heard it said repeatedly in this Committee that a nation reaching a stage of technology which permits the production of nuclear explosive devices for peaceful purposes can no more be classified as a non-nuclear power than can a nuclear power with nuclear weapons—the contention being that the same explosive devices for peaceful purposes could be used equally as weapons of destruction (ENDC Meeting 323: 14).

It appears that the Ethiopian representative is simply calling attention to the dual-use nature of nuclear technology, a common refrain throughout the ENDC and also in contemporary nuclear politics. However, then the representative goes onto note that Ethiopia objects to this formulation:

> [. . .] our desire for and commitment to development dictate that no avenues should remain unexplored. In that connexion [sic] we are greatly disturbed at the proposal that the non-proliferation treaty, to which we attach great importance, should also cover nuclear devices for peaceful purposes (ENDC Meeting 323: 14).

A nuclear explosion appears to be the key to the definition of a nuclear weapon state, something that the Ethiopian representative is very much aware of. But the representative is not simply lamenting the proliferation risks of civilian technology. Instead, he is referring specifically to the practice of conducting "peaceful" nuclear explosions for

construction or development purposes—a phenomenon that was documented in both the United States and Soviet Union at the time. States like Ethiopia worried that the NPT would bar peaceful nuclear explosions for "non-nuclear" states, thus barring their development potential. This possibility inverts the usual dual-use fears of turning peaceful technology toward destructive purposes by implying that something destructive, the nuclear explosion, can be actually peaceful. Invoking the peaceful nuclear explosion demonstrates that the nuclear explosion or test, rather than providing a simple material marker of nuclear statehood, still requires an interpretive and discursive framework by which to perceive the explosion. As David Mutimer (2000) argues about the Comprehensive Test Ban Treaty, what allowed a test ban to take place, was a shift in the "discursive context in which nuclear testing was conducted" (6).

Still, for the legal text of the NPT, the nuclear test does indeed appear to be the key material marker in defining nuclear status, regardless of how it is perceived. However, as mentioned previously, the explosion is coupled with a particular date in the NPT Article IX definition, which undermines the materiality of the explosion criteria from the very beginning. And beyond the legal oddity of Article IX, nuclear explosions have a tenuous history with nuclear status. For instance, when India conducted its first nuclear test in 1974, it declared that the explosion was a "peaceful" nuclear explosion. Though many analysts cite 1974 as the year that India became the sixth nuclear power, others argue that it was not until the mid-1980s that India could actually be seen as a nuclear weapon state (Abraham, 2008) and still others might trace India's nuclear statehood to its 1998 weapons tests. In any case, the point here is not to undermine the idea that there is some materiality to nuclear status but to bring attention to the language that is used to make sense of the nuclear explosion. Material ambiguities exist primarily because discourse is necessary for understanding the impact of technological change. Moreover, this analysis goes a long way in undermining a broader distinction between material power and social construction that continues to dominate the field of IR. The nuclear test does not speak for itself.

Despite the complex technopolitics surrounding nuclear explosions, one might still contend that either a state has nuclear weapons or it does not—what is in the liminal space between having and not having nuclear weapons? ENDC participants discussed the problems with a "semi-nuclear" status, particularly brought on by the possibility of alliances and nuclear statehood (ENDC Meeting 176: 11). What would be the nuclear status of countries that were a part of NATO and could have possible "co-ownership" of nuclear weapons? The United States considered the creation of a "Multilateral Force" (MLF) for NATO countries throughout the 1950s and 1960s (Buchan, 1964). The MLF constituted the possibility of a NATO-operated nuclear missile force and further exposed the link between legal and ontological categories and real political consequences. Of course, the interaction between alliances and nuclear status played out through the broader great power politics between the United States and Soviet Union at the time. The aforementioned fear of "semi-nuclear" status was stated by the Polish representative to the ENDC as a means of undermining NATO. On the other side, Western states criticized the Soviet Union for essentially the same problem. The United Kingdom's representative stated the following about a Soviet nonproliferation proposal:

> If a 'state possessing nuclear weapons' means no more than a state having the custody of nuclear weapons, then a non-nuclear state which has already signed and ratified the treaty might, in certain circumstances, be able to change its status to that of a nuclear state [. . .] Let us suppose that a non-nuclear state were to borrow or acquire a nuclear weapon, possibly from a nuclear state not party to the treaty—under strict controls, of course, and without the power to use it or move it and without any independent control over it whatsoever. The weapon need never be armed, since in the Soviet draft treaty the meaning of 'nuclear weapon' is not defined either (ENDC Meeting 270: 36).

