

# ICAN SUBMISSION TO SWEDEN'S INQUIRY ON THE TPNW

## Introduction

This submission by the International Campaign to Abolish Nuclear Weapons (ICAN) is made in respect of the report drafted by Lars-Erik Lundin for Sweden's parliament.

ICAN is grateful for the opportunity to correct some of the main misunderstandings and misrepresentations that are contained in Mr Lundin's report. This is intended to help Sweden's parliament to make an informed decision based on an accurate understanding of the content of the United Nations Treaty on the Prohibition of Nuclear Weapons (TPNW) and of ICAN's policy positions. The English translations are unofficial except when the text referred to is included in Mr Lundin's English Executive Summary of his report.

ICAN partners SLMK and WILPF Sweden will be submitting more detailed submissions, which will complement the present paper.

ICAN renews its call to Sweden to sign and ratify the TPNW.

## Key misunderstandings and misrepresentations

### On the prohibition on assistance

Mr Lundin writes on page 122 that "*there have been reasons for choosing a limited interpretation of the ban on assistance. It is also this interpretation that most of the current and future state parties prefer.*" A prohibition on assisting prohibited activities has been included in every disarmament treaty in some form. The text in the TPNW is identical to that included in the 1992 Chemical Weapons Convention (the most widely ratified disarmament treaty, to which 193 states are party)<sup>1</sup> and the 1997 Anti-Personnel Mine Ban Convention (to which 164 states are party).

The provisions on assistance are clearly accepted and understood in international law. The prohibition in the TPNW is no different to that included in the Chemical Weapons Convention and the Anti-Personnel Mine Ban Convention and any suggestion to the contrary demonstrates a basic lack of understanding of international law and the law of treaties. While it is perfectly possible, as a matter of national policy, to *broaden* the prohibition on assistance (an option open to Sweden and any other state that adheres to the relevant treaties), it is not possible to make reservations to *narrow* its scope.

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<sup>1</sup> A total of 197 states may adhere to this treaty and the Anti-Personnel Mine Ban Convention.

## On additional protocols and amendments

Mr Lundin writes on page 86 that: *“There is currently a reluctance to discuss the space created in the TPNW text for further development in the form of additional protocols and amendments.”* With all due respect, this is a bizarre statement to make. In which disarmament treaty which has been recently concluded have the negotiating states begun discussing amendments before the treaty has even entered into force? Indeed, no references are provided in the text to sustain an assertion that this is anything other than normal, appropriate, and predictable.

The additional protocols are intended to enable the facilitation of the adherence and disarmament obligations of a nuclear-armed state to the TPNW. None has so far done so. When that occurs, there will of course be very detailed discussion of the need for a dedicated additional protocol to the treaty.

## Under the heading “ICAN’s view of interpretations”

Mr Lundin writes as follows on page 125 that: *“The view that most state parties will not be affected by the Convention in the future is unlikely to be accepted by many civil society organizations. This, despite the fact that ICAN currently supports the position that most countries, except those cooperating with the nuclear states, are already more or less complying with the convention. At the same time, ICAN and its member organizations are already presenting their own interpretations of the Convention’s prohibition. Examples of this are financing<sup>2</sup> and transit of nuclear weapons, which ICAN believes should be considered prohibited under the Convention, despite the fact that it does not contain any explicit prohibitions in these areas. Here is a quote from an ICAN publication in unofficial translation: ‘The convention also prohibits a state party to directly or indirectly finance the development and manufacture of nuclear weapons. Nor can any state party allow the transit of nuclear weapons through its territorial water, land territory or airspace. All such activities would be a violation of the wording and spirit of the Convention. The fact that the Convention does not explicitly refer to the activities does not in any way mean that they are allowed. The ban is inclusive.’<sup>3</sup> There are probably more examples of how many of the civil society organizations will try to concretize the general prohibition of the convention. There are already publications that monitor compliance with the Convention on the basis of interpretations made by ICAN and its partner organizations. For example, when the concept of assistance has been discussed in other parts of the world, uranium exports to a nuclear weapon state have been mentioned as a possible breach of the new convention’s ban on assistance. Although the uranium when imported is intended for civilian use, it can help to preserve domestic uranium resources that can be used for military purposes. During the investigator’s conversation, several respondents have assumed that this or similar issues may at some point be examined in court.”*

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<sup>2</sup> Footnote in original: “Several state parties have already officially stated that their national interpretation is that funding is prohibited, Casey-Maslen (2019)”

<sup>3</sup> Footnote in original goes to the following link: <http://www.icanw.org/campaign-news/poised-to-outlaw-nuclear-weapons/>.

There are several points to be made here. First, Mr Lundin refers to an aspirational advocacy document on ICAN's website *before the text was settled and the treaty was adopted*.

Second, the financing of nuclear weapons programmes is indeed prohibited under the TPNW. That is the case whether the funding is provided directly or through an intermediary. It is also the clear position under the 1992 Chemical Weapons Convention with respect to the funding of a chemical weapons programme.

Third, transit of a foreign state's nuclear weapons is not prohibited under the TPNW. This is clearly stated in the *Nuclear Weapons Ban Monitor* published by Norwegian People's Aid and ICAN in October 2018. There was much discussion of the possibility to ban transit during the negotiation of the treaty but no agreement was found to incorporate such a provision. If, however, transportation of any nuclear explosive devices amounts to allowing the stationing, installation, or deployment of any nuclear weapons or other nuclear explosive devices in a state party's territory or at any other place under its jurisdiction or control, this is explicitly prohibited under Article 1(1)(g) of the TPNW.

