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Policy Brief

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A treaty banning nuclear weapons and its implications for the Netherlands

International support for a new multilateral treaty banning nuclear weapons is increasing. What implications would such a treaty have for the Netherlands? This policy brief describes the legal and political context of such a treaty and examines the implications of two scenarios: one in which the Netherlands will join such a treaty, and one in which it will remain outside such a treaty. Without discussing the feasibility of such a treaty or the advisability for the Netherlands to join or not, it concludes that any decision in this regard will be a political choice rather than a clear-cut best option.

Introduction

In the past few years an increasing number of states have supported the initiative to emphasise the catastrophic humanitarian consequences of any use of nuclear weapons, and to cooperate in preparing a new multilateral treaty aimed at banning nuclear weapons. Because of this increase in support it is not unlikely that in the near future a significant number of states will have successfully negotiated, concluded and adopted such a treaty banning nuclear weapons (TBNW).

This policy brief will examine what implications a TBNW may have for the Netherlands, both in terms of its international relations and within the domestic legal order. It will not address the feasibility of such a treaty in general, nor discuss whether the Netherlands should join it at all. Rather, the aim is to explore the potential implications when such a treaty will be adopted by a significant number of states.

These implications are examined in two specific scenarios: a situation in which the Netherlands joins a TBNW, and a situation in which the Netherlands remains outside a TBNW. This policy brief will start by describing the political and legal context of a TBNW. Next, the two scenarios will be discussed.

Context of a treaty banning nuclear weapons

The 'humanitarian initiative', as it is regularly called, gained momentum in 2010, when the Final Document of the 2010 Non-Proliferation Treaty (NPT) Review Conference for the first time included the phrasing "The Conference expresses its deep concern at the continued risk for humanity represented by the possibility that these weapons could be used and the catastrophic humanitarian

consequences that would result from the use of nuclear weapons."[1]

In 2013 and 2014 three international Conferences on the Humanitarian Impact of Nuclear Weapons were organised by key drivers of the initiative: Norway, Mexico and Austria. An increasing number of states participated in these conferences; in the last one (December 2014 in Austria) 158 States were represented. It should be emphasised, however, that the states which engaged in these conferences have varied aims and views on the anticipated outcomes of the initiative and that participation in the Conferences on the Humanitarian Impact of Nuclear Weapons is separate from formal support for the initiative.[2] Although many of the participating states do not directly support a new treaty banning nuclear weapons, the increasing support may well result in such a treaty in the near future, maybe starting with a limited group of States Parties, but slowly attracting more signatures. For instance, a pledge by Austria "to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons"[3] was supported by 79 states (as of 28 April 2015).[4]

In fact, however, the initiative to emphasise the catastrophic humanitarian consequences of any use of nuclear weapons and, as a consequence, the need to cooperate in preparing a new multilateral treaty aimed at banning nuclear weapons, originates in civil society. Especially from the mid-2000s various civil society actors focused on the humanitarian consequences of the use of nuclear weapons. This meant a shift from the traditional non-proliferation and disarmament emphasis which has dominated the state-level discussions since the Cold War era – especially within the diplomatic frameworks of the NPT and the Conference on Disarmament (CD).

The humanitarian initiative was encouraged by an increasing amount of scientific research, using new computer modelling capabilities and highly specialised technical measurements enabling more reliable forecasts on both the immediate and longer-term implications of the use of nuclear weapons. Apart from the direct victims of nuclear warfare, this research also highlighted consequences for the global environment, including food, water and resources. The scientific reports suggest that even a limited nuclear war would cause, apart from the millions of people directly killed, billions of people to starve from hunger because the resulting climate change would have catastrophic effects on global agriculture.[5] The scientific assertion that any use of nuclear weapons would have catastrophic humanitarian and environmental

1 2010 NPT Review Conference, Final Document, Volume 1 (NPT/CONF.2010/50 (Vol. I)), par. 80, p. 12, <http://www.un.org/en/conf/npt/2010/>.

2 Lukasz Kulesa, *The nuclear weapon ban is inevitable – too bad that it won't bring disarmament*, European Leadership Network, 9 December 2014, <http://www.europeanleadershipnetwork.org/the-nuclear-weapon-ban-is-inevitable--too-bad-that-it-wont-bring-disarmament_2239.html>; Jenny Nielsen & Marianne Hanson, *The European Union and the humanitarian initiative in the 2015 Non-Proliferation Treaty Review Cycle*, EU Non-Proliferation Consortium, Non-Proliferation Papers No. 41, December 2014, pp. 2-4, <http://www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-41>.

3 'Austrian Pledge', <http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Austrian_Pledge.pdf>.

4 'List of states that have pledged to fill the legal gap for the prohibition and elimination of nuclear weapons', <http://www.icanw.org/pledge/>.

5 For example: Alan Robock & Owen Brian Toon, 'Local Nuclear War, Global Suffering', *Scientific American*, January 2010, pp.74-81 <http://climate.envsci.rutgers.edu/pdf/RobockToonSciAmJan2010.pdf>; Ira Helfand, *Nuclear Famine: A Billion People at Risk. Global Impacts of Limited Nuclear War on Agriculture, Food Supplies, and Human Nutrition*, Somerville & Washington: International Physicians for the Prevention of Nuclear War / Physicians for Social Responsibility, 2012 <http://www.psr.org/nuclear-weapons/nuclear-famine-report.pdf>; International Committee of the Red Cross, *Climate effects of nuclear war and implications for global food production*, ICRC Information Note, No. 2, February 2013, <https://www.icrc.org/eng/assets/files/2013/4132-2-nuclear-weapons-global-food-production-2013.pdf>.

consequences that would overwhelm any system designed to mitigate the effects encouraged disarmament advocates to emphasize that the use of nuclear weapons would, by definition, be illegal under international law, regardless of the circumstances. Any purported contribution of nuclear weapons to deterring threats or to strategic stability is essentially rendered irrelevant by this humanitarian approach.

Moreover, frustration concerning a widely perceived lack of progress on nuclear disarmament within existing disarmament negotiating fora contributed to the search for new instruments to increase the speed of disarmament efforts. A growing number of civil society organisations and states began to consider a treaty banning nuclear weapons from a humanitarian perspective as a viable instrument to put more pressure on the nuclear weapon states to work more seriously on steps towards disarmament.

So far, no draft for a TBNW has yet been publicly put forward by any civil society organisation or any state. Most discussions on a potential TBNW envisage a treaty that will supplement the NPT with prohibitions on the use of nuclear weapons.[6]

The drafting and negotiation process of a treaty which aims to codify universal rules involves a balancing act between the sufficient normative strength of a treaty and its viability to attain universality. This policy brief will not speculate on the specific details of a TBNW. However, based on the knowledge of what already exists in international law, considering the literature and sources on current incentives and the proposals of various states to adopt a new treaty, and through the art of deductive reasoning, it becomes possible to sketch the main features and contours of such a treaty.[7]

The current law on nuclear weapons

Currently no international rule exists, by treaty or custom, which explicitly prohibits the *use* of nuclear weapons. The nuclear weapon possessor states have developed national nuclear postures and made unilateral commitments to restrict the use of nuclear weapons to specific situations and conditions. These are, however, national doctrines and they are subject to changes in policy and/or circumstances. Since 1998 an international moratorium on the testing of nuclear weapons has been observed by all states except one.[8] This moratorium will be strengthened when the 1996 Comprehensive Test-Ban Treaty (CTBT) enters into force, since it will then also be legally sanctioned. The treaties on various nuclear-weapon-free zones prohibit and exclude nuclear

6 Tim Caughley, *Analysing effective measures: Options for multilateral nuclear disarmament and implementation of NPT article VI*, ILPI-UNIDIR NPT Review Conference Series, No. 3, April 2015, p. 6, <http://unidir.ilpi.org/wp-content/uploads/2015/04/No-3-Effective-Measures-TC.pdf>.