So even if the NPT was able to define nuclear and non-nuclear statehood, the worry was that states could see a change in their capability but still remain "non-nuclear" from the legal perspective of the NPT.

Indian representatives to the ENDC also brought attention to the idea that alliances changed the underlying legal categories of the NPT. Indian representative to the ENDC, V.C. Trivedi was particularly outspoken during negotiations while advocating for India. Trivedi was consistently preoccupied with how to categorize states: "There cannot be three categories of nations: nuclear nations, non-nuclear nations in alliance with nuclear nations, and non-nuclear nonaligned countries. Our eventual objective is to abolish all existing differences of this nature" (ENDC Meeting 240: 16). Trivedi knows that in fact those categories do matter and that alliances play a major role in the way that legal distinctions between nuclear and non-nuclear states will be interpreted. And even though the nonaligned states wanted to distinguish themselves, they were strategic enough to prevent the kind of distinctions that might lead to a strategic disadvantage. The politics of great power alliances during the Cold War were entangled with this question of nuclear statehood. And of course, the question still stands. Does the policy of extended deterrence undermine the separation between nuclear and non-nuclear states?

But perhaps the more important question for the current study is why, despite these technological and political ambiguities, did states decide to structure the NPT around these categories? One potential explanation is that it was an entirely instrumental move—these categories left legal loopholes for both nuclear and non-nuclear states to manipulate. This constitutes a more realist explanation of the legal choices behind the NPT's categories. And given the debate over the "semi-nuclear" status of NATO or Soviet satellites, interest-based motivations are certainly present. But interests alone do not capture why both the nuclear and non-nuclear sought to be recognized as such through the mechanism of international law. The law provided legitimation, even for the nuclear states. The practice of treaty negotiation itself brought out underlying interests but in the process, those interests were subject to the particular context of the ENDC. And the ENDC provided a forum for the law to be very power*ful*, not power*less* as realists might conclude.

Exploring the multiple meanings of the contested terms of the NPT is not only important from the perspective of transparency, it also affects the kinds of conflicts and identities we observe in the global nuclear regime. Gregoire Mallard (2014) theorizes the polysemy inherent in nuclear politics and has shown that "there are differences in the degree to which legal texts are open to multiple interpretations, and that these differences reflect the various tactics adopted by diplomats during the negotiation of treaties and conventions" (20). But legal categories also constitute political actors and shape their

identities and interests, a phenomenon not entirely captured by discussing polysemy and legal interpretation. States are consistently engaging in disagreements about the meanings of certain legal terms. But these interpretive battles become particularly salient when legal categories and language are also tied to the constitution of political agents and actors, to how these actors understand themselves. Different interpretations of nuclear and non-nuclear status implicate broader notions of self-understanding and belonging, particularly for the non-nuclear states.

By debating the liminal space between nuclear and non-nuclear states and between having and not having nuclear weapons, ENDC participants also opened up what Maria Mälksoo (2012) calls a "vital moment of creativity, a potential platform for renewing the societal make-up" (481). As I show in the next section, the ENDC opened a discursive, thereby performative, space for states to define their non-nuclear status. Thus, another potential explanation for why states chose to order the world through the distinction between nuclear and non-nuclear states is the identity politics behind the category of "non-nuclear." An exploration of the discourse of "non-nuclear" states that played out in the ENDC also leads to an understanding of why the NPT endures, despite its many problems.

Being "non-nuclear"

Why did the non-nuclear states accept the seemingly lesser status of being non-nuclear? An entirely realist explanation of the hierarchical structure of the NPT might point to the way in which the materially powerful states were able to legitimate their possession of nuclear weapons at the expense of those less powerful. While there is certainly an element of this great power hierarchy at the center of the NPT, the negotiations behind the treaty were nonetheless much more contingent than the realist view can account for. As Mallard argues, "the ambiguities of the legal rules embedded in new treaties and agreements are not only a resource for the powerful" (28). The non-nuclear states perpetuated a legal and normative distinction between themselves and the nuclear states to bring meaning to a collective non-nuclear identity but this process had the unintended effect of reifying the hierarchy of the NPT.

