

Letter dated 16 June 1995 from the Minister for Foreign Affairs a.i.  
of the Netherlands, together with Written Statement of the  
Government of the Netherlands



MINISTER FOR FOREIGN AFFAIRS

JURA-107713

The Hague, 16 June 1995

In response to your invitation, on the basis of the articles of the Charter of the United Nations and of the Statute of the Court, I enclose the observations of the Government of the Kingdom of the Netherlands with regard to the advisory opinion requested by the General Assembly of the United Nations.

The Minister for Foreign Affairs a.i.  
of the Kingdom of the Netherlands

A handwritten signature in black ink, appearing to read 'H.F. Dijkstal', enclosed within a hand-drawn oval.

H.F. Dijkstal

The Registrar of the  
International Court of Justice  
Peacepalace  
Carnegieplein 2  
2517 KJ The Hague

THE NETHERLANDS GOVERNMENT,

Having regard to Resolution 49-75K adopted on 15 December 1994 by the General Assembly of the United Nations, whereby the General Assembly decided to request the International Court of Justice urgently to give an advisory opinion on the following question:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?";

*Having regard to the Order of the Court of 1 February 1995, by which the Court designated 20 June 1995 as the time-limit within which written statements might be submitted to the Court by the United Nations and by States which are entitled to appear before the Court, in accordance with Article 66(2) of the Statute of the Court;*

Having regard to the fact that the Netherlands is a member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations also a party to the Statute of the Court;

Wishing to avail itself of the opportunity given by the Court's Order of 1 February 1995 to States entitled to appear before the Court to make a written statement on the above-mentioned request by the General Assembly of the United Nations for an advisory opinion from the Court;

Has the honour to present the following statement:

I OBSERVATIONS ON THE COMPETENCE OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS TO REQUEST, AND ON THE COMPETENCE AND DISCRETION OF THE COURT TO GIVE, THE ADVISORY OPINION

1. According to Article 96 of the Charter of the United Nations

"(1) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

(2) ....." (Emphasis added)

2. According to Article 65 of the Statute of the International Court of Justice which forms an integral part of the UN Charter:

"(1) The court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(2) ....." (emphasis added)

3. While Article 96 of the UN Charter determines who is competent to request an advisory opinion from the Court, Article 65(1) of the Court's Statute determines the competence of the Court to give an advisory opinion. According to Article 96(1) of the UN Charter only the UN General Assembly or Security Council may request the Court to give an advisory opinion on any legal question.

4. The question submitted to the Court for an advisory opinion concerns the permissibility of the threat or use of nuclear weapons in any circumstance under international law, and therefore constitutes a legal question.

5. In the opinion of the Netherlands Government, the General Assembly of the United Nations must be deemed competent to request an advisory opinion on the question submitted to the Court.
6. If the Court considers the General Assembly of the United Nations competent to request, and itself competent to give, the advisory opinion concerned, the Netherlands Government would nevertheless draw attention to the fact that the Court's power to give advisory opinions is a discretionary one, As stated by the Court itself in the Peace Treaties case (ICJ Rep. 1950, p. 71):

"Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request".

7. Although the Netherlands Government is in general very much in favour of the exercise by the Court of its competence to give advisory opinions, it believes that there are good policy reasons why, in this particular case, the Court should decide to abstain from giving the advisory opinion requested.
8. The Netherlands Government attaches great value to the Non-Proliferation Treaty (NPT), the operation of which has been indefinitely extended by the NPT conference on May 11 1995 in New York. By their decision to extend this treaty indefinitely, the parties to the treaty reaffirmed the importance of this treaty as the international instrument for preventing the proliferation of nuclear weapons.
9. The universal application of the norm provided by the NPT has recently been enhanced by the accession to the treaty of a number of states, making the NPT one of the treaties with the most universal adherence.

