

Reaction of the Dutch Government to the motion Voordewind about nuclear disarmament and non-proliferation 30-01-2019

The government is, in conformity with the coalition agreement, within the framework of NATO-obligations, committed to a world without nuclear weapons given the great risks of proliferation of these weapons, based on the guidelines set out in the letter to the Parliament regarding the Dutch effort for nuclear disarmament of 21 June (document 33 694 nr 20) and the activities as described in that letter. This also includes, as requested in the motion Ploemen et al. of 20 November 2018 (document 33 694, no. 33), an international dialogue with the nuclear powers about a comprehensive and verifiable elimination of nuclear weapons in accordance with Article 6 of the NPT. This dialogue includes new initiatives for the creation of international conditions favorable to nuclear disarmament, and the reduction of the risks of the use of nuclear weapons.

The motion Voordewind of 15 November 2018 (document 33 694, no. 31) calls on the government to work on increasing the support base for the Treaty on the Prohibition of Nuclear Weapons among NATO members and to conduct a legal analysis of the compatibility of existing national legislation with the UN-treaty and to inform the parliament about which parts of the legislation are in conformity with the treaty and where changes to national legislation would be necessary. This letter contains the government's reaction to this motion.

The legal analysis led to the following comments.

Legal analysis:

Compatibility with NATO-obligations:

The Treaty on the Prohibition of Nuclear Weapons contains several components which are not compatible with obligations arising from Dutch NATO membership and the principles of the Deterrence and Defense Posture Review (DDPR), including the notion that NATO remains a nuclear alliance as long as nuclear weapons exist. An extensive explanation was already shared with your chamber (document 22 783, nr.26).

Compatibility with Dutch national legislation:

In the Netherlands international law is part of the Dutch legal system. As far as the execution of obligations under international treaties is possible within existing legislation and regulations and can be fulfilled without intervention of national institutions, no specific action is required

Regarding the implementation of obligations under the Treaty on the Prohibition of Nuclear Weapons the estimation is that no specific Dutch legislation exists that precludes the obligations of the treaty and for that reason would require adjustments.

However, the Treaty on the Prohibition of Nuclear Weapons does include a number of specific provisions that cannot be implemented in the Netherlands without further implementation legislation. This concerns especially article 5, paragraph 2, of the treaty, that requires parties to take all appropriate legal, administrative and other measures, including the drafting of penal legislation, to prevent and counter activities prohibited under the treaty by persons or on the territory under the jurisdiction or control of the state party.

This article 5 contains some similarities with Article VII of the Chemical Weapons Convention.

Like the Chemical Weapons Convention, the Treaty on the Prohibition of Nuclear Weapons does not create direct obligations for citizens and companies, so that also regarding this treaty a national implementation law, similar to the implementation law for the Chemical Weapons Convention, would have to be drafted. In the opinion of the government this also indicates that the treaty does not

contains any clause binding everyone within the meaning of article 93¹ and 94² of the Dutch Constitution.

A possible implementing law with regard to the Treaty on the Prohibition of Nuclear Weapons should regulate how the prohibitions of the treaty would be enforced on the basis of Dutch law, both in terms of administrative and criminal law.

The conclusion of the legal analysis is that the need for implementation legislation or possible adaptation of existing legislation per se does not stand in the way of a possible signing and acceptance of the Treaty by the Kingdom. This namely also applies to other treaties. Therefore, this aspect did not play a role in the determination of the position of the Dutch government regarding the text of the treaty.

The decision of the cabinet that the Netherlands cannot support this Treaty and to proceed to a vote against it, was preceded by a careful analysis. This was done on the basis of clear criteria. The considerations on which the cabinet decision is based and which the current cabinet endorses, have already been shared with you. The Netherlands has had to determine that a treaty has been created that is not in line with the criteria as formulated by the Netherlands (see document 33 783, nr. 24, 26 and 29).

The request to increase support among NATO allies

The key question in decision-making concerning international obligations regarding arms control is whether it is in the Dutch interest to commit itself to these obligations. Various political, security-related and international-legal aspects are taken into account in this process. If necessary, relevant national legislation is subsequently aligned with the new international obligations, possibly through specific implementation laws.

The observation that there are no fundamental obstacles in the Dutch legislation to join the nuclear ban treaty therefore does not affect the government's decision that the Netherlands cannot support this treaty.

In addition, the cabinet wants to emphasize in response to the motion Voordewind, that this decision was taken after the Nuclear ban Treaty was tested on the fundamental principles of the Dutch foreign, security and defense policy, as stated in the Integrated International Security Strategy (GBVS, document 33 694, no. 12). This [the GBVS, red] confirms, in the context of increasing threats to the Netherlands, that NATO is of fundamental importance for the security of the Netherlands and the constitutional duties to ensure national security. To deter potential enemies, Article 5 of the NATO treaty, which regulates the collective self-defense, is essential. According to the GBVS, this deterrence, concerns new domains such as cyber, as well as conventional and nuclear deterrence, on which the Netherlands is dependent for its own security.

For this reason, NATO membership and the US security guarantees cannot be separated from nuclear deterrence, as also emphasized in the letter that explains the decision to not support the Treaty on the Prohibition of Nuclear Weapons (document 33 783 no. 29). This is not only the position of the Dutch government, but also that of NATO itself and of the NATO allies.

Therefore, the question is not whether a prohibition of nuclear weapons would be incompatible with existing national legislation, but rather whether or not the Netherlands wants to be part of the NATO alliance for its own security and thereby falls under the nuclear umbrella of the nuclear powers within NATO, especially the US. As long as the answer to this question is "yes", Dutch acceptance of the treaty will not be possible.

¹ "Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud een ieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt." – Provisions of treaties and decisions of international organisations, whose content can be binding on everyone, have binding force after they have been announced.

² "Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties." – Legal requirements valid within the Kingdom will not be applied when this application is not compatible with provisions of treaties and decisions of international organisations that are binding on everyone.

The GBVS also states that the Netherlands is in favor of a balanced approach to nuclear disarmament, arms control and non-proliferation. Furthermore, strengthening of the international legal order is a top priority for the Netherlands. The Treaty on the Prohibition of Nuclear Weapons has also been evaluated by the Dutch government in this context. The results of this evaluation were shared with the Chamber (Document 33 783 Nos. 26 and 29). On balance, the Treaty on the Prohibition of Nuclear Weapons on balance does not make an effective contribution to the disarmament process or the international legal order, because it cannot be verified, conflicts with existing legal frameworks and does not have broad political support. The possible positive effects that are attributed to the Treaty on the Prohibition of Nuclear Weapons by its proponents do not outweigh these shortcomings.

On the basis of these arguments, the previous cabinet came to the conclusion that the Netherlands cannot support the Treaty on the Prohibition of Nuclear Weapons. In light of that conclusion, it is also not possible to work on increasing the support for this treaty among NATO-countries. Because of the reasons stated above, this cabinet cannot deviate from this position, but will, as stated, of course remain fully committed to the implementation of the disarmament section in the Coalition Agreement. In doing so, the cabinet looks for initiatives and opportunities that offer the greatest chance of success.

Examples are our active presidencies and co-presidencies of international partnerships and treaties such as the Non-Proliferation Treaty and the partnership for disarmament verification, our leading role in the attempts to establish a Fissile Materials Cut-Off Treaty, and the open letter of the Minister of Foreign Affairs and his Polish colleague in the *EU Observer* of October 31st.

In these and other ways, the government continues to work for a world without nuclear weapons. The Netherlands will also continue to speak out internationally about the need to achieve a nuclear-free world and will thereby also call on the nuclear weapon states to take their responsibility.

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