In my exploration of ENDC meeting transcripts, I paid particular attention to instances where states used the distinction through the context of identity, signifying an "us v. them" mentality. More often than not, this sort of perspective is advanced by the non-nuclear states as they attempt to define a non-nuclear identity. Instances of this "identity talk" are replete in the negotiations but prominent examples include the mention of a "non-nuclear club" by both Sweden and Poland (ENDC Meeting 19: 10; ENDC Meeting 22: 38; ENDC Meeting 176: 10-12), the mention of "non-nuclear" people by Romania (ENDC Meeting 135: 30), and the consistent linking of non-nuclear status with "nonaligned" status by India, Brazil, and the United Arab Republic (UAR)[3] (ENDC Meeting 15: 27; ENDC Meeting 137: 42; ENDC Meeting 245: 4). I discuss each instance of "identity talk" briefly later and its implications for the role of international law.

The discussions conducted throughout the ENDC were indicative of broader discourses in nuclear politics at the time. In fact, the legal distinction between nuclear and non-nuclear states did not originate in the ENDC. The distinction has its origins in a

series of UN resolutions from 1958 put forward by Ireland's Minister of External Affairs, Frank Aiken (O'Driscoll and Walsh, 2014). And even though Ireland did not participate in ENDC negotiations,[4] its earlier diplomacy exerted an influence on the ENDC. The "non-nuclear" participants referenced Irish diplomacy during their deliberations, especially as they tried to bring meaning to their non-nuclearity.

For example, while discussing the many proposals presented at the ENDC, the representative from Poland stated that, "Some suggestions have referred to the closing of the 'nuclear club'. Others have related to the creation of a 'non-nuclear club'" (ENDC Meeting 176: 10). The "nuclear club" might be based on the possession of nuclear weapons, but a "non-nuclear club" would have to be based on nonmaterial elements to be meaningful. Non-nuclear status implied the absence of material capabilities and thus solidarity around this identity had to move beyond material power to be meaningful. The same representative also noted that "we do not think that a non-nuclear status should be considered discriminatory" (ENDC Meeting 176: 11). The non-nuclear states used the ENDC to assert that being non-nuclear did not signal a lesser status. Though these states knew that there were obvious differences in capabilities between the great power and themselves, they nonetheless used international law to change what being non-nuclear meant in the global nuclear regime.

Similarly, states like Brazil and Sweden made a deliberate effort to refer to themselves as "non-nuclear powers," as a way to assert that power comes from remaining non-nuclear (ENDC Meeting 157: 36; ENDC Meeting 160: 22; ENDC Meeting 196: 5). For these countries, even more than in the example of Poland stated earlier, it was necessary to assert the power that came from being non-nuclear. As Mohamed Shaker (1980) notes in his history of the NPT, Brazil and Sweden were among eight nonaligned countries added to what was previously the Ten Nation Disarmament Committee (72).[5] The ENDC presented a particularly important forum for these eight states that undermined the global hierarchy created by the United States and Soviet Union. For these states, non-nuclear status was as much about rejecting this hierarchy than it was a marker of material difference. Much of this type of diplomacy fits with recent scholarship on the important place of "small powers" in international politics (Renshon, 2017). But power politics as practiced by materially weaker states is characteristically different from the power politics of "great" powers. This is evidenced in Sweden's use of the term "non-great" to refer to the non-nuclear states (ENDC Meeting 222: 12–14). Diplomatic forums like the ENDC are particularly important for sustaining a vision of power that is certainly related to the materially powerful but at once attempts to subvert the idea that power comes from military hardware.

The non-nuclear states also advocated for the "inalienable right" to nuclear energy and linked this right with the self-determination of people. For example, during an ENDC session, the representative of Romania stated that any restriction on peaceful uses of nuclear energy would "infringe on the inalienable right of every people to benefit fully from the great achievements of modern civilization" (ENDC Meeting 344: 16). As Daniel Joyner (2011) has noted, the term "inalienable" right is very rare in international law—with the Universal Declaration on Human Rights as the other prominent example of its use. And while the NPT establishes the inalienable right of *states* to pursue peaceful nuclear energy, this right gets conflated with the rights of *people*, as made clear by the

Romanian representative to the ENDC. Conflating the right of "people" to develop nuclear energy had the effect of turning nuclear energy into a symbolic cause for independence and self-sufficiency. These narratives around non-nuclear statehood rendered the category an identity, particularly for the seemingly disadvantaged non-nuclear states.