7 To discipline the exercise further it is presumed that the negotiations on a TBNW would involve three basic principles. (i) "*Politics is the art of the possible, the attainable – the art of the next best.*" This quote is attributed to Bismarck. This maxim also applies to the politics of multilateral treaty negotiations by states which will involve compromises to consolidate the various interests of states affected by such a treaty, either directly or indirectly, politically or economically, and in all other ways State interests may express themselves. (ii) States will not seek to reinvent the wheel, meaning that they will use what is available in their inventory – for this exercise that involves the reuse of concepts, principles and techniques available in other treaties, principally those concerning arms control and disarmament. (ii) States will not duplicate existing treaties in a new treaty. Inevitably, duplication and fragmentation issues arise with the increasing number of treaties. And due to the nature of a TBNW, inherently, some elements of existing treaties may be reused (hence also the first principle). But nevertheless states will in principle avoid the duplication of existing treaties in order to ensure their stable operation. This may raise some questions with regard to the NPT being duplicated by a TBNW. However, that is not necessarily the case as this exercise focusses on a treaty supplementing the NPT.

8 The nuclear explosive tests conducted by the Democratic People's Republic of Korea in 2006, 2009 and 2013.

weapons for specific regions only. For the moment, except for Central Asia,[9] no regions of nuclear-weapon-free zones have been established in the northern hemisphere.

In its advisory opinion of 8 July 2006, the International Court of Justice (ICJ) addressed the question of the legality of the threat or use of nuclear weapons. After careful consideration of the various humanitarian and environmental consequences of the use of nuclear weapons, and observing that "[a] threat or use of nuclear weapons should (…) be compatible with the requirements of the international law applicable in armed conflict", the Court did not definitely conclude on the lawfulness or unlawfulness of the use of nuclear weapons in an extreme circumstance of self-defence in which the very survival of the state is at stake.[10] The only universal legal rule currently existing which explicitly bans nuclear weapons is found in the NPT. This treaty prohibits Non-Nuclear Weapon States to, inter alia, receive, control, manufacture or acquire nuclear weapons or other nuclear explosive devices.[11] The prohibitions of the NPT are limited (excluding *usage*) and fragmented (differentiating between Nuclear Weapon States and Non-Nuclear Weapon States).[12] The reason behind this lies in the fact that the NPT recognises and accommodates Nuclear Weapon States. However, the NPT provides that all States Parties undertake to pursue negotiations in good faith on, inter alia, a treaty on general and complete disarmament under strict and effective international control.[13]

The normative scope of a TBNW

Weapons treaties are characterised principally by two types of normative scope: (i) the restrictions and prohibitions on the use of a weapon (which is the focus of the Law of Armed Conflict / International Humanitarian Law) and (ii) the prohibitions on, *inter alia*, receiving, developing, manufacturing, stockpiling, transferring, acquiring or retaining a weapon or its components, materials or delivery system (which is the focus of Multilateral Arms Control and Disarmament Law). Certain treaties, such as the 1993 Chemical Weapons Convention (CWC), combine both normative scopes (thereby establishing the *comprehensive ban*).

The various initiatives on nuclear disarmament focus either on the NPT disarmament agenda (or rather the perceived lack thereof),[14] on supplementing the NPT with an additional international treaty banning the use of nuclear weapons,[15] or on a comprehensive ban, with[16] or without[17] a destruction and verification regime. This policy brief will assume the last situation, namely: the adoption of a TBNW with a comprehensive ban, prohibiting, inter alia, the development, production, stockpiling, acquisition, retention, transfer and use of nuclear weapons, establishing the so-called comprehensive ban with no provisions on a particular destruction or verification regime.

For a comprehensive ban on nuclear weapons, inspiration may be sought in the nuclear weapon free zone treaties, the 1972 Biological and Toxin Weapons Convention (BTWC)[18] and the CWC.[19] It is likely that

9 Not including the national nuclear-free zone of Austria and the unilaterally established nuclear-weapon-free zone of Mongolia.

10 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, para. 98.

11 Article II of the NPT.

12 Article I and Article II of the NPT.

13 Article VI of the NPT.

14 The 13 Practical Steps under paragraph 15 of the Final Report of the 2000 Review Conference.

15 See the Draft Convention Prohibiting the Use of Nuclear Weapons in UN General Assembly Resolution A/Res/50/71, 12 December 1995.

16 See the Draft on the Model Nuclear Weapons Convention, UN General Assembly Resolution A/C.1/52/7, 17 November 1997. This draft was introduced by Costa Rica and inspired by the CWC.

17 Such as the Initiative on the Humanitarian Impact of Nuclear Weapons.

18 Although the text of the BTWC does not explicitly prohibit the use of biological weapons, States Parties interpret the use of such weapons to constitute a violation of the Convention, see Final Declaration of the 1996 Fourth Review Conference, <http://www.un.org/disarmament/WMD/Bio/Fourth_Review.shtml>.

19 Article 1(a)(b) of the 1967 Treaty of Tlatelolco, Article I of the BTWC and Article I(a) of the CWC.

a TBNW, given its aim, would also prohibit States Parties from allowing the hosting of nuclear weapons (such as by means of allowing the stationing, storing, stockpiling or otherwise emplacement of foreign nuclear weapons within the territory or jurisdiction of States Parties). For this reason it is presumed that the drafters of a TBNW may seek inspiration from the various provisions of the nuclear weapon free zone treaties to exclude any presence of nuclear weapons, domestic or foreign, within the territory or jurisdiction of states which are party to a TBNW.[20] The current international moratorium on the testing of nuclear weapons has rendered Article V of the NPT on the right to peaceful applications of nuclear explosions inoperable. This right is therefore not taken into consideration for this policy brief.[21] Moreover, a TBNW may exclude verification rules on the peaceful uses of nuclear energy and technology as these are already covered by the NPT and IAEA Safeguards.[22] Finally, in order to support nuclear non-proliferation, a TBNW would not only establish obligations for states, but extend this obligation also to natural and legal persons within the state's territory and jurisdiction. The question remains by which means a TBNW would seek to achieve this. The classical approach for this in arms control and disarmament treaties is seen in Article IV of the BTWC and Article VII of the CWC, in which the extension of State obligations to natural and legal persons within its territory and jurisdiction is left to the discretion of States Parties. This is achieved by means of a treaty provision requiring national implementation which focusses on the prohibitive obligations (by means of criminalising certain activities) and sometimes combining certain restrictive obligations (by means of licensing/inspection requirements for activities which are claimed to be conducted for peaceful purposes).

Terms and definitions in a TBNW

For the terminology and the definition of nuclear weapons that can be used in a TBNW, there are two main variations in multilateral treaties: the first variation is found in the NPT and the CTBT; and the second variation is found in the regional nuclear-weapon-free zone treaties. The NPT and the CTBT use the terminology of *nuclear weapons or any other nuclear explosive devices*,[23] thereby covering both weaponised and non-weaponised nuclear explosive devices. These treaties do not provide further definitions of these terms.

The nuclear-weapon-free zone treaties choose a different approach. For example, the 1967 Treaty of Tlatelolco uses the more simple term *nuclear explosive device* and defines it as *any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used. The term includes such a weapon or device in unassembled and partly assembled forms, but does not include the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it*. This formulation has

20 On this matter various formulations exist as found in Article 1(b) of the 1967 Treaty of Tlatelolco; Articles 1(d) and 6 of the 1985 Treaty or Rarotonga; Articles 1(d) and 3(2)(b) of the 1995 Treaty of Bangkok; Articles 1(c) and 3(d)(i)(ii)(iii) of the 2006 Treaty of Semipalatinsk; and Article 4(1)(2) of the 1996 Pelindaba Treaty.

