

# Second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons

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## **IALANA Germany recommends joining the TPNW**

### **Working paper submitted by IALANA Germany**

1. The general prohibition of all nuclear weapons, which is binding for all states, and thus their abolition depends on whether the TPNW becomes customary international law or whether the majority of the nuclear-weapon(s) states accede to it.
2. The essential provisions of the TPNW would become customary law if they were also practiced by the vast majority of nuclear-weapon states irrespective of their accession and if these states thereby assumed that they were applying valid law. The nuclear-weapon(s) states and their allies are still resisting such a development.

#### ***Human Rights***

3. The use of nuclear weapons and the threat thereof violate, among other things, the human right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>. This came into force in 1976 and is also applicable in armed conflicts. Article 6 reads as follows: "Everyone has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
4. The unjustifiable killing with weapons of war of which the use is prohibited under international law is arbitrary and would disregard this human right.
5. In October 2018, the UN Human Rights Committee, stated in paragraph 65 of the Commentary 36 on Article 6 of the ICCPR, that States Parties involved in the "deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons and means or methods of warfare must always take into account their impact on the right to life". Furthermore, paragraph 66 specifically states: "The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law."<sup>2</sup>

#### ***ICJ on Nuclear Weapons***

6. The nuclear powers justify the use of nuclear weapons as part of their military strategies by citing the advisory opinion of the International Court of Justice (ICJ) of July 8 1996, which held that the use of nuclear weapons is not precluded under extreme circumstances of self-defense in which the existence of their state is at stake. The ICJ stated:

7. "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."<sup>3</sup>

8. The nuclear-weapon states overlook the fact that the ICJ did not justify the use of nuclear weapons with this pronouncement. It merely stated that it could not make a decision in this regard.<sup>4</sup>

9. In contrast, the core statement of the advisory opinion provides:

10. "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;"<sup>5</sup> The ICJ refers to the Additional Protocol to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Conflicts (Protocol 1) of 8 June 1977, where Art 35 Paragraph 1 states unequivocally: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." They may only defend themselves with weapons that international humanitarian law does not prohibit. In the reasoning of the advisory opinion, the ICJ states in this regard that the right of self-defence under Article 51 of the UN Charter is limited by international humanitarian law, whatever means of force are used.

11. Paragraph 42 of the Advisory Opinion literally states, "The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."<sup>6</sup>

12. The rules of international humanitarian law, with the Geneva Conventions, prohibit the use of weapons,

- whose effects do not distinguish between combatants and civilians,
- whose radioactive radiation causes unnecessary suffering and superfluous injury,
- that cause damage to the environment and human livelihoods for future generations, and
- that cause harm to neutral states through cross-border fall-out.

13. Nuclear weapons cannot avoid these effects, not even the so-called mini-nukes used by nuclear weapon states. They indiscriminately hit all living beings in the target area, radiate survivors and the environment radioactively and send the fall-out through winds to neighboring countries. Since, according to the ICJ, the crucial rules of international humanitarian law have become customary international law, they are also binding to nuclear-weapon(s) states and their allies, that have so far refused to join the TPNW.

14. The wording in the operative part of the opinion is unfortunate because it can lead to misunderstandings. The TPNW has taken up the ICJ's argumentation under international law and formulates unambiguous steps toward a universal ban on nuclear weapons.

***Germany's nuclear sharing***

15. Germany is a non-nuclear-weapon(s) state because it does not possess nuclear weapons. However, nuclear weapons are stationed on German territory and are in the

custody of the U.S. Army. In the event of a NATO use of the nuclear weapons, they are latched onto Bundeswehr aircrafts within the framework of nuclear sharing, flown to the target sites by German soldiers and dropped there. This means that German soldiers will have these nuclear weapons at their disposal in the event of the use of nuclear weapons. Germany then becomes a nuclear- weapon(s) state for a limited period of time and thus comes into conflict with the NPT.<sup>7</sup>

16. As a party to the NPT, the non-nuclear-weapon state Germany is obliged under Art. 2 NPT "not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices. "Similarly, under Art. 1 NPT, the U.S. is obligated "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices." The NPT does not provide an exception for nuclear sharing. The German government nevertheless invokes the fact that it declared a formal reservation at the time of signature and at the time of ratification of the NPT, by which it reserved the right to power of disposal of nuclear weapons in the event of war.