10. As is well known, the Non-Proliferation Treaty acknowledges the legality of the possession of nuclear weapons by certain States, i.e. the five recognized nuclear weapon States, while other States parties to the treaty have undertaken not to develop or otherwise acquire nuclear weapons (Article II of the NPT).
11. A judgment of the Court declaring the threat or use of nuclear weapons illegal might jeopardize the operation of the Non-Proliferation Treaty. On the other hand, a judgment of the Court declaring the threat or use of nuclear weapons legal might induce a number of States to withdraw their support for the treaty or encourage other States to refrain from acceding to the treaty, thereby undermining its universal application.
12. Another important provision of the NPT regards disarmament. In Article VI of the NPT each of the NPT parties undertakes 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. This undertaking has guided the international community in its disarmament efforts, and was reconfirmed during the recently held NPT conference.
13. The Netherlands Government believes that the risks involved in the threat or use of nuclear weapons will be more effectively countered by further negotiations in the field of disarmament and non-proliferation of nuclear weapons, in line with the provisions of the NPT. Any judgment of the Court in reply to the request submitted by the General Assembly would create a real danger of undermining the ongoing process of nuclear non-proliferation and disarmament.

## II OBSERVATIONS ON THE MERITS OF THE LEGAL QUESTION SUBMITTED TO THE COURT FOR AN ADVISORY OPINION

14. Should the Court decide to consider admissible the request of the General

Assembly of the United Nations for an advisory opinion contained in UNGA Res. 49/75K of 15 December 1994 and should the Court be willing to examine the merits of the legal question submitted by the General Assembly, the Netherlands Government would like to make the following observations.

15. The legal question submitted by the General Assembly is couched in extremely general terms, i.e. "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" Theoretically this question could be answered either in the negative or in the affirmative. An answer in the negative would mean that the threat or use of nuclear weapons would under no circumstances be permitted under international law and hence be unlawful per se under international law. An answer in the affirmative would mean that there would be at least certain circumstances under which the threat or use of nuclear weapons would be permitted and hence not unlawful under international law. It is clear that a rejection of the first answer necessarily implies the acceptance of the second answer. Moreover, it should be kept in mind that the request for the advisory opinion submitted by the General Assembly to the Court does not compel the Court to give an answer to the question of under what circumstances, if any, the threat or use of nuclear weapons would be permitted under international law.
  
16. As already observed in the statement made by the Netherlands Government in connection with the request for an advisory opinion submitted to the Court by the Forty-sixth World Health Assembly of the WHO in its resolution WHA 46.40 of 14 May 1993, the question of the illegality of the use of nuclear weapons put in general terms - i.e. the question of whether the use of nuclear weapons would in all circumstances be unlawful - can only be answered in the negative. As already indicated above such a negative answer to the request for an advisory opinion submitted by the WHA implies necessarily a positive

answer to the request for an advisory opinion submitted by the General Assembly of the United Nations. Henceforth the legal reasoning set forth by the Netherlands Government in respect of the WHA request for an advisory opinion can be followed likewise in respect of the request for an advisory opinion submitted by the General Assembly of the United Nations.

The fact that the WHA request referred merely to "the use of nuclear weapons by a State in war or other armed conflict" while the UNGA request refers to "the threat or use of nuclear weapons in any circumstance" does not lead to a different reply. It may be recalled in this connection that in setting limits on the use of force by member States of the UN - of which the use of nuclear weapons is only one form - Article 2(4) of the UN Charter also sets limits on the threat of such force. Indeed where the use of force is deemed unlawful, the threat of such use of force must, in principle, be deemed equally unlawful.

17. As stated by the Netherlands Government on other occasions - e.g. during the debate in the Netherlands Parliament on the approval of the 1985 Agreement between the Netherlands and the United States on the Stationing of Ground-launched Cruise Missiles in the Netherlands (Treaty Series of the Kingdom of the Netherlands 1985 No. 145) - with regard to the question of the legality or otherwise under international law of the possession or even use of cruise missiles, such possession or even use does not inevitably constitute a violation of the rules or principles of international humanitarian law in armed conflict or of other rules or principles of the jus in bello which more particularly concern the permissibility of certain types of weapons in war or other armed conflict.
18. Thus, according to the Netherlands Government, Article 23(a) of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention IV concluded at the 1907 Hague Peace Conference (2 AJIL 1908 Suppl. p. 90), which prohibits the employment

of "poison" or "poisoned weapons" and/or the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and other Gases, and of Bacteriological Methods of Warfare (94 LNTS p. 65), which condemns the (first) use of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" do not entail a prohibition per se of the use of nuclear weapons. Indeed, the use of poison and poisonous gas is generally categorized under chemical warfare and nuclear weapons are usually distinguished from chemical or biological weapons which are the concern of the provisions referred to here. Article 23(a) of the Hague Regulations and the 1925 Geneva Protocol were intended to apply only to weapons whose principal effect was poisonous and not to those where poison was only a secondary effect. It should be noted that the primary effects of the use of nuclear weapons are the enormous blast wave and thermal radiation they produce, effects which are not covered by the said provisions.