21 Article V of the NPT on the peaceful application of nuclear explosions is rendered inoperable by the international moratorium on the testing of nuclear weapons and will become inapplicable once the CTBT enters into force. This will lead to the situation under either Paragraph 3 or 4 of Article 30 of the Vienna Convention on the Law of Treaties (VCLT), if the paragraphs are indeed of a customary nature. In this regard it is conceivable that a TBNW may include a provision about its relation and compatibility with the CTBT, thereby setting a priority of norms in accordance with Paragraph 2 of Article 30 VCLT and overcoming any fragmentation issues which would result from the Paragraph 4 situation. Such compatibility clauses are also found in Article VIII of the BTWC and Article XIII of the CWC with respect to the 1925 Geneva Protocol.

22 Presuming that States Parties would seek to avoid duplication. Nevertheless, if a TBNW is adopted some future issues on safeguarding the peaceful uses of nuclear energy and technology may arise as the NPT does not compel the NPT Nuclear Weapon States to adopt IAEA Safeguards unless they *voluntarily* enter into an agreement with the IAEA.

23 Articles I, II, III and IX of the NPT and Article I(1)(2) of the CTBT.

been reused in all other regional nuclear–weapon-free zones.[24]

While either formulation may be reused in a TBNW depending on what is diplomatically achievable and politically desired, questions of definition remain – as to what constitutes a nuclear weapon or a nuclear explosive device and, more importantly, when exactly does it cease to be a nuclear weapon or a nuclear explosive device. At this stage the likelihood of nuclear weapon possessor states joining the negotiations and the adoption of a TBNW is deemed low. For the purpose of this policy brief it is rather unnecessary to address the possible details of the steps towards nuclear disarmament.[25] Questions of defining nuclear weapons and nuclear explosive devices can nevertheless be overcome, should the Nuclear Weapon States indeed not take part in negotiating and adopting a TBNW, by excluding the disarmament process from the treaty's scope and by defining only the conditions in which nuclear weapon possessor states can accede to a TBNW. Ultimately, the question of precise definitions is subject to the agreements on multilateral nuclear weapon disarmament and destruction that are yet to be negotiated.[26]

To negotiate or not to negotiate?

The Netherlands, like all NPT States Parties, has an obligation under the NPT to pursue negotiations on nuclear disarmament in good faith.[27] Nevertheless, some observations concerning the *politics* of negotiating a TBNW can be made.

To be involved in the drafting and negotiation process and thereby to retain an option to contribute to and influence the final content of a TBNW may, in political terms, be more rewarding for the Netherlands. This is because the alternative would lead to a situation with only two extreme options: namely to either remain outside a treaty or to accede thereto, should its terms allow this, and therewith to assume all treaty obligations immediately. Thus to negotiate and join a TBNW may provide greater flexibility and a smoother transition to the eventual ratification of a treaty.

With regard to the obligations of a signatory State, should the Netherlands become a TBNW signatory but, for whatever reason, fail to ratify the treaty, the question arises as to what extent the Netherlands would be able to reconcile a TBNW-signatory status with its obligations under the Treaty establishing the North Atlantic Treaty Organisation (NATO) and the bilateral agreement with the United States relating to the NATO nuclear deterrence policy. As a TBNW signatory, the Netherlands would be obligated to refrain from acts that would defeat the object and purpose of the treaty.[28]

The presumed object and purpose of a TBNW would be to indiscriminately and unconditionally prohibit the possession or use of nuclear weapons.[29] Whether a signatory state is defeating a TBNW's object and purpose when there is ambiguity, either in fact or as a policy of that state, remains open for interpretation. Crucial is whether other States Parties would condone any ambiguity in this matter.[30] However,

24 Article 1(b) of the 1967 Treaty of Tlatelolco. The definition is also used in Article 1(c) of the 1985 Treaty of Rarotonga, Article 1(c) of the 1995 Treaty of Bangkok, Article 1(b) of the 2006 Treaty of Semipalatinsk and Article 1(c) of the 1996 Pelindaba Treaty.

25 For ideas about the steps towards multilateral disarmament see for example: Schulz, Perry, Kissinger and Nunn, *A World Free of Nuclear Weapons*, 4 January 2004, The Wall Street Journal; and Schulz, Perry, Kissinger and Nunn, *Next Steps in Reducing Nuclear Risks*, 5 March 2013, The Wall Street Journal.

26 Not taking into account the bilateral nuclear arms control and reduction agreements between the United States and the Soviet Union/the Russian Federation.

27 Article VI of the NPT.

28 Article 18 of the Vienna Convention on the Law of Treaties.

29 Inspired by the preambulatory paragraphs of the Austrian Pledge.

30 For an analogy the following cases may be examined: the continued ambiguity by: Egypt on biological weapons while a signatory to the BTWC; and Israel on chemical weapons while a signatory to the CWC. It is presumed that both States did develop such weapons in the past but remain ambivalent about the current state of affairs. See <http://www.nti.org/country-profiles/egypt/biological/>; and <http://www.nti.org/country-profiles/israel/>.

it is inconceivable how the Netherlands could reconcile the TBNW obligations as a signatory state with its actions arising from its NATO obligations including – in the extreme event of an armed conflict with a hostile nuclear weapon possessor state – the use of foreign nuclear weapons, either actively (with the Royal Netherlands Air Force flying and deploying US nuclear weapons) or passively (by supporting a nuclear weapon strike conducted by a NATO ally).

Scenario 1: When the Netherlands joins a TBNW

This first scenario will investigate what implications could arise if the Netherlands decides to join a TBNW as described above. This requires a scrutiny of the current agreements concerning the NATO nuclear deterrence policy and of what conflicts could arise when such a treaty becomes the law of the Netherlands.[31]

1959 Agreement

NATO's policy of nuclear deterrence was established under the NATO Communiqué of 1957.[32] The 1959 Agreement between the Government of the Kingdom of the Netherlands and the Government of the United States of America for cooperation on the uses of atomic energy for mutual defence purposes (hereinafter the 1959 Agreement) may function as the basis for, if it indeed exists, a policy of hosting nuclear weapons in the Netherlands.[33] The 1959 Agreement was concluded for the purposes of exchanging information (that is necessary for the development of defence plans; the training of personnel and defence against atomic weapons; an evaluation of enemy capabilities; and the development of delivery systems compatible with the atomic weapons which they carry) and the transfer of non-nuclear parts of atomic weapons systems involving restricted data.[34]

The Agreement was discussed in the parliamentary sessions of July 1959, addressing questions on: whether or not the Agreement required explicit parliamentary approval;[35] whether the Agreement had a different financing arrangement than what was agreed in the 1950 Mutual Defense

31 Statements by former officials (such as former Dutch Prime Ministers) and documents which have been leaked on the internet (Wikileaks) may provide details about the hosting of US nuclear weapons in the Netherlands. But as these sources may be questioned as to their validity, authenticity, accuracy or completeness, this brief will examine other sources which have been made publically available by the Netherlands and/or the United States.

32 The Communiqué of December 1957 in which NATO decided, in order to counter the policies of the Soviet Union, "to establish stocks of *nuclear warheads*, which will be *readily available* for the defence of the Alliance in case of need" [emphasis added]. <http://www.nato.int/nato_static/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf>.

33 *Tractatenblad* (Treaty Series of the Netherlands), 1959, no. 52: Overeenkomst tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika tot samenwerking op het gebied van het gebruik van atoomenergie voor de wederzijdse verdediging, 's-Gravenhage, 6 mei 1959.

34 Article II and Article III of the 1957 Agreement.

35 Dutch constitutional law requires parliamentary approval for treaties, but exempts those treaties which are concluded in order to implement provisions of earlier treaties that already enjoy parliamentary consent. The debate addressed the question of whether or not the 1959 Agreement could be interpreted as a treaty implementing the provisions of the 1950 Mutual Defense Agreement. The debate was within the context of the old Constitution, prior to the major constitutional amendment of 1983, and will therefore not be scrutinised further. As the motion to require the Government to seek parliamentary approval for the 1959 Agreement was defeated by 5 votes in favour and 102 votes against, Parliament concurred with the Government's view that the 1953 Agreement implemented the provisions of the 1950 Mutual Defense Agreement. Since the amendments of 1983, Article 91(1) of the Constitution provides that *[t]he Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.* These exceptions are codified in the 1994 Act on the approval and announcement of treaties (1994 Rijkswet goedkeuring en bekendmaking verdragen).