Romania's linking of nuclear rights with the inalienable rights of people is particularly puzzling given that Romania was a Soviet satellite and ally during this period. But for others, the ENDC provided a forum to perform their identity as both "non-nuclear" and "nonaligned." ENDC meetings coincided with the founding of the Non-Aligned Movement (NAM) in 1961 and thus constituted a space in which to perform and perhaps even test out the unifying force of the nonaligned identity. The NAM had its origins in the Bandung Conference, which took place in Indonesia in 1955 and shaped the way that the decolonized world thought of their identity as independent nation-states in international society. India, Brazil, and the UAR all attempted to consolidate non-nuclear identity around their nonaligned status. During the earlier meetings of the ENDC, the Indian representative condemned the continuing arms race between the United States and Soviet Union and asserted the importance of a "third side" in resolving these tensions: "There are not just two sides to this question, namely, the Western side and the other side: there is the third side, represented by the unaligned countries. And there is a wider side than the unaligned countries: there is the world itself" (ENDC Meeting 15: 27). The "other side" of course was represented by the Soviet Union and the "third side" represented an alternative global identity to the Cold War politics of the time. Non-alignment signified a political position but also an economic one. For example, the Brazilian representative noted that "we are a non-aligned, non-nuclear country in process of development, but we all have a deep sense of international responsibility [. . .]" (ENDC Meeting 137: 42).[6] Developmental concerns drove these states to both revile nuclear weapons while remaining open to the economic potential brought by nuclear technology, which entangled strategic concerns with normative ones.

The nonaligned states diverged on many different issues throughout Bandung. As Itty Abraham (2008) notes, "mutual disagreements were rife, dislike of particular individuals strong, and the possibility of a breakdown in consensus always present" (208). But despite constant disagreement, nuclear disarmament represented one of the few consensus issues and was, thus, key to sustain the image that the nonaligned states had a set of commensurate interests. Still, while non-nuclearity provided a framework to bind states in an effort to create a global force against the United States and Soviet Union and their many allies, it also reified that idea that there was indeed an inherent hierarchy between nuclear and non-nuclear states. There was much at stake in articulating a unified identity around non-nuclear status, particularly because nuclear disarmament presented one of the few topics on which the diverse NAM agreed on. But the effect was a primarily statist approach of both perceiving and governing the global nuclear regime—an approach that was taken for granted by both the nuclear and non-nuclear states. Moreover, from a legal perspective, the NPT's separation between NWS and NNWS conflicts with the idea that states are juridically equal in the eyes of international law. How could NPT member states be seen as juridically equal and yet still separated by legal hierarchy? The legal categories that structure the NPT reflected the way that states themselves talked about their place in the global nuclear regime—even those that are seemingly disempowered

by the NPT's discriminatory structure. Instead of disavowing the hierarchy, non-nuclear states instead strengthened it.

What does identity-building around the category of "non-nuclear state" say about the role of international law in the context of nonproliferation? First, it undermines the simplistic view that the NPT is a weapon of the powerful states who wanted to shape the nuclear order to benefit their material interests. The ENDC provided a forum for many other states to perform their identity on the world stage. For many states, though not all that were purportedly non-nuclear, this performance accompanied the founding of the NAM and bolstered a post-colonial identity. Second, the diplomatic role of the "non-nuclear" states undermines an entirely materialist understanding of what marks the difference between nuclear and non-nuclear states. Nuclear status constitutes a separate phenomenon than nuclear capability—in practice, "non-nuclear" states had a variety of capabilities but one identity around which they chose to rally around. Non-nuclearity might connote nonaligned status, a post-colonial identity, or a commitment to nuclear energy, among many other meanings.

Realists might also contend that these countries were just cynically exploiting the "non-nuclear" category to develop nuclear weapons secretly. And this view is not entirely wrong—India exploded a nuclear device in 1974, only a short time after the NPT came into force in 1970. Realists are not wrong to look to power politics but they are wrong to posit a reductive view of power. The realist story overlooks the role of legal language in opening up conditions of possibility in which new preferences and identities can form. Once the hierarchy between nuclear and non-nuclear states is legalized through the NPT, the pursuit of nuclear weapons could be legitimated as a counterhegemonic move. The discourse of nuclear apartheid provided the right kind of justificatory framework for nuclear desire. Methodologically, I am not attempting to make a causal claim between the NPT and proliferation—particularly because of the complex causality behind the decision to pursue nuclear weapons. But the NPT does provide a discursive resource in the legitimation of nuclear pursuits, weaponry or not. The discourse of nuclear apartheid, which originated in the ENDC, came to define both a counterhegemonic identity and the kind of nuclear policies that NPT nonsignatories have come to practice in contemporary nuclear politics.

