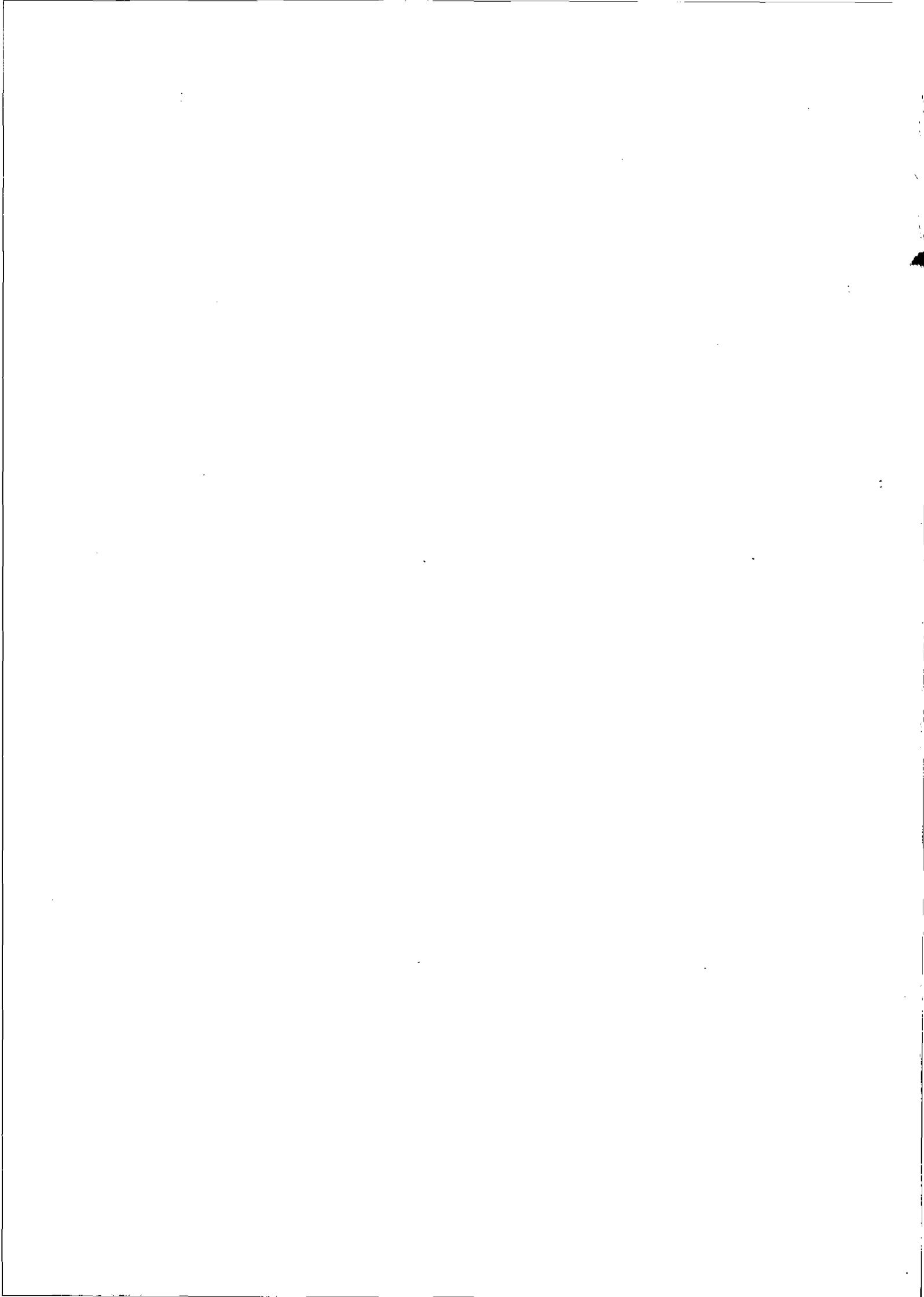


**Written Statement of the Government of the Netherlands**





## MINISTERIE VAN BUITENLANDSE ZAKEN

## THE NETHERLANDS GOVERNMENT,

Having regard to Resolution WHA 46.40 adopted on 14 May 1993 by the Forty-sixth World Health Assembly of the World Health Organization, whereby the Assembly decided to request the International Court of Justice to give an advisory opinion on the following question:

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?";

Having regard to the Order of the Court of 13 September 1993, by which the Court fixed 10 June 1994 as the time-limit within which written statements might be submitted to the Court by the World Health Organization and by those of its member 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 World Health Organization and a party to the Charter of the United Nations, and by virtue of Article 92 of the Charter also a party to the Statute of the Court;

Wishing to avail itself of the opportunity given by the Court's Order of 13 September 1993 to member States of the World Health Organization entitled to appear before the Court to make a written statement on the above-mentioned request by the World Health Organization for an advisory opinion from the Court;

Has the honour to present the following statement:

I OBSERVATIONS ON THE COMPETENCE OF THE WORLD HEALTH ORGANIZATION 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) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

(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. Other organs of the United Nations and specialized agencies which have been so authorized by the UN General Assembly may only request an advisory opinion on legal questions arising

within the scope of their activities.

4. According to Article X(2) of the 1947 Agreement concluded between the United Nations and the World Health Organization (19 UNTS p. 194) the latter organization is entitled to request the Court to give an advisory opinion on "legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