Fourth, exports of uranium to any nuclear-armed state for use in the development or production of nuclear weapon or other nuclear explosive devices are prohibited. Exports of uranium to any source for peaceful purposes are lawful, as long as the safeguards required by the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the TPNW are duly observed. Indeed, a provision in the NPT and a preambular paragraph to the TPNW both emphasise that "nothing in this Treaty shall be interpreted as affecting the inalienable right of its States Parties to develop research, production and use of nuclear energy for peaceful purposes without discrimination". It is simply legally incorrect to claim otherwise. Moreover, citing "conversations" with unnamed individuals and without any supporting evidence should have no place in such an important inquiry.

## On civil society

Mr Lundin refers to the following preambular paragraph in the TPNW:

*Stressing* the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons, and recognizing the efforts to that end undertaken by the United Nations, the International Red Cross and Red Crescent Movement, other international and regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha

Mr Lundin writes on page 194 that: *"The Convention explicitly refers to the importance of civil society work, which can be seen as an implicit recognition of ICAN. This is language that is unlikely to be liked by states that do not allow an active civil society. There are several nuclear weapons states in this group as well as a number of countries that support the Convention."*

Mr Lundin seems to have a personal problem with ICAN for some unknown reason. This preambular paragraph reflects those contained in the preambles to the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions.

Moreover, as it is a preambular paragraph, it contains no substantive obligations upon any state party. It just represents the context of the adoption of the treaty, which involved a very broad range of civil society actors.

## On institutional support

Mr Lundin writes on pages 101 to 102: *“As stated above, the Convention is not supported by a continuously functioning institution with a board that could have the task of dealing with problems when they arise. Nor are there any preparatory committee meetings for the State Party meetings. The task of managing the process is, for the foreseeable future, assigned to the UN Secretary-General with the assistance of very limited resources within the Department of Disarmament Affairs at the UN Secretariat (UNODA) in New York. This places a potentially significant burden on both the State Party meetings and the Secretary General, without regard to whether the future challenges are organizationally and financially feasible. By comparison, the Chemical Weapons Convention contains detailed provisions on the establishment of the Chemical Weapons Banning Organization (OPCW) with an Executive Council and a Technical Secretariat with currently about 400 employees. It has been proposed that the UN Security Council may use its powers to ensure compliance with the new Convention. The Security Council has a much broader mandate than the IAEA. The IAEA mandate includes the military dimension of the nuclear fuel cycle, not the nuclear weapons as such. But it is very unlikely that the P5 countries, which have the decisive influence in the Security Council, agree to cooperate on the basis of a convention that they do not recognize.”*

Several points need to be made here. First, there is no need for a permanent and expensive secretariat for the TPNW. Ad hoc arrangements are perfectly sufficient and suitable.

Second, the fact that no preparatory meetings are foreseen in the Convention does not mean that they will not take place. No such preparatory meetings are foreseen in the NPT, the 1971 Biological Weapons Convention, the Chemical Weapons Convention, the Anti-Personnel Mine Ban Convention, and the Convention on Cluster Munitions, *yet they are held*.

Third, given the existence of the International Atomic Energy Agency (IAEA), there is no need to create another major structure. Indeed, it would be astonishing were negotiating states to have suggested this. Moreover, the IAEA operates on the basis of safeguards, which are required of states parties by both the NPT and the TPNW. Again, building on what already exists is logical, efficient, and entirely appropriate.

## On financing the work

Mr Lundin writes on pages 102 to 103: *“In this context, it should be noted that the costs (Article 9) for meetings and for secretarial services will be divided between what is likely to be a group of state parties with on average limited financial resources. Few large and economically strong countries are likely to join the Convention in the early years. It will take a long time before the convention’s state parties have the financial resources that correspond to more than one or a few tens of percent of the total contribution of the international community to the financing of*

*the UN system. This means that the possibilities for developing the convention will to some extent be dependent on states that choose to formally participate as observers. These are assumed to share the costs of meetings with the state parties. However, the costs of institutional support for the actual disarmament must be borne by the relevant State Parties. During the interviews made during the investigation, these issues have given rise to considerable concern. This has been particularly evident in discussions on the implementation process with institutional representatives of existing organizations and other forums in Vienna and Geneva. Until now, UNODA, as mentioned, appears to be the only UN-related entity empowered to support convention work, even though important supporting work has been done at the UN's Disarmament Research Institute (UNIDIR). It is difficult to estimate the total budgetary need for such an organization. The chemical weapons ban organization had a budget of around EUR 70 million for the year 2015 and the IAEA's regular budget is over EUR 350 million. This illustrates that it will take time before the budget issues are resolved and decisions can be made on the mechanisms that will further support the implementation of the Convention. For the Chemical Weapons Convention, it took several years before the organization got started and worked properly. With regard to the competent international authority for the new convention, work will be even more complicated. There is currently a temporal institutional gap between what is stipulated in the Convention and what is possible to implement."*

Here too several points need to be made. The first pertains to a lack of consistency. Previously, Mr Lundin was arguing that the TPNW was too cheap, now he is claiming it is going to be too expensive. He cannot have it both ways.

In fact, the treaty's institutional and implementation architecture is well designed. It is no more than is required for the task ahead but remains flexible. If an additional protocol is needed, it will be prepared with the state concerned and the competent international authority to be designated by the states parties under Article 4 of the TPNW. The IAEA verified the elimination of South Africa's nuclear weapons programme in the early 1990s, for example, and could do so for other nuclear-armed states.

Panama is the latest state to adhere to the TPNW, bringing the total number of ratifications and accessions to 23 as of writing. The treaty will enter into force 90 days after the fiftieth ratification or accession.