Nuclear apartheid and the NPT

The NPT's legal structure gave rise to the discourse of "nuclear apartheid," which conceives of the nuclear world as a contest between "nuclear haves" and "nuclear have-nots." Though this conclusion appears to be inevitable, the ENDC and NPT were, nonetheless, meant to *lessen* hierarchical relations between different states through two primary ways—the inclusion of nonaligned states in negotiations and the integration of both nonproliferation and disarmament objectives into one grand bargain. But as the previous discussion of ENDC politics has shown, both of these efforts did not go according to institutional design. I argue that participants failed to level the nuclear playing field because all participants were unable to conceive of nuclear relations beyond the distinction between nuclear and non-nuclear states, a distinction that limits equality rather than increasing it. Still, one could argue that the presence of both nonproliferation

and disarmament principles demonstrates the NPT's equitable nature. Indeed, Article VI of the treaty, which compels the NWS to pursue disarmament, seems to abolish the hierarchy between NWS and NNWS—the non-nuclear states are not the only actors deprived of nuclear technology, but the nuclear states are also obliged to get rid of their nuclear weapons.

But as previously mentioned, Article VI is written in a vague manner, calling on the end of nuclear arms race "at an early date." This ambiguity already begins to undermine the notion that obligations between NWS and NNWS are equal. But beyond this textual vagueness, in practice the United States and Soviet Union did indeed demonstrate a reluctance in ENDC negotiations to outline a specific plan for disarmament. In August 1965, the United States presented a draft treaty to the ENDC, which ultimately resembled the final text of the treaty but with one important exception—Article VI was different entirely and a commitment to disarmament was missing from the draft. During this meeting, the US representative to the ENDC, William C. Foster, noted that:

> The United States has proposed a number of measures to stop the build-up of and to reduce nuclear stockpiles. We are prepared to agree to them even before a treaty such as we have tabled today is signed. But we do not believe they should wait on this treaty or that this treaty should wait on them. Let us proceed on all such proposals at the same time, making progress wherever we can (ENDC Meeting 224: 20).

The United States publicly advocated disarmament but was unwilling to include any specifics in the NPT and explicitly sought to keep nonproliferation and disarmament as separate goals. Of course, the nonaligned states were able to push for a disarmament clause in the treaty but one that called for general disarmament and did not outline specific steps. India in particular insisted on a specific timeline but this effort eventually failed and even India gave into the pragmatism of a vague commitment to disarmament (Ford, 2007: 406).

This diplomatic context eventually gave rise to the idea that the NPT promoted a "nuclear apartheid." India coined the term in the midst of ENDC negotiations. Indian representative to the ENDC, V.C. Trivedi, noted that "civil nuclear powers can tolerate a *nuclear weapons apartheid*, but not an *atomic apartheid* in their economic and peaceful development" (ENDC Meeting 298: 10). Trivedi evoked the distinctions between peaceful and destructive and between military and civilian by referencing "civil" nuclear powers. Trivedi sets up a binary between nuclear weapons apartheid and atomic apartheid in a way that eventually allows India to claim that the NPT is only achieving "atomic apartheid" and not a "weapons apartheid," which justifies India's decision to not sign the NPT. He went on to invoke Brazil, which also focuses on the importance of nuclear energy for development, drawing out a global grand narrative in which states like India and Brazil intend to be responsible with nuclear energy in opposition to the Cold War rivalry of the United States and Soviet Union.

Of course, only shortly after the NPT was open for signature, India tested a "peaceful" nuclear device. Whether this act was the consequence of a perceived "atomic apartheid" is a difficult historical and causal question. However, the ENDC did ultimately leave an impact on how India thought about the nuclear world. George Perkovich (1999) notes that particularly toward the end of ENDC negotiations in 1967–1968, "the question

shifted from whether India should *actually* produce nuclear weapons to whether India should sign a treaty relinquishing *the right* to produce weapons. The focus was less on what India should do technologically and militarily than on what the rest of the world should do morally and equitably" (134). India's competing interests between developing an indigenous nuclear program and also retaining its identity as a peaceful, nonaligned state appear to be incompatible. But the NPT helped with this incompatibility by providing a language by which it could at once retain its self-understanding as a "peaceful" nuclear power and still continue the development of its nuclear program.