Agreement with the United States (which is the basis for the 1959 Agreement); whether, under the Agreement, command over the use of the armed forces of the Netherlands was de facto relinquished to the United States; and whether the Netherlands was stockpiling nuclear weapons on its territory and, if so, whether it would have discretion over the deployment and use of these weapons. These last points remained unclarified as the then Prime Minister (De Quay) declared his wish to keep the discussion focussed on the issue at hand and not to include the decision under the NATO Communiqué of 1957 unless Parliament would wish to open a new discussion on that particular matter.[36]

No specific additional national codes have been adopted to implement the provisions of the 1959 Agreement. This seems fitting given the contractual nature of the Agreement, aimed at establishing a particular type of defence cooperation between states while not conferring any specific rights or obligations on the subjects of those states. Certain definitions in the 1959 Agreement are subject to the classification policies of the governments involved;[37] while the exact scope of the agreement is ambivalent as it facilitates the transfer of *non-nuclear parts* of atomic weapons systems but leaves the question open as to what is agreed, if at all, on the *nuclear parts* of atomic weapons systems. While Article IV(B) of the Agreement does provide that "there will be no transfer by either Party of *atomic weapons*, non-nuclear parts of atomic weapons, or special materials", its scope is limited by the preceding words "[u]nder this Agreement". Moreover, a broad interpretation of the word *transfer* used in Article IV(B) would contradict Article III, which specifies that, indeed, the transfer of non-nuclear parts of atomic weapons will occur. Therefore Article IV(B) requires a different, but as yet unknown, interpretation of what constitutes a *transfer* under that article. The logical assumption remains that there is another agreement which details the sharing of the nuclear parts of atomic weapons systems and that it is concluded on a policy level. This is based on the fact that Article III of the 1959 Agreement refers to the terms and conditions *to be agreed*; however, the Treaty Series of the Netherlands do not document any other agreement that covers this question.[38] The details of the 1959 Agreement, and atomic cooperation agreements with other NATO allies, were examined at the US Congressional hearings by the Subcommittee on Agreements for Cooperation of the Joint Committee on Atomic Energy, between 11 June and 2 July 1959.[39] During the hearing the US Assistant to the Secretary of Defense for Atomic Energy (Loper) explained that:

> *With respect to these four agreements, the cooperation provided for is an essential part of the implementation of the concept of a stockpile of arms for the strengthening of the North Atlantic Treaty Organization defenses. Further, by carrying out these agreements, the United States will be enabled to cooperate effectively in mutual defense planning with these nations and training of the respective NATO forces in order to attain an effective state of operational readiness in the uses of nuclear weapons in their defense should it become necessary. (…) First: The matter of custody, control, and ownership of weapons*

36 Kamerstukken, Tweede Kamer, 9de vergadering van dinsdag 7 juli 1959, pp. 177-174. <http://www.statengeneraaldigitaal.nl/>.

37 Article X(B)(D) of the 1959 Agreement.

38 The only other reference is found in the 1978 Memorandum of Understanding between the Government of the Kingdom of the Netherlands and the Government of the United States of America Concerning the Principles Governing Mutual Cooperation in the Research and Development, Production and Procurement of Defense Equipment, in which the 1959 Agreement is excluded from the MOU's scope and application.

39 Agreements for cooperation for mutual defense purposes, Hearings before the Subcommittee on Agreements for Cooperation of the Joint Committee on Atomic Energy, Congress of the United States, Eighty-sixth Congress, first session, on the exchange of military information and material with the United Kingdom, France, Canada, the Netherlands, Turkey, Greece, and the Federal Republic of Germany, June 11, 12, 17, July 1 and 2, 1959. Retrieved from the Joint Committee on Atomic Energy Digital Library, Stanford University, <http://collections.stanford.edu/atomicenergy/bin/page?forward=home>.

which may be stockpiled in support of the armed forces of these nations which are committed to the defense of NATO. (…) These stockpiles will be essentially ammunition depots under the full control of the United States. They will contain tactical or air defense atomic weapons suitable for delivery by the trained nuclear capable forces of the countries concerned and will be of such types and in such numbers as will enable those forces to carry out their NATO assigned defensive missions in the event of attack. These agreements do not provide in any way for the transfer of atomic weapons to any nation. Second: What is meant by nonnuclear parts of atomic weapons systems which may be transferred under these agreements? Nonnuclear parts of atomic weapons systems are those accessories for handling the weapons, for attaching weapons to delivery vehicles, and for monitoring and checking out the bomb or warhead to insure that it is in a safe and operating condition prior to actual use. Nonnuclear parts of the systems include the control mechanisms which are parts of aircraft or missile launching devices associated with the warhead; lugs, pylons, and other devices for attaching the missile or bomb to its carrier and the like.[40]

The question is thus what effect a TBNW would have for the 1959 Agreement and which conflicts would arise if the Netherlands would become a State Party to a TBNW. Two types of conflicts could occur: a conflict between the obligations in a bilateral treaty and a multilateral treaty on (partly) the same subject-matter; and a conflict within the national legal order. The former conflict is principally governed by the law of treaties as recognised in customary international law and codified in the Vienna Convention on the Law of Treaties (VCLT). The latter conflict is principally governed by the Constitution of the Netherlands and related jurisprudence.

Conflicting treaty obligations and the law of treaties

Assuming that the Netherlands has ratified or acceded to a TBNW and that this treaty is in force, the following observations are made with respect to conflicting treaty obligations. The VCLT provides rules in the situation of conflicting treaty obligations. Article 30 of the VCLT provides that: "(w)hen the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." When applying Article 30,[41] the first question is whether a TBNW and the 1959 Agreement relate to the *same subject-matter*. As there is no clear consensus on the interpretation of this term and as this brief concerns a hypothetical situation, it becomes

40 Agreements for cooperation for mutual defense purposes, Hearings before the Subcommittee on Agreements for Cooperation of the Joint Committee on Atomic Energy, Congress of the United States, Eighty-sixth Congress, first session, on the exchange of military information and material with the United Kingdom, France, Canada, the Netherlands, Turkey, Greece, and the Federal Republic of Germany, June 11, 12, 17, July 1 and 2, 1959, p. 90.

41 Article 59 covers the situation in which an earlier treaty has been abrogated or its operation entirely suspended if all the parties to it conclude a later treaty; while Article 30 covers the situation where such abrogation or suspension is not the case – meaning that both treaties are in force and in operation – and addresses the priority between the inconsistent obligations. The difference between the provisions is their scope; Article 59 concerns a conflict between treaties as a whole, whereas Article 30 concerns a conflict in which the incompatibility can occur on the level of provisions. The 1959 Agreement was concluded with the United States. In this exercise it is deemed unlikely that the US would agree to a TBNW under the present circumstances. Given this unlikeliness, Article 59 will not be applied.

impossible to ascertain anything conclusive.[42] The second question, if it is concluded that the treaties relate to the same subject-matter, is whether a *conflict* occurs. Articles II and III of the 1959 Agreement provide that the communication/exchange of information and the transfer of non-nuclear parts of atomic weapons systems *will* occur, thereby emphasising the obligatory nature of the provisions. The discretion only concerns *how* the provisions are implemented.[43] A conflict would likely occur between Articles II and III of the 1959 Agreement and what was described about a TBNW, in particular its provision(s) on a comprehensive ban. Paragraph 4(b) of Article 30 of the VCLT provides that: "[a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." Thereby the Netherlands would still be bound to respect and fulfil its obligations under the 1959 Agreement, while being a party to a TBNW. Furthermore, Article XI of the 1959 Agreement provides that the agreement remains in force until it is terminated by an agreement of both Parties or, when the North Atlantic Treaty expires, that either Party may terminate its cooperation under Articles II and III of the Agreement. This would create a situation in which the Netherlands is unable to terminate the 1959 Agreement, unless the US agrees, while also being unable to satisfy the obligations under a TBWN and the 1959 Agreement simultaneously. Thereby it is likely that the Netherlands would fail to meet its obligations under one of the treaties, leading to an opportunity for claims of State responsibility in the non-performance or breach of either treaty.