17. The German government's stated reservations do not confirm this. They merely emphasize that Germany remains committed to the NATO collective security system. The declarations do not designate the weapons with which, according to NATO's collective security rules, the protection of the Federal Republic should be ensured. Although the special interest of the Federal Republic was the continued existence of nuclear sharing and the safeguarding of the "European option"<sup>8</sup>, nuclear weapons are not explicitly mentioned in the reservations. It cannot be inferred from the wording of the declarations<sup>9</sup> that defense with nuclear weapons is agreed upon. The declarations do not preclude NATO from defending the Federal Republic exclusively with conventional weapons systems, especially since the NATO Treaty does not provide for nuclear weapons either. Nor does it follow from the declarations that the nuclear sharing already practiced at that time was to be continued after the entry into force of the NPT.

18. In interpreting reservations under Article 31 of the Vienna Convention on the Law of Treaties (VCLT)<sup>10</sup>, the wording is decisive, irrespective of what the parties subjectively meant by the formulations used when they concluded the treaty.<sup>11</sup> Moreover, according to Article 19 (c) of the VCLT, only reservations that are not incompatible with the object and purpose of the treaty are permissible. Handing over nuclear weapons would practically nullify the NPT, because its purpose is that nuclear-weapon states may not hand over nuclear weapons to non-nuclear-weapon states and that the latter may not exercise any power of disposal over nuclear weapons. Further provisions are not contained in Articles 1 and 2 NPT. The continued practice of nuclear sharing (i.e. the transfer of the power to dispose of nuclear weapons in the event of war) even after the entry into force of the NPT would reverse the wording and the purpose of the NPT. Pursuant to Article 19(c) of the VCLT, the content of Germany's reservation cannot be a reservation under international law and is therefore ineffective as a reservation.<sup>12</sup>

19. Germany's nuclear sharing cannot be justified under any aspects of international law, but is nevertheless practiced. Germany's accession to the TPNW would oblige Germany under Art. 1 lit. g to end its nuclear sharing and under Art. 3 to conclude a comprehensive safeguards agreement with the International Atomic Energy Agency

(IAEA). Art. 4 para. 4 TPNW also requires acceding participating states to remove expeditiously existing nuclear weapons on its territory that are in the possession of another state. No time period is specified, which opens the door to possible delays and stalling tactics.

### ***TPNW and NPT***

20. In contrast to the NPT, the TPNW contains a concrete disarmament commitment and delegitimizes the strategy of nuclear deterrence. Whereas the purpose of the NPT is to prevent the proliferation of nuclear weapons, the TPNW is concerned with verifiably and irreversibly "winding down" nuclear weapons, cancelling their operational readiness and destroying them as soon as possible.<sup>13</sup>

21. There are no irresolvable contradictions between the provisions of the TPNW and the NPT. The obligations of non-nuclear-weapon states that accede to the TPNW derive from Article 3 of the TPNW. These include nuclear sharing states. Their obligations go further than those of the non-nuclear sharing states. Until accession, the existing safeguards obligations to the IAEA remain effective. Thereafter, the existing or new safeguards agreements with the IAEA will apply. Negotiations thereon shall commence 180 days after the effective date of accession. Within 18 months after accession, the safeguards agreement shall enter into force. In this respect, the obligations under Art. 3 TPNW correspond to the requirements of Art. 3 para. 1 NPT.<sup>14</sup>

22. One problem could be that Art. 3 TPNW only requires the conclusion of a simple safeguards agreement with the IAEA, but not the conclusion of the IAEA Additional Protocol of 1997, which lays down more far-reaching verification standards. There is a danger that accession states will freeze their verification obligations at the standard laid down in Art. 3 TPNW, with little motivation to ratify the IAEA Additional Protocol as well. One objection to this is that the NPT does not require ratification of the Additional Agreement either. Legally, the verification provisions of the TPNW are on par with the NPT and do not fall short of it.<sup>15</sup> No state is prevented from acceding to the IAEA Additional Protocol. Moreover, the TPNW's newly created verification regime will continue to evolve, as has happened with the 50-year-old NPT.