Since the particular negotiating context of the ENDC, the discourse of nuclear apartheid has become a part of the repertoire of resistance[7] to the hierarchy of the global nuclear regime and, as such, is often a convenient discursive resource for states. When India conducted nuclear tests in 1998, it justified the decision by invoking nuclear apartheid. Shortly after the tests, Indian foreign minister, Jaswant Singh (1998), wrote a piece for *Foreign Affairs* titled "Against Nuclear Apartheid." The language of apartheid allowed India to combine strategic interest with normative justification. The legal text of the NPT sustains a hierarchy between NWS and NNWS, which legitimates India's dissent. And one need not look any further than the long history of civilizational discourses that render non-Western states unfit for nuclear weapons possession (Maddock, 2010) for proof that nuclear apartheid is a very real force in the history of the global nuclear regime.

But what makes nuclear apartheid an effective discourse for states like India? How exactly have the disempowered wielded this discursive resource? Nuclear *apartheid* is effective precisely because it invokes the way that the law justifies racial difference. Indian representatives to the ENDC were very strategic about the use of the term "apartheid" to refer to the distinction between nuclear and non-nuclear states. The Final Communique of the Bandung Conference, which sought to create a nonaligned world order, championed the prohibition of nuclear weapons along with the end of racial discrimination with specific allusions to apartheid South Africa (Hecht, 2012: 26). Referring to a "nuclear apartheid" allowed for a rhetorical linking between two core issues of nonalignment—racial discrimination and disarmament—which perfected the nonaligned message. Nuclear apartheid is an effective discourse not just because it invokes global inequalities but because it invokes the very specific injustices of apartheid South Africa. But as Shampa Biswas (2001) notes, nuclear apartheid is a racial signifier but a problematic one—the language of nuclear apartheid attempts to draw out certain "democratic entitlements" of sovereign states but fails to address the "fundamentally undemocratic character of nuclear weapons" (487). Turning the discourse toward racial inequalities and the rights of sovereign states has the (perhaps intended?) effect of detracting from the destructive potential of nuclear weapons. Nuclear apartheid serves as an effective discursive resource for dissenting against the global nuclear regime while still maintaining the state-centric nature of these debates.

While the term "apartheid" implicates the broader people of these countries, the way in which nuclear apartheid is used reveals that it is confined to hierarchy across states rather than within them. Complaints of the unequal nature of the global nuclear regime are justified. But the discourse of nuclear apartheid is not attempting to bring light to the kinds of economic and labor inequities sustained by the nuclear regime and is rather calling attention to the inequality between those states that are legally legitimate in their

possession of nuclear weapons and those states that are not. Elsewhere Biswas (2014) notes that "for countries such as India, Pakistan, North Korea, and Iran, nuclear weapons have done little to alleviate the poverty of large numbers of the population," which is of course another way to think about inequality in the global nuclear regime. The conceit of nuclear apartheid is that it is not ultimately about justice but about status and legitimacy, and this is in part what makes it an effective normative discourse to deploy in developing a foundation for dissent.

Nuclear apartheid, rather than offering an alternative to the NPT's structure, reifies its hierarchy because the discourse is itself a resource for states in legitimating their nuclear policies. As Runa Das (2010) notes, Pakistan also cites nuclear apartheid as its reason for remaining outside of the NPT's structure but because it wants to be recognized as an NWS (149). Similarly, India sought recognition as an NWS by the United States as a part of the United States–India Civil Nuclear Agreement of 2005 but ultimately settled with being recognized as a "responsible" nuclear state (Saran, 2017). Given the strategic politics around recognition of nuclear status, it is difficult to conceive of nuclear apartheid as an emancipatory discourse. Nuclear apartheid is very real in that both legal and diplomatic history points to efforts by the great powers to consolidate their status through nuclear weapons possession and, even more, to conceive of *their* nuclear weapons as necessary in maintaining international security. And yet, it is also the case that nuclear apartheid is a discursive resource for states outside this realm of legitimate actors.