Conflicting rules within the constitutional order of the Netherlands

The constitutional order of the Netherlands is characterised by limited monism in which rules of international law are directly applicable within the national legal order without an explicit need for prior transposition but with the requirement of publication.[44] The question is whether these rules of international law enjoy primacy when they are in conflict with domestic law. Article 93 of the Constitution draws a distinction between *provisions of treaties or of resolutions by international institutions that are binding on all persons*[45] and provisions that are not binding on all persons.[46] In accordance with Article 94 of the Constitution only the former types of treaty provisions have primacy over domestic statutory law. The 1959 Agreement has not been transposed as statutory law, thereby any possibility for the primacy of a treaty provision, within the meaning of Article 93, over the 1959 Agreement is extinguished. Nevertheless, Article 93 of the Constitution may warrant a closer examination considering its central function in arranging the primacy of international rules over domestic rules.

The following observations can be made about the interpretation and application of Article 93. The article concerns the application of specific treaty *provisions*

42 For example, Sinclair, who followed the negotiations, favours a strict interpretation of the term "same subject-matter" whereas the International Law Commission provides a broader interpretation. See Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, Second Edition, 1984, p. 98; and *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Geneva, A CN.4/L.682, 13 April 2006, pp. 129-131, <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>.

43 With the use of the terms "as is jointly determined" in Article II and "subject to terms and conditions to be agreed" in Article III.

44 See Besselink, Internationaal recht en nationaal recht, pp. 17-18, in: Horbach, Lefeber, Ribbelink (eds.), *Handboek Internationaal Recht*, Asser Press, 2007.

45 Article 93 of The Constitution of the Netherlands reads "[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

46 This brief will only address *provisions of treaties* that are binding on all persons and will not cover *resolutions by international institutions* that are binding on all persons.

and, as a result of this, a treaty can contain provisions which are both binding and non-binding within the meaning of Article 59 of the Constitution.[47] The judiciary enjoys the final discretion to decide on whether or not a treaty provision is binding on all persons.[48] A treaty provision does not require a State's natural and legal persons to be *explicitly* addressed in order to achieve an effect which is binding on all persons.[49] In terms of interpretation the Dutch Supreme Court prioritises the substance of a provision over the intention of the drafters of the provisions, especially when the latter is unclear or inconclusive.[50] Thus the guiding formula to determine the existence of a provision which is binding on all persons includes (a) whether the provision recognises obligations or rights to the litigating parties; and (b) whether these obligations or rights are unconditional and sufficiently precise to be applied by a judge.[51] Thereby treaty provisions which are "binding on all persons" can be interpreted as provisions which are "self-executing" or have "direct effect" – meaning that there is no discretion for the state in the application of the provision which confers specific rights and/or obligations on persons.[52]

Taking these observations into consideration, the provisions of a TBNW addressing states exclusively should not, ipso facto, bar such provisions from being interpreted as binding on all persons within the meaning of Article 93 of the Constitution. Nevertheless, while neither Article 93 nor jurisprudence exclude the application of the provision for specific treaties, it is observed that most cases concerning Article 93 involve claims against the provisions of human rights treaties which aim to guarantee certain rights for all persons. Moreover, in one of the few cases concerning the claim for the direct effect of provisions in a treaty concerning international security, namely Articles 2(4),

47 For example, Article 7 of the Convention on Elimination of Discrimination Against Women (CEDAW) is interpreted as binding on all persons (*Hoger beroep van de SGP*, Judgment of the Council of State, Administrative Jurisdiction Division (Raad van State, Afdeling Bestuursrechtspraak), 5 December 2007, ECLI:NL:RVS:2007:BB9493; and *De Staat der Nederlanden tegen Stichting Proefprocessenfonds Clara Wichmann e.a.*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 9 April 2010, ECLI:NL:HR:2010:BK4547) while Article 11(2)(b) of the CEDAW has been interpreted as not binding on all persons (*Stichting Proefprocessenfonds Clara Wichmann e.a. tegen de Staat der Nederlanden en de SGP*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 1 April 2011, ECLI:NL:HR:2011:BP3044). For a further examination of this subject, see Vlemminx and Meuwese, Commentaar op artikel 94 van de grondwet, in: E.M.H. Hirsch Ballin en G. Leenknegt (red.), *Artikelsgewijs commentaar op de Grondwet*, webeditie 2014, <http://www.nederlandrechtsstaat.nl/module/nlrs/script/viewer.asp?soort=commentaar&artikel=94>.

48 *Stichting Proefprocessenfonds Clara Wichmann e.a. tegen de Staat der Nederlanden en de SGP*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 1 April 2011, ECLI:NL:HR:2011:BP3044, para. 3.5.

49 Jurisprudence reveals that Article 33 of the Convention relating to the Status of Refugees and Article 26 of the International Covenant on Civil and Political Rights, the former addressing specifically the Contracting States and the latter to be read as addressing States, have been interpreted as provisions which are "binding on all persons".

50 *NV Nederlandse Spoorwegen tegen Vervoersbond FNV e.a.*, 30 May 1986, NJ 1986, no. 688, para. 3.2. Translated it reads "For the question whether a provision is binding on all persons, the intention of the treaty drafters is not indispensable when neither the text nor the treaty negotiations reveal any intent, by the treaty drafters, to exclude to that provision a binding effect on all persons. Thereby the substance of a treaty provision will suffice in deciding whether this requires the legislator to arrange an implementing code or whether the provision is of such a nature that it can function within the national legal order without additional acts." The case involved the question whether Article 6(4) of the European Social Charter could be interpreted as a provision within the meaning of Article 93 of the Constitution.

51 *Stichting Proefprocessenfonds Clara Wichmann e.a. tegen de Staat der Nederlanden en de SGP*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 1 April 2011, ECLI:NL:HR:2011:BP3044, para. 3.5.

52 Besselink, *supra* note 44, pp. 16-17.

42 and 51 of the UN Charter, the Dutch Supreme Court denied that the provisions in question should be interpreted as binding on all persons.[53]

Some of the obligations in the BTWC and CWC on non-proliferation were transposed into the Dutch legal order by incorporating criminal provisions prohibiting certain activities and by amending existing provisions in the domestic legal order.[54] If this approach is also adopted in a TBNW, its related provision on extending State Party obligations to its subjects by means of national implementation would not, by providing discretion on how to implement the provision, be sufficiently precise to be binding on all persons within the meaning of Article 93 of the Dutch Constitution.

Implications for Dutch foreign relations

The Netherlands is a State Party to all other multilateral disarmament and arms control treaties, from which perspective signing and ratifying a TBNW would not be a very surprising decision. However, the foreign policy implications of joining a TBNW could be quite significant.

The implications of becoming a State Party to a TBNW would especially depend on which other states join the treaty as well. An important factor in this scenario is that the Netherlands is a member state of the European Union (EU) and the NATO, both organisations in which some member states possess nuclear weapons. The Dutch relationship with these allies may deteriorate if the Netherlands would explicitly take this anti-nuclear weapons stance. Obviously, the more other EU and NATO member states sign a TBNW, the fewer implications it will have for the Netherlands itself, because the Netherlands would be part of a larger group instead of acting unilaterally.