19. The Netherlands Government rejects the view that the use of nuclear weapons would be unlawful per se on the grounds that such use would necessarily lead to a violation of the rule laid down in Article 23(e) of the 1907 Hague Regulations which forbids belligerents "to employ arms, projectiles, or material calculated to cause unnecessary suffering." (emphasis added). The question to be raised here is when suffering caused by a certain weapon can reasonably be called "unnecessary".
20. It seems that suffering may be called "unnecessary" when its infliction was not necessary to attain a lawful military advantage or greatly exceeds what could reasonably have been considered necessary to attain that military advantage.
21. The availability of considerably less harmful means to attain the military advantage or the causing of suffering out of proportion to the military advantage to be gained therefore appear to be the essential yardstick for

determining whether the use of certain weapons must be deemed to cause "unnecessary" suffering. This approach has governed the development of rules with regard to means and methods of warfare since 1868.

22. Hence, in the view of the Netherlands, the use of nuclear weapons cannot in abstracto be deemed unlawful. The question of whether a specific use is in contravention of the said obligation cannot therefore be weighed until the exact implications, both at the level of military advantage gained and with regard to the injury caused, are known.
23. The Netherlands Government further wishes to emphasize that the drafting history of the 1977 Additional Protocol I (Int. Com. Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949, Geneva 1977, p. 3) to the 1949 Geneva Conventions (75 UNTS pp. 33, 85, 135 and 287) makes clear the intention of the negotiating States that the rules introduced by that protocol, in so far as they relate to the use of weapons, should not cover warfare with weapons of mass destruction such as nuclear weapons. As the restriction to conventional weapons was not explicitly laid down in that protocol, the Netherlands - like several other parties to the protocol - made a declaration on the occasion of its ratification that it was the understanding of the Netherlands Government that the rules introduced by Protocol I relating to the use of weapons were intended to apply and consequently would apply solely to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons.
24. The drafting history of Additional Protocol I to the 1949 Geneva Conventions, moreover, indicates that in any event the majority of States acknowledged, explicitly or tacitly, that the use of nuclear weapons is not already unlawful per se under international humanitarian law.

25. In this connection the Netherlands Government also wishes to note that a general prohibition of the use of nuclear weapons de lege lata cannot be deduced from UNGA Resolution no. 1653 (XVI) entitled "Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons" which was adopted by the General Assembly of the United Nations on 24 November 1961. This resolution which, it is true, declared the use of nuclear weapons illegal, as it would be contrary to the Charter of the United Nations, the rules of international law and the laws of humanity, cannot in the view of the Netherlands Government be considered as embodying an already existing rule or principle of general international law. The very fact that the resolution was adopted with 55 votes for, 20 against (including the nuclear weapon States the United States, Great Britain and France) and 26 abstentions proved the absence of a general opinio iuris on the part of States that the use of nuclear weapons is unlawful per se.

UNGA Resolution 2936 (XXVII) on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, which was adopted by the General Assembly on 29 November 1972 - this time with 73 votes for, 4 against (including China) and 46 abstentions (including France, the United Kingdom and the United States) - inter alia again solemnly declared "the permanent prohibition of the use of nuclear weapons".

Considering the special weight to be attached to the position of the nuclear weapon States among the States voting against or abstaining and the very high number of States which abstained, it would, the Netherlands Government believes, still be very difficult to conclude that the resolution codified or gave rise to a generally recognized rule or principle of international law.

It is also relevant in this connection that the UNGA Resolution 1653 (XVI)

of 1961 referred to above invited the Secretary-General of the United Nations to examine the possibility of a conference being convened where participating States would sign a convention on the prohibition of nuclear weapons, but that this attempt, as well as many later attempts to promote the conclusion of such a convention, remained without success due to disagreement on the matter among States.

