

First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons

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Encouraging universal adherence to the TPNW on the basis of existing international obligations

**Working paper submitted by ICAN on behalf of member
organization Tribunal for Peace, The Netherlands**

I. International obligations of non-parties to the TPNW

1. Many States that are not parties to the TPNW do have international obligations that irreconcilable with any involvement in nuclear armament and the reliance on nuclear deterrence and strategies. Besides States that are parties to a treaty establishing a nuclear-free zone and forming part of the concerning zone, States parties to the Geneva Conventions of 1949 and Additional Protocol I of 1977 can be mentioned in this regard, as well as States parties to the Genocide Convention.

2. In case of an armed conflict Parties to the Geneva Conventions and Additional Protocol I have the obligation to abstain in all circumstances from attacks against the civilian population or against individual civilians, as well as from attacks in which no distinction is made between the civilian population and combatants and between civilian objects and military objectives. Moreover, they may in no circumstance attack civilian hospitals or military medical units, but shall at all times respect and protect such medical facilities.

3. Parties to the Genocide Convention have the obligation to prevent and to punish genocide in time of peace as well as in time of war. The aim of the Convention is to prevent the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such. Therefore, under the terms of the Convention not only genocide is a crime, but also the preparatory acts of conspiracy to commit genocide and incitement to commit genocide. Conspiracy and incitement are inchoate crimes, which are punishable even if the genocide had not been consummated. The crime of conspiracy to commit genocide has been committed at the moment that an agreement to commit genocide has been reached. This agreement need not be an express or formal one, but may be inferred from the concerted or coordinated actions, in which case a tacit understanding of the criminal purpose of these actions is sufficient to demonstrate the criminal intent.

II. Nuclear armament and deterrence

4. Nuclear weapons States are of the opinion that possession of these weapons of mass destruction deters aggression against them and against their non-nuclear allies. In order to uphold the credibility of this deterrence, nuclear weapons states have stated their willingness to use their nuclear weapons and also have shown their ability to do so. Furthermore, they upgrade or modernize the nuclear warheads and bombs and the delivery systems continuously.

5. Nuclear deterrence results from the terrible consequences of the possible use of nuclear weapons against any aggression. The numerous lives that will be lost and the enormous destruction that will be inflicted in case of a nuclear response to aggression is thought to be prohibitive; the costs of an aggression exceed by far the gains an aggressor State might expect to obtain from an armed attack.

6. In order to make the costs of aggression prohibitive for any aggressor, nuclear strategies and military operational plans have been prepared so that an adequate and proportional reaction to aggression will be assured. Present nuclear strategies and operational plans provide for the tactical and strategic use of nuclear weapons. Tactical use includes attacks against military targets situated in or in the vicinity of cities and villages. Strategic use possibly encompasses the annihilation of hostile cities in the most extreme situation of alleged defence against aggression.

III. Use of nuclear weapons inconsistent with international obligations

7. The aforementioned possible uses of nuclear weapons are without any doubt inconsistent with the international obligations of nuclear weapons States and their non-nuclear allies. These states are all parties to the Geneva Conventions of 1949 and, with the exception of the United States of America, to the Additional Protocol I of 1977 as well. All the nuclear weapons States and their non-nuclear allies are parties to the Genocide Convention.

8. The tactical use of nuclear weapons against military targets in or in the vicinity of cities and villages would be a violation of the treaty obligation in pursuance of Additional Protocol I to abstain from indiscriminate attacks. Although the United States of America did not ratify Additional Protocol I, they are bound by the customary rule of armed conflict that distinction must be made between the civilians and combatants and between civilian objects and military targets. So they also would act against international law if they should resort to the tactical use of nuclear weapons under consideration.

9. Moreover, the tactical use of nuclear weapons at issue would definitely be also an infringement of the treaty obligation in pursuance of the Geneva Conventions of 1949 to respect and protect civilian and military medical facilities.

10. The strategic use of nuclear weapons against cities or other population centres not only would mean that the civilian population would be the object of the attack, but also that the crime of genocide would be committed. For the nuclear annihilation of population centres would definitely imply at least that a national group would be partly destroyed. Furthermore, the crime of conspiracy to commit genocide would surely have been committed.

11. The foregoing means that the use of nuclear weapons in accordance with the current strategies and military operational plans flies into the face of current international obligations of States. For most of the nuclear weapons States and for all of their non-nuclear allies this concerns treaty obligations.

IV. Good faith: basic principle of international law

12. According to the Vienna Convention on the Law of Treaties every treaty in force is binding upon the parties to it and must be performed by them in good faith. This means that States parties must refrain from behaviour that would be inconsistent with the object and purpose the concerning treaty. Good faith is a basic principle of international law without which international law and stable international relations cannot exist.

13. In view of incompatibility of the use of nuclear weapons, tactical as well as strategic, with treaty obligations of nuclear weapons States and their non-nuclear allies as well, it must be concluded that those States do not fulfil their treaty obligations in good faith. With the possession of nuclear weapons, the nuclear strategies and military operational plans concerning the use of these means of mass destruction, nuclear weapons States show eventually to be willing to commit war crimes and the most heinous crime of genocide. Non-nuclear allies that hide under the nuclear umbrella of the nuclear weapons States knowingly accept this illegitimate behaviour.

14. In view of the illegality of the conspiracy to commit genocide the conclusion must even be that in the present situation, in which nuclear weapons States possess the means to annihilate population centres and have made plans for the execution of that annihilation, the nuclear weapons States nowadays are acting in a criminal way already.

15. So every day that the nuclear weapons States maintain their nuclear weapons and their non-nuclear allies accept and support this illegitimate or even illegal situation, they undermine the rule of law and the binding force of the Geneva Conventions, Additional Protocol I and the Genocide Convention. In order to maintain the rule of law and to protect a peaceful international society, nuclear weapons States and their non-nuclear allies should be urged to end their law undermining behaviour.

IV. The need to act in good faith: foundation for the furtherance of accession to the TPNW

16. The fundamental importance of the principle of good faith with regard to upholding the rule of law should be stressed in the discussions about the accession to the TNPW. Nuclear weapons States and their non-nuclear allies should be made aware that in the present situation they are constantly undermining the rule of law and endangering a peaceful international society.

17. In this connection nuclear weapons States and their non-nuclear allies could be reminded of the considerations of the International Court of Justice in its Advisory Opinion of 8 July 1996 concerning the legality of the threat or use of nuclear weapons. In paragraph 94 the Court observed: *"that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the 'clean' use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into high yield nuclear weapons"*. The Court therefore could not affirm the validity of this view.

18. The awareness of the illegitimacy of any involvement in nuclear armament and the reliance on nuclear deterrence and strategies, of even the criminality of the conspiratorial preparations for a nuclear annihilation of population centres, and of the necessity to act in accordance with treaty obligations in good faith, might be a forceful incentive to further the universal adherence of all States to the TPNW.