Being a NATO member state would bring some specific problems if the Netherlands would become a State Party to a TBNW. As long as NATO is basing its deterrence capabilities upon a mix of conventional and nuclear weapons the new treaty and NATO membership would appear to contradict each other. One could argue, however, that membership of the new treaty would contribute to the ongoing debate within NATO on the necessity of nuclear weapons reliance. Moreover, becoming a state Party to a TBNW would not directly violate any of the Dutch NATO commitments. The 2010 Strategic Concept of the NATO stated that "[n]ational decisions regarding arms control and disarmament may have an impact on the security of all alliance members. We are committed to maintain, and develop as necessary, appropriate consultations among Allies on these issues."[55] NATO thus reaffirmed that each member state can make disarmament and arms control decisions based on its national priorities and that there is room within the alliance for national discretion and various different positions. NATO member states have always reserved the right to adopt independent national policies on nuclear weapons. Some member states like Denmark, Norway, and Spain do not allow the deployment of nuclear weapons on their territory in peacetime. Iceland and Lithuania do not allow nuclear weapons to be deployed on their soil without any distinction between a time of war and peacetime.[56]

53 *Vereniging van Juristen voor de Vrede e.a. tegen de Staat der Nederlanden*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 6 February 2004, ECLI:NL:HR:2004:AN8071, para. 3.2.

54 *Uitvoeringswet verdrag biologische wapens*, 1981 (last amended in 2010); and *Uitvoeringswet verdrag chemische wapens*, 1995 (last amended in 2014), <http://wetten.overheid.nl/zoeken/>.

55 *Active Engagement, Modern Defence: A Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation*, NATO, 2010, p. 25, <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf>.

56 Stein-Ivar Lothe Eide, *A Ban on Nuclear Weapons: What's in it for NATO?*, International Law and Policy Institute (ILPI), Nuclear Weapons Project Policy Brief No. 5, January 2014 <http://nwp.ilpi.org/wp-content/uploads/2014/02/PP_05-14_NATO-and-a-BAN-WEB.pdf>.

Even apart from the Dutch NATO membership, it should be noted that the Netherlands is traditionally a close ally of the United States and the United Kingdom. The relationship with these nuclear weapons states may be damaged to a certain degree by signing the new treaty, although it is difficult to predict to what extent – this is again dependent on which other states join the treaty as well.

While the relations with traditional allies may deteriorate, the Dutch 'reputation' may increase to some extent among the other member states of the new treaty, being in the same group so to say. Whether the importance of these states in terms of foreign policy is equal to that of the US and UK could of course be questioned, but this is above all a political choice.

Moreover, it is conceivable that becoming a State Party to a TBNW will have a negative impact on the Dutch position in other multilateral disarmament and arms control fora. The Dutch role in these fora is mostly that of a more or less neutral intermediary, having a good relationship with both nuclear weapons states as well as with fierce opponents of these weapons. By alienating itself from the nuclear weapons states, especially the US and the UK, this role of a 'broker' may be negatively influenced. If the Netherlands is no longer considered to be a reliable, somewhat neutral ally by the US and UK, it may lose influence on the arms control and disarmament debates in which these states are involved. Even among non-nuclear weapons states, which may be pleased with the Dutch decision to become a State Party to a TBNW, the Netherlands may lose influence when they consider the Netherlands to be a less important player because it has less involvement with the nuclear weapons states.

It is conceivable that becoming a State Party to the new treaty will damage the Dutch influence within the NPT process. Some states, not least the five nuclear weapons states within the NPT framework, emphasise the need of a cautious step-by-step approach to nuclear disarmament, which can only be done when all nuclear weapons possessor states are participating in the process. Even though four of the current nine nuclear weapons states are not a State Party to the NPT, the NPT process is the most inclusive one so far.[57] While acknowledging that already for decades the disarmament negotiations within the NPT process have hardly shown any progress, damaging the engagement between nuclear weapon states and non-nuclear weapon states within these negotiations could be harmful to the multilateral arms control and disarmament system in general, and as such also for the active proponents thereof like the Netherlands.[58]

On the other hand, changing the equilibrium is exactly what the new treaty aims at; ending the status quo situation and making more efforts to stigmatise the possession of nuclear weapons and thus push for nuclear disarmament. Even more, one could argue that a TBNW could coexist with and/or supplement the NPT process when it would be seen as a layered approach to enhance progress on the disarmament pillar of the NPT, similar to other initiatives parallel to the non-proliferation pillar like UN Security Council Resolution 1540, the Proliferation Security Initiative, or the Nuclear Security Summit process.[59] Initiatives like the various Nuclear Weapon Free Zones exist parallel to the NPT as well without any serious problems. Becoming a State Party to a TBNW does not automatically imply losing influence in the NPT process, but it is a risk that, again, depends on which states, including other EU

57 John Borrie & Tim Caughley, *After Oslo: Humanitarian perspectives and the changing nuclear weapons discourse*, United Nations Institute for Disarmament Research (UNIDIR), Humanitarian Impact of Nuclear Weapons Project, Paper No. 3, 2013, p. 3, <http://www.unidir.org/files/publications/pdfs/after-oslo-en-469.pdf>.

58 Lukasz Kulesa, *The nuclear weapon ban is inevitable – too bad that it won't bring disarmament*, European Leadership Network, 9 December 2014, <http://www.europeanleadershipnetwork.org/the-nuclear-weapon-ban-is-inevitable--too-bad-that-it-wont-bring-disarmament_2239.html>

59 Borrie & Caughley, After Oslo, pp. 8-9. On arguments for and against from a disarmament movement perspective: Wilbert van der Zeijden & Susi Snyder, *Doubting a Ban*, PAX, May 2014, <www.nonukes.nl/media/files/nato-paperfinal.pdf>.

and NATO member states, are joining the new treaty as well.

Implications for nuclear weapons sharing

If, in this scenario, the Netherlands becomes a State Party to a TBNW, the Dutch government would face a problem which very few other states would be faced with: what should be done with the US nuclear weapons that are widely presumed to be stored in the Netherlands under an ambiguous (never officially acknowledged or denied) nuclear weapons sharing agreement?[60] A ban on nuclear weapons – including their possession – would put an end to any current claim that nuclear sharing is permissible under existing multilateral treaties like the NPT. Two policy choices can be made: continuing or ending the storage of the nuclear weapons on Dutch soil.

If the Netherlands decides to continue storing the nuclear weapons, it would be violating a TBNW from the moment it becomes a State Party – although none of the governments involved in the nuclear weapons sharing agreement ever officially acknowledged that there are nuclear weapons stored in the Netherlands. As long as the other member states of the treaty are convinced that the Netherlands is hosting nuclear weapons, the Netherlands may well be blamed of inconsistency in policy, which may negatively affect Dutch credibility in the international political arena in general.

Ending the storage of nuclear weapons on Dutch soil is the most logical step when a TBNW would be signed. This decision would require close cooperation with the US, the owner of the nuclear weapons, and the other member states of NATO. Whether the weapons are transferred to the US or to other NATO member states is difficult to predict. What impact it will have on Dutch relations with the US and other NATO allies is hard to envisage as well. One could argue that hosting the nuclear weapons provides the Netherlands with additional status within NATO and with the US, as well as a way of demonstrating a commitment to the alliance.[61] This potentially perceived status will be lost. Although it is difficult to imagine that the withdrawal of the estimated 20 or 22 old-fashioned B61 gravity bombs will seriously damage the Dutch alliance with the US in the longer term, in the short term the US and some other NATO member states may dislike the decision, especially with regard to the current tense situation in the eastern neighbourhood of the alliance.

An important variable regarding any Dutch decision on the nuclear weapons sharing agreement is what the other few states with similar agreements will decide. Belgium, Germany, Italy and Turkey are also presumed to be storing US-owned nuclear weapons on their soil under a similar agreement.[62] If the Netherlands is acting on its own the implications might be different from when (a group of) these states would cooperate and come to a joint decision. If the Netherlands decides to keep the nuclear weapons while (most of) the other states decide to get rid of them, or vice versa, the Netherlands would get more attention – both positive and negative – from the proponents and opponents of nuclear weapons sharing agreements. What implications this attention would have for Dutch foreign policy is again difficult to predict, although in any case one may assume that the long-term effects will be rather limited.