26. According to the Netherlands Government the use of nuclear weapons need not - as is sometimes alleged - necessarily amount to genocide in terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (45 AJIL 1951 Suppl. p. 7). Indeed, as long as the use of nuclear weapons, or for that matter of any weapons, remains directed at the combatants of the other belligerent and is not directed at the population (which may be considered as a national group) as such, with the intent to destroy that population in whole or in part as such, i.e. whether having the status of combatant or not, there can be no question of genocide within the meaning of the 1948 Genocide Convention.
27. The Netherlands Government is, moreover, of the opinion that the use of nuclear weapons cannot be considered in itself to be in violation of the right to life, as enshrined inter alia in Article 6 of the 1966 International Covenant on Civil and Political Rights (Annex to UNGA Res. 2200 (XXI) of 16 December 1966) or in Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Eur. Treaty Series. No. 5). According to the Netherlands Government, these articles do not create an absolute right to life. Thus, the travaux préparatoires of Article 6 of the International Covenant make clear that, instead of listing the circumstances in which the deprivation of life would not be considered contrary to the right to life, the drafters decided to agree on the formulation that "No one shall be arbitrarily deprived of his life" (emphasis added). One of the instances mentioned in this connection by the drafters as an example of a deprivation of life which is not

arbitrary was "the performance of lawful acts of war". Explicit support for such an exception, as far as Article 2 of the European Convention is concerned, can also be found in Article 15(2) of the European Convention, which provides that "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war ... shall be made under this provision." (emphasis added).

28. The Netherlands Government is aware of the existence of certain treaties which prohibit the deployment of nuclear weapons in Antarctica (1959 Antarctic Treaty, 402 UNTS p. 71), outer space or on celestial bodies (1967 Outer Space Treaty, 610 UNTS p. 205), or on the deep seabed (1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, 995 UNTS p. 115) or most of Latin America and certain adjacent waters and islands (1967 Treaty of Tlatelolco, 634 UNTS p. 326, or its First Protocol, *idem* p. 360), or in certain parts of the South Pacific (1985 Treaty of Rarotonga, 24 ILM 1985 p. 1440, or its First Protocol, 28 ILM 1989 p. 1600 ), but such treaties impose such obligation only on parties to those treaties and, moreover, - except of the Rarotonga Treaty - only in respect of certain areas. The existence of a general prohibition under general international law on the use of such weapons anywhere cannot be concluded from such treaties. Indeed the contrary conclusion can more readily be deduced from them. The same applies to the 1963 Partial Test Ban Treaty which prohibits the parties from conducting nuclear tests in certain areas (i.e. in the atmosphere, under water or in outer space) but does not purport to restrict their use of nuclear weapons in the course of hostilities.

The Netherlands Government believes that the unlikelihood of a general prohibition of the use of nuclear weapons under existing international law would, also follow from the fact that there are certain treaties which

regulate the possession of nuclear weapons, such as the 1968 Non-Proliferation Treaty referred to above. Indeed, the fact that certain States are permitted, subject to certain conditions at least, to possess nuclear weapons also would seem to be difficult to reconcile with the idea that the use of those weapons is unlawful in itself.

29. The Netherlands Government further believes that even if it were to be assumed that the (first) use of nuclear weapons by a State were unlawful per se under present international law - quod non -, this would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons, provided of course the retaliating State observed the conditions set by international law for the taking of lawful reprisals, i.e. satisfies, inter alia, the requirement that the retaliation is proportionate and serves as an ultimum remedium.
30. The view held by the Netherlands Government that existing international law does not in itself prohibit the use of nuclear weapons does not, of course, mean that in the opinion of the Netherlands Government every use of nuclear weapons would necessarily always be lawful.
31. Thus the use of weapons, and hence of nuclear weapons, is permissible only in the case of the lawful exercise of the right of self-defence or under a mandate conferred by the UN Security Council in the exercise of its powers under Chapter VII of the Charter. In this connection it should also be pointed out that the presently existing variety of nuclear weapons creates, in principle, a possibility for States to take necessary and proportionate action with such weapons in self-defence against an armed attack with or without nuclear weapons.
32. Moreover, according to the Netherlands Government, the general principles of international humanitarian law in armed conflict also apply to

the use of nuclear weapons. Two principles, in particular, which form part of that law are the prohibition on making the civilian population as such the target of an attack and the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population. The applicability of general principles of international humanitarian law in armed conflict - among which must also be counted the principle laid down in Article 22 of the 1907 Hague Regulations that the right of a belligerent to adopt means of injuring the enemy is not unlimited - to the use of nuclear weapons was also confirmed as long ago as 1965 in Resolution XXVIII of the 20th International Conference of the Red Cross (Vienna) which was passed unanimously. Consensus on this point was also reached at the diplomatic conference on Additional Protocol I to the 1949 Geneva Conventions.

The Hague, 16 June 1995