Taken together, the role of non-nuclear states and the development and use of nuclear apartheid complicates both realist and institutionalist perspectives on the NPT. An inordinate focus on compliance or material power differences obscures not just what the NPT does in global politics but what international law does in global politics. The NPT is sustained not because of its compliance pull or because it is a tool for strong states but because it provides a forum for non-nuclear states to perform that identity and because it provides a foundation for contesting the global nuclear regime through the discourse of nuclear apartheid.

Conclusion: categorization and international law

A turn toward language and rhetoric is key to understand the operation of nuclear weapons and technology in global politics. Nuclear weapons and the many technical concepts surrounding them (deterrence, proliferation, mutually assured destructive, strategic stability) are definitive of the way that language mediates material reality. Paul Chilton et al. (1985) coined the term "nukespeak" to refer to the jargon of nuclear politics, which was and continues to be "mystificatory in aim and power-building in effect" (3). Language determines how both political analysts and the broader public understand nuclear politics. As Benoit Pelopidas (2011) has argued, the dominance of the "proliferation paradigm" not only distorts nuclear history but also limits political innovation when it comes to the threat of nuclear weapons. ENDC negotiations illuminate the politics of building a discursive order around nuclear technology. Like the "proliferation paradigm," the distinction between nuclear and non-nuclear states remains a state-centric way to organize nuclear politics, limiting the kinds of institutional structures that can govern nuclear weapons.

Conflicts surrounding legality in nuclear politics are often based on contestation over legal language and categories—the language is itself a site of contestation rather than simply being a guise to accomplish narrow self-interest. And this contestation creates a context for states to identify with certain beliefs or discourses that they would not identify with otherwise (Koskenniemi, 1990). International law is "political" in that it is a part of the ongoing negotiation over the "who" of states—over how we identify certain states and the rights and obligations that follow from those identifications. This particular use of international law is largely ignored by theories that examine the legality of nonproliferation in nuclear politics. Law, specifically the NPT, attempts to reinforce and manage the unique hold of nuclear technology and materials in the modern state imaginary. The NPT legitimates the nuclear weapons of the NWS by quite literally constituting them as the only permissible NWS—which demonstrates that the category does not only exist because it describes an objective material reality but because it defines and delimits what is and is not acceptable in the nuclear world.

But, as was seen in ENDC negotiations, the NNWS also sought legitimacy and meaning through the mechanism of the NPT. The NPT does not simply endure because the powerful have sanctioned it, but because it created a space for the seemingly disempowered to expand their influence from below. The ENDC was explicitly a forum in which to debate nonproliferation and disarmament but it also provided a forum for states to perform a burgeoning non-nuclear identity based on different understandings of their place in the nuclear regime but also more broadly in international society. In turning to what the NPT does, rather than what the treaty regulates and limits, the article illuminates the constitution of nuclear and non-nuclear states in global politics.

Ensuring that the study of law in political science is politically grounded and empirically minded requires an understanding of the constitution of legal categories. Exploring the origins of these categories illuminates the ordering power of international law. Order, as John Keeley (1990) has argued, is not only a means of lessening conflict, but also a "loci of struggle" in which "resistance can persist in the face of ordering efforts or even be created by them" (93). Other legal distinctions such as the one between civilian and combatants (Kinsella, 2011), and between public and private (Romany, 1993) also have a reifying effect on the way that states practice international politics. The politics of defining and categorizing states, actors, or spheres of international life is often bolstered by international law. Investigating this process of categorizing in contexts beyond nuclear politics provides a fruitful way to think about legal institutions as sites of contestation.

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Notes

1. The treaty came open for signature on 1 July 1968 but ENDC negotiations continued until 1969. After the NPT opened for signature, much of the subsequent discussion at the ENDC focused on how to achieve disarmament.
2. The ENDC consisted of the United States, the United Kingdom, Canada, France, Italy, the Soviet Union, Czechoslovakia, Poland, Romania, Bulgaria, Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the UAR. These were the official members but France chose not to send a representative to the deliberations.
3. The UAR was the national experiment of Gamal Abdul Nasser who tried to unite Syria and Egypt into one Arab nation. Syria ceded from the UAR in 1961 and Egypt continued to go by the UAR until 1971. So throughout the ENDC meeting, Egypt went by this name.
4. Although later it did become a part of the UN Committee on Disarmament.
5. These countries include Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the UAR.
6. Brazil's interaction with the NAM is unique. Brazil attempted to send a representative to the 1961 conference in Belgrade and was limited in its participation due to American interference (see Hershberg, 2007).
7. I thank an anonymous reviewer for this turn of phrase.

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