Yet, if the Dutch decision to end the storage of US nuclear weapons coincides with similar decisions by other NATO nuclear weapons sharing states, it is conceivable that it will create some unrest among other

60 Hans M. Kristensen & Robert S. Norris, 'Nonstrategic nuclear weapons, 2012', *Bulletin of the Atomic Scientists*, Vol. 68 (2012), No. 5, pp. 96–104, see p. 100, <http://bos.sagepub.com/content/68/5/96.full.pdf+html>.

61 Simon Lunn, 'The role and place of tactical nuclear weapons. A NATO perspective', in: Tom Nichols, Douglas Stuart, and Jeffrey D. McCausland (eds.), *Tactical Nuclear Weapons and NATO*, Strategic Studies Institute, U.S. Army War College, 2012, pp. 235-256, see p. 250, <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1103>.

62 Kristensen & Norris, 'Nonstrategic nuclear weapons, 2012', p. 100.

NATO members who deem NATO's nuclear weapons policy to be essential for the Article 5 collective defence commitment of the alliance. Theoretically, this potential unrest could be resolved by transferring the nuclear weapons from the Netherlands (and other states) to the NATO countries that consider it essential to keep them stored in Europe. However, these are generally the states close to Russia, and transporting NATO nuclear weapons closer to Russia's borders might lead to increasing tensions with Russia – at least, it will not be helpful in stabilizing NATO-Russia relations. From that perspective, a Dutch decision might even have security implications for the complete NATO territory. Nevertheless, in practice one might expect that the owner of the nuclear weapons, the US, will not risk this kind of precarious decisions in response to a Dutch request to end the nuclear weapons sharing agreement.

Scenario 2: When the Netherlands remains outside a TBNW

The first observation in this scenario is that the provisions of a TBNW will have no legal effect within the Netherlands during the period when the Netherlands does not join the treaty. The question remains whether the Netherlands *should* join a TBNW when it has been adopted by the international community. Article 90 of the Dutch Constitution provides that "[t]he Government shall promote the development of the international legal order." This creates an opportunity to scrutinise the compatibility of Government acts with the rules of international law.[63] The pertinent question, however, is what constitutes the promotion of the development of the international legal order.

It has been argued that Article 90 is more about *what the law should be* than *what the current law is*, thereby creating a conundrum for domestic courts in reviewing the matter at hand.[64] Moreover, its functional value in the legal discourse is limited as the Dutch legal tradition does not facilitate a constitutional review.[65] Nevertheless, it is observed that Article 90 does provide a starting point for public debate in the Netherlands on matters concerning international law and international society and the role and actions of the Netherlands in this subject.[66]

Customary international law and the domestic legal order

A TBNW would, during the time when the Netherlands has not joined, remain foreign law without legal effect within the domestic legal order.[67] Consequences may arise, however, if rules of customary international law (CIL) are formed on the basis of the rules adopted under a TBNW, whereby the question then arises: (i) whether the TBNW rules could acquire a customary status and (ii) whether these can be invoked before a Dutch court of law. With respect to the first question it is observed that the formation of CIL rules does have to meet strenuous criteria. In theory any conventional rule could, so far as it is not already a codification of an existing CIL, acquire a customary status. However, treaties do not always affect the interests of all states equally and, sometimes, these differences may be such that the non-participation of states that are especially affected may obstruct a treaty

63 Besselink, *The constitutional duty to promote the development of the international legal order: the significance and meaning of Article 90 of the Netherlands constitution*, Netherlands Yearbook of International Law, December 2003, vol. 34, p. 130.

64 Besselink, *supra* note 63, p. 130.

65 Article 120 of The Constitution of the Netherlands. In this regard the Article would not provide a legal basis for a claim that the government of the Netherlands has failed, when a situation arises where the Netherlands has not joined a TBNW, to promote the development of the international legal order.

66 Besselink, *supra* note 63, p. 101.

67 A distinction should be drawn between the situation in which a treaty has yet to enter into force and the situation in which a treaty has already entered into force. For the sake of brevity and as it is the far more interesting scenario, this brief addresses only the latter situation.

rule from acquiring a customary status. This follows from the North Sea Continental Shelf Case in which one of the parties claimed that Article 6 of the Geneva Convention on the Continental Shelf had acquired a customary status and where the ICJ stated that:

> *With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*[68]

In view of this judgment the formation of new CIL rules based on a TBNW is unlikely to occur without the participation of states whose interests are especially affected, namely those that are currently bound by a policy of nuclear deterrence. However, entertaining for a moment that a situation has arisen in which a TBNW leads to the forming of new CIL rules, the question remains what role these CIL rules would have in a Dutch court of law.[69] The Dutch legal system is characterised by limited monism in which rules of customary international law are applicable in domestic cases.[70] However, where a conflict occurs between municipal law and rules of customary international law, the former will enjoy primacy over the latter.[71] Thus any CIL rule based on a TBNW could be applied in a domestic case, but it will not enjoy primacy over domestic law nor over the treaty obligations of the Netherlands.

A domestic case addressing the legality of nuclear weapons

In a domestic case from nearly two decades ago, a claim was brought by a group called the Dutch Association of Lawyers Supporting Peace against the State of the Netherlands to challenge the legality of the threat or use of nuclear weapons. The reasoning of the Dutch courts provides some insight into how the judiciary views the issue of addressing the subject while the Netherlands is not bound by specific conventional rules. In this case, in view of (a danger of) a wrongful act by the State of the Netherlands, the plaintiffs brought suit requesting the Dutch courts to determine and declare the unlawfulness of: any Dutch cooperation in the use of nuclear weapons; making Dutch delivery systems available for the actual use of nuclear weapons; conducting nuclear bombardments, delivered

68 *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, I.C.J. Reports 1996, para. 74.

69 It should be noted that even in this scenario the Netherlands could, as a persistent/subsequent objector, resist a customary rule from becoming applicable as against the Netherlands.

70 As can be read in the case *De Democratische Republiek Oost-Timor/'Fretilin' e.a. tegen de Staat der Nederlanden*, District Court of The Hague, 21 February 1980. In this case the Court applied rules of customary international law on statehood (as partially codified in the Montevideo Convention) to determine whether the facts support the existence of a State of East Timor which the claimant asserted to represent.

71 Article 94 of The Constitution of the Netherlands.

by Dutch F16 fighter aircraft or by other means with an equivalent nuclear yield; any form of Dutch cooperation in or agreement with the deployment of strategic nuclear weapons against populated areas; ordering members of the armed forces, professional or conscript, to perform acts involving, directly or indirectly, the use of nuclear weapons; and, alternatively, the first use of nuclear weapons.[72]

The case reached the Supreme Court which issued a judgment in 2001. The Court did not address the merits of the case but limited its scrutiny to examining the admissibility of the questions and the legal interest of the plaintiffs.[73] The Supreme Court took into consideration the elaborations of the Court of Appeal in the appeals judgment. These included the Court's emphasis that it cannot determine the unlawfulness of future acts and order the cessation of present acts if the questions are not described sufficiently precisely, as a result of which the plaintiffs lacked sufficient legal interest and the claim was declared inadmissible.[74]

The Court of Appeal furthermore noted that the claims concerned the policy of the State on matters of foreign relations and defence. And that, therefore, the judiciary has to be reserved in judging claims, as presented in the case, which are aimed at determining the unlawfulness and illegality of future acts that are subject to political decision-making in the areas of foreign relations and defence. The Court, moreover, emphasised the separation of powers and the need to respect sufficient discretion for the responsible State organs to exercise that political decision-making.[75]

The Supreme Court agreed with the Court of Appeal and denied the admissibility of the claims and the legal interest of the plaintiffs. The Supreme Court emphasised that the Court cannot, prima facie, determine the lawfulness or unlawfulness of the use of nuclear weapons in an extreme situation of self-defence; but that this would depend on the particular circumstances of the situation. However, the present claims were deemed to be not sufficiently precise. An attempt by the plaintiffs to present a hypothetical situation in which nuclear weapons with a large yield are used against a densely populated area in Europe did not make their interest and the situation sufficiently concrete for further judgment.[76]

Implications for Dutch foreign relations

The implications for Dutch foreign policy of a decision to remain outside a TBNW mostly depend, once again, on which states decide to join the treaty. If it is only a rather small group of states, the implications of 'staying out' will be less than when a TBNW attracts many more member states. In both cases, not signing and ratifying a TBNW may result in earning as well as losing 'political currency'. As described above, this policy brief is written from the assumption that a TBNW will be joined by a significant number of states, but by none of the current nuclear weapons states. This implies that the Dutch position towards these nuclear weapons states – especially the traditional military ally, the United States – will not significantly change.

