FILLING THE LEGAL GAP: THE PROHIBITION OF NUCLEAR WEAPONS
At the December 2014 Conference on the Humanitarian Impact on Nuclear Weapons in Vienna, Austria made a pledge calling on “all states parties to the NPT to renew their commitment to Article VI [of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)], and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.”

The key “legal gap” that needs to be filled is the explicit prohibition of nuclear weapons and establishment of a framework for their elimination. The other weapons of mass destruction, biological and chemical weapons, are prohibited and subject to elimination processes through international legal instruments. It is past time that nuclear weapons are put on the same legal footing.

The “legal gap” regarding prohibition and elimination arises from various deficits in the regulation of activities involving nuclear weapons, as currently codified. This includes legal deficits regarding the development, production, testing, transfer, acquisition, transit, stockpiling, deployment, threat of use or use of nuclear weapons, as well as assistance, financing, encouragement, or inducement of these activities. The current international legal regulation of nuclear weapons is fragmentary, with several instruments covering only certain areas or activities. The legal gap also arises because the rules in the existing instruments on nuclear weapons apply to different states in different ways. Thus what is needed is a comprehensive instrument that prohibits all activities involving nuclear weapons in all circumstances for all states parties.

The table overleaf summarises the gaps in existing treaty law related to nuclear weapons. A treaty banning nuclear weapons, by categorically prohibiting nuclear weapons and establishing a framework and impetus for their elimination, would help to fill these gaps. Such a treaty would build on existing norms and reinforce existing legal instruments, but it would also close loopholes in the current legal regime that enable states to engage in nuclear weapon activities or otherwise to claim perceived benefit from their continued possession and deployment while purporting to promote their elimination.

The negotiation of a treaty banning nuclear weapons should fill the legal gap regarding the prohibition of nuclear weapons by providing clear common obligations with respect to the issues outlined in the chart. Whilst some aspects of the current legal framework are to be applauded, the overall patchwork of partial regulation hampers development of a clear normative recognition that nuclear weapons are unacceptable. In doing so, it facilitates retention of these weapons by certain states, which may in turn incentivize proliferation. History shows that legal prohibitions of weapon systems—their possession as well as their use—facilitate their elimination. Weapons that have been outlawed increasingly become seen as illegitimate. They lose their political status and, along with it, the money and resources for their production, modernisation, proliferation, and perpetuation. Even if nuclear-armed states do not join initially, a treaty banning nuclear weapons would have a significant normative and practical impact.

States should commence negotiations in 2015 on a treaty banning nuclear weapons as an effective measure for nuclear disarmament. At a time when the nuclear-armed states continue to demonstrate their lack of commitment to pursuing tangible, good faith nuclear disarmament, as international tensions rise, and as the potential for accidents persists, banning nuclear weapons is an urgent necessity.
There are no specific international obligations to decontaminate or remediate areas affected by nuclear weapon detonations, whether through testing, use, or production. Remediation is a legal obligation of states party to the NWFZ treaties to redress the environmental and human health consequences of nuclear testing. This includes providing assistance to victims and survivors of violence with regards to assistance, redress, and justice, and the restoration of international environmental law standards.

The International Court of Justice (ICJ) did find that the threat or use of nuclear weapons was illegal under customary international law. The Court ruled that any use of nuclear weapons would violate the laws of the United Nations, the laws of armed conflict, and the laws of human rights.

The Antarctic Treaty prohibits any measure of a military nature in Antarctica, including the stationing of nuclear weapons.

NPT articles I and II only make nuclear weapons manufacture illegal for non-nuclear-armed states parties; there is no comprehensive prohibition. NPT non-nuclear-armed states parties are not prohibited from assisting nuclear-armed states parties in the manufacture and acquisition of nuclear weapons. NPT nuclear-armed states parties are not prohibited from producing nuclear weapons.

The Comprehensive Test Ban Treaty (CTBT) prohibits all nuclear test explosions.

The NPT does not impose prohibitions on the acquisition or development of nuclear weapons, nor is there any legal obligation to prevent the acquisition or development of nuclear weapons. States parties to the NPT are not prohibited from assisting non-nuclear-armed states parties in the manufacture of nuclear weapons.

The NPT prohibits all nuclear test explosions. The Comprehensive Test Ban Treaty (CTBT) prohibits all nuclear test explosions.

NPT article I prohibits nuclear-armed states parties from transferring nuclear weapon technology to any other states parties.

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There is no explicit treaty prohibition against financing of the production, maintenance, or modernisation of nuclear weapon systems. Companies in non-nuclear-armed states are currently contributing to the modernisation of nuclear arsenals.

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3. Five NWFZ treaties cover 115 countries (60% of UN member states); Mongolia has separately declared itself a nuclear weapon free zone. Some states have also outlawed nuclear weapons in their constitutions or domestic legislation. The five NWFZ treaties are: Tlatelolco (covering Latin America and Caribbean NWFZ), Rarotonga (South Pacific), Pelindaba (Africa), Bangkok (Southeast Asia), and Semipalatinsk (Central Asia). For a comparative analysis of legal obligations arising under NWFZ treaties, which informs this table, see “Nuclear Weapon Free Zones and Banning Nuclear Weapons,” Article 36, April 2014, http://www.article36.org/?p=684.

4. China, France, Russia, and the UK have ratified these protocols.


6. See the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001) and the Commentary thereto, §§2-4. For a recent discussion, see Martina Kunz and Jorge E. Viñuales, “Environmental approaches to nuclear weapons,” in Gro Nystuen et al. (Eds.), Nuclear Weapons Under International Law, Cambridge University Press, 2014.

7. China, Democratic People’s Republic of Korea, Egypt, India, Iran, Israel, Pakistan, and the US.

8. The US understanding of control, based on the US Senate’s interpretation that was reportedly uncontested during NPT negotiations, is that control means the independent power to use nuclear weapons. See Hon. Brian Donnelly, “The Nuclear Weapons Non-Proliferation Articles I, II and VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” presentation at the conference “Non-Proliferation: Point of View from Latin America and the Caribbean,” Cancún, Mexico, 11–13 January 1995, http://www.opanal.org/Articles/cancun/can-Donnelly.htm.


11. International Court of Justice, op. cit., p. 266.

12. Ibid.


