



THE LEGAL GAP

ICAN CAMPAIGNERS MEETING/GENEVA

The “legal gap”: where does it come from?

At the Vienna conference on the Humanitarian Impact on Nuclear Weapons in December 2014, the Austrian government made a Pledge calling on all signatories to the nuclear Non-Proliferation Treaty (NPT) to renew their commitment to Article VI, which calls for the “negotiation in good faith for the elimination of nuclear weapons”.

To this end, the Austrian government pledged “to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.” After the conference, Austria invited other states to endorse this Pledge. So far, over 127 states have issued their support for what is now known as the Humanitarian Pledge.

What is the “legal gap”?

The key “legal gap” 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 treaties covering only certain areas or activities. Whilst some aspects of the current legal framework are to be applauded, the overall patchwork of partial regulation hampers development of a clear legal recognition that nuclear weapons are unacceptable.

In doing so, it facilitates retention of these weapons by certain states, which may in turn incentivize proliferation. The legal gap arises because different countries are subject to different rules when it comes to nuclear weapon-related activities. What is needed is a comprehensive instrument that prohibits all activities involving nuclear weapons in all circumstances for all states parties.

How can we fill the “legal gap”?

ICAN believes that filling the legal gap requires a legally-binding international instrument that clearly prohibits nuclear weapons based on their unacceptable consequences. A treaty banning nuclear weapons would build on existing norms and reinforce existing legal instruments. It would also close loopholes in the current legal regime that enable some states to engage in nuclear weapon activities while clearly codifying the illegitimacy of possession. In line with other international legal instruments, it would also reaffirm the rights of people who have been victimized by the detonation of nuclear weapons.

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, bringing moral authority and legal clarity.



“ A ban treaty will have normative and practical impacts on those that stand inside and outside of it. ”

CHAIR'S SUMMARY IN VIENNA

“Many delegations stressed the need for security for all and underscored that the only way to guarantee this security is through the total elimination of nuclear weapons and their prohibition.

They expressed support for the negotiation of a new legal instrument prohibiting nuclear weapons, constituting an effective measure towards nuclear disarmament, as required also by the Non-Proliferation Treaty.”

A treaty banning nuclear weapons should:

- Establish a non-discriminatory international legal instrument that would prohibit its parties, their nationals, and any other individual subject to its jurisdiction from engaging in the development, production, testing, acquisition, stockpiling, transfer, deployment, threat of use, or use of nuclear weapons, as well as assistance, financing, encouragement, or inducement of these prohibited acts.
- Provide an obligation for the complete elimination of nuclear weapons and a framework to achieve it. The ban treaty would not need to establish specific provisions for elimination, but states parties to the treaty could agree to relevant measures and timelines as part of the implementation process, through protocols or other appropriate legal instruments.
- Include positive obligations for states parties, such as ensuring the rights of victims and survivors of nuclear weapons, requiring actions to address damage to affected environments, and providing for international cooperation and assistance to meet the obligations of the instrument.

Impacts of a ban treaty

A ban treaty will have normative and practical impacts on those that stand inside and outside of it. A ban treaty would offer states opposed to nuclear weapons an opportunity to formalise a categorical rejection of the use or possession of nuclear weapons by anyone under any circumstances. Establishing a clear rejection of nuclear weapons would enhance the stigma that already exists against these weapons.

The process of banning nuclear weapons would require governments to decide whether they want to continue to support nuclear weapons or reject them entirely. Furthermore, a ban treaty, negotiated and signed by a large number of the world's states, would have wide-ranging implications for nuclear weapons including:

- The prohibition of financial investment in nuclear weapons;
- Pressures on military cooperation involving nuclear weapons; and
- The development of a stronger community of states and civil society working together towards elimination based on a clear legal prohibition of nuclear weapons.

AUSTRIAN PLEDGE

“Austria calls on all states parties to the Non-Proliferation Treaty to renew their commitment to the urgent and full implementation of existing obligations under article VI, and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons, and Austria pledges to cooperate with all stakeholders to achieve this goal.”

“Austria pledges to cooperate with all relevant stakeholders, states, international organizations, the International Red Cross and Red Crescent Movement parliamentarians and civil society in efforts to stigmatize, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks.”

Summary

- The “legal gap” regarding the prohibition and elimination of nuclear weapons arises from various deficits in the regulation of activities involving nuclear weapons. This includes 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 framework regulating nuclear weapons is incomplete. The legal

gap also arises because the rules in the existing instruments on nuclear weapons apply to different states in different ways. States must therefore outline and negotiate a comprehensive instrument that prohibits all activities involving nuclear weapons in all circumstances for all states parties.



Key Messages on the Legal Gap

- Nuclear weapons are the only weapons of mass destruction not yet prohibited under international law in a comprehensive and universal manner. Like-minded States should work together to correct this unacceptable legal anomaly.
- In the UN General Assembly, the vast majority of States have acknowledged that a legal gap exists in the current regime governing nuclear weapons, and have pledged to cooperate in efforts to fill this legal gap.
- Filling the legal gap requires the negotiation of a legally binding instrument prohibiting nuclear weapons. A partial prohibition, such as one on use only, would be inadequate, as would the pursuit of purely non-legal measures.
- A legally binding instrument prohibiting nuclear weapons would remove any doubt regarding the illegality of the use of nuclear weapons, and render illegal the development, production, testing, possession etc. of such weapons.

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