23. When a nuclear-weapon(s) state accedes to the TPNW, Article 4(2), Article 3 TPNW apply. The nuclear-weapon(s) states are obliged to agree on a timetable for the implementation and monitoring of the disarmament of their nuclear weapons and related facilities with a "Competent Authority" yet to be created. A verification agreement is then to be concluded with the IAEA at the level of the IAEA Additional Protocol.<sup>16</sup>

24. The Bundestag's Scientific Service (Wissenschaftlicher Dienst des Deutschen Bundestages-WD) calls the TPNW "the fulfillment of a customary law obligation under Article 6 of the NPT."<sup>17</sup> The TPNW does not undermine the NPT, but is part of a common nuclear disarmament architecture. Existing obligations of NPT states under the NPT are neither abrogated nor relativized by accession to the TPNW.<sup>18</sup>

25. The TPNW does not create entirely new verification structures, but rather draws largely on existing mechanisms, such as the safeguards agreements of the States Parties with the International Atomic Energy Agency (IAEA).<sup>19</sup>

26. IALANA Germany suggest that at the 2nd Conference of the States Parties, in fulfillment of Article 12 TPNW, the States Parties call upon all NPT States Parties to accede to the TPNW.

27. Since the use or the threat of use must not occur for ethical and international legal reasons, the stationing of nuclear weapons ready for use and, moreover, their existence makes no sense. While the TPNW does not contain a complete system of verification

of nuclear disarmament, it does indicate initial steps toward complete nuclear disarmament through negotiations with the IAEA or other international authorities.

28. While the ICJ has assessed the use of nuclear weapons and the threat thereof under international law (in accordance with the UN General Assembly's request for an expert opinion), it has not opined on the legality of the existence of nuclear weapons, their development, production, transportation, stockpiling, or stationing ready for use. The TPNW has filled the gap left by the ICJ in its advisory opinion.

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<sup>1</sup> BGBl. 1973 II, Page 1534.

<sup>2</sup> Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life - 30 October 2018 - CCPR/C/GC/36. <https://daccess-ods.un.org/tmp/102277.19321847.html>

<sup>3</sup> ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons. LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS ICJ of 8 July 1996. <https://www.icj-cij.org/case/95/advisory-opinions>

<sup>4</sup> ICJ President M. Bedjaoui, in his statement appended to the opinion, stated: "I will never be able to emphasize enough that the Court's inability to go beyond the finding it has reached should in no way be interpreted as having thereby held open a door to the recognition of the legality of the threat by or use of nuclear weapons." ICJ-IALANA, Atomwaffen vor dem Internationalen Gerichtshof, Münster 1997, Page 113ff. (115)

<sup>5</sup> ICJ loc. cit. Tenor E (1)

<sup>6</sup> ICJ loc. cit.

<sup>7</sup> Bernd Hahnfeld, Nuclear Sharing, [www.ialana.de](http://www.ialana.de)

<sup>8</sup> Matthias Küntzel, Bonn und die Bombe, Deutsche Atomwaffenpolitik von Adenauer bis Brandt, Frankfurt/M. 1992, p. 143

<sup>9</sup> Bernd Hahnfeld, Nukleare Teilhabe ist völkerrechtswidrig, W&F 2/2020. p. 46 ff.

<sup>10</sup> BGBl 1985 II p. 927

<sup>11</sup> Wolfgang Graf Vitzthum in Wolfgang Graf Vitzthum, Völkerrecht 4. Auflage, 1. Abschnitt RdNr. 123; von Heinegg loc. cit. § 12 RdNr. 12

<sup>12</sup> Bernd Hahnfeld loc. cit.

<sup>13</sup> Wissenschaftlicher Dienst des Bundestags (WD BT) WD2 – 3000 – 111/20 – Ziff. 2.8. <https://www.bundestag.de/resource/blob/814856/28b27e2d04faabd4a4bc0bfd0579658c/WD-2-111-20-pdf-data.pdf>.

<sup>14</sup> WD BT loc. cit. Ziff. 2.4.1

<sup>15</sup> WD BT loc. cit. Ziff. 2.6.1

<sup>16</sup> WD BT loc. cit. Ziff. 2.8

<sup>17</sup> WD BT loc. cit. Ziff. 3.2

<sup>18</sup> WD BT loc. cit. Ziff. 4

<sup>19</sup> WD BT loc. cit. Ziff. 2.1