If other important partner states, for example fellow member states of the EU and/or NATO, become a State Party to a TBNW the Netherlands may become relatively more isolated. Currently, however, the support for the new treaty among EU and NATO member states is relatively modest; although many of them attended the three Conferences on the Humanitarian Impact of Nuclear Weapons, few of them supported various joint statements on the humanitarian consequences of nuclear weapons within the United Nations General Assembly or in NPT

72 *Vereniging van Juristen voor de Vrede e.a. tegen de Staat der Nederlanden*, Judgment of the Supreme Court of the Netherlands (Hoge Raad), 21 December 2001, ECLI:NL:HR:2001:ZC3693.
73 *Idem*, para. 3.3.
74 *Idem*, para. 3.3 (C).
75 *Ibid.*
76 *Idem*, para. 3.7.

meetings.[77] The Austrian pledge "to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons", which may currently be the best indicator of which states eventually plan to join a TBNW, was only signed by four EU member states (Austria, Cyprus, Ireland, and Malta) and no NATO member states (the situation as of 28 April 2015).[78]

Not signing and ratifying a TBNW will have implications for the Dutch position in international disarmament and arms control policies. The Netherlands is a party to all other multilateral disarmament and arms control treaties, and from this perspective a decision to remain outside this new treaty would be a surprising choice. However, it could be argued that a decision to stay outside a TBNW could be more beneficial to the active role which the Netherlands traditionally plays in disarmament dialogues. As described above, the Dutch importance in nuclear non-proliferation and disarmament fora is mostly that of an effective intermediary because of its good relationship with both nuclear weapons states and non-nuclear weapons states. By alienating itself from the nuclear weapons states, especially the US and the UK, this role of a 'broker' may be negatively influenced. If the US and the UK no longer regard the Netherlands as a reliable, like-minded ally with regard to nuclear weapons disarmament processes, it may lose influence on the arms control and disarmament debates in which these states are involved.

On the other hand, if the Netherlands would stay outside a TBNW, non-nuclear weapons states may consider the Netherlands to be a less reliable broker as well, preaching to be anti-nuclear weapons but not willing to sign a treaty banning them. Which side of the balance is preferred: losing influence among the group of states that will join a TBNW or among the states that will not join, is ultimately a political choice. The number of states in each group is certainly not the only variable in this choice, but also the Dutch relationship with certain key states in these groups.

Within the context of the NPT, the Netherlands could be accused by other States Parties of not being compliant with the letter or the spirit of this treaty. Specifically with respect to the obligation under Article VI of the NPT "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control".[79] The potential accusation of inconsistency – that the Netherlands claims to support nuclear disarmament while not taking steps towards that goal by joining a TBNW – is not very different (though maybe more exposed) from any current questions about how it can reconcile its NPT obligations with the bilateral agreements with the US on the transfer of non-nuclear parts of atomic weapons systems and the presumed stationing of US nuclear parts of atomic weapons systems. In practice this issue does not have serious implications for Dutch foreign policy either.

Except for the impact on the Dutch position in international disarmament and arms control policies, little implications are to be expected when the Netherlands would not join a TBNW. As long as most other EU and NATO members will not join a TBNW either, it is hard to imagine that international pressure will mount to the extent that it will have a negative impact on vital foreign policy issues beyond potential repercussions for

77 For an analysis of EU member states' engagement in the humanitarian initiative, see: Jenny Nielsen & Marianne Hanson, *The European Union and the humanitarian initiative in the 2015 Non-Proliferation Treaty Review Cycle*, EU Non-Proliferation Consortium, Non-Proliferation Papers No. 41, December 2014, pp. 5-6, <http://www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-41>.

78 'List of states that have pledged to fill the legal gap for the prohibition and elimination of nuclear weapons', <http://www.icanw.org/pledge/>.

79 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml>.

its diplomatic campaigns (like the Dutch campaign for a non-permanent seat on the UN Security Council).

Conclusion

This policy brief examined what a potential new multilateral treaty on banning nuclear weapons would imply for the Netherlands, both from a domestic legal and a foreign policy perspective.

Historically, it is rare if not unprecedented for the Netherlands not to be involved in the drafting and negotiation of a multilateral treaty on international arms control and disarmament.

Within the domestic legal order, joining or not joining a TBNW may provide some opportunity for further debate on the Netherlands' position on NATO's nuclear deterrence policy, the related agreements it has entered into with the United States to implement this deterrence, and the continued policy of ambivalence by the Dutch government on this issue. However, the opportunity to change Dutch policy by means of legal proceedings may prove to be slim when taking into consideration the provisions of the Dutch Constitution, its legal tradition, the jurisprudence relating to the primacy of international rules, and the comments of scholars on these matters.

The implications of joining or remaining outside a TBNW for Dutch foreign policy are difficult to forecast. Much depends on what decisions other states, especially other EU and NATO member states, will make. In any scenario, however, both positive and negative implications can be envisaged. The Dutch reputation may increase among the states which make the same policy decision, while it may decrease among the other group of states. The relatively strong position of the Netherlands in multilateral arms control and disarmament negotiations fora, such as the NPT, may be harmed by any of the two decision options. The Dutch reputation is based, apart from decades of hard diplomatic work, on the good relationship the Netherlands has with both nuclear weapon states and non-nuclear weapon states. If the choice between signing and ratifying a TBNW really has to be made, the relationship with these two groups will always become strained to some extent: joining a TBNW could deteriorate the good relationship with nuclear weapons states – especially the important Dutch ally, the US – while not joining a TBNW could alienate the Netherlands from the non-nuclear weapons states that join the treaty. In both cases the Dutch position as a somewhat 'neutral' broker with good relations among various groups will be damaged.

An extra complication for the Netherlands is that it is one of the few states in the world presumed to store nuclear weapons owned by another state (the US) on its soil, which the Netherlands neither denies nor confirms. The Netherlands could decide to join a TBNW while continuing this practice. This would, however, damage the international credibility of the Netherlands and it remains a question to which extent other TBNW States Parties would tolerate such a situation. On the other hand, ending such ambiguity and the presumed storing of nuclear weapons may cause difficulties in fulfilling NATO obligations, and may lead to political tensions with NATO allies.

While considering the implications of choosing between joining a TBNW or not, it can only be emphasized that none of the choices will bring only positive or negative consequences. A choice as described in this policy brief will always be a political choice, rather than a clear-cut best option. It will depend on the leeway the Netherlands enjoys to either continue or alter earlier decisions when being confronted with new realities, and how skilfully it manages to rebalance its interests and values and attune them to these new realties.

About Clingendael

Clingendael is the Netherlands Institute of International Relations. We operate as a think-tank, as well as a diplomatic academy, and always maintain a strong international perspective. Our objective is to explore the continuously changing global environment in order to identify and analyse emerging political and social developments for the benefit of government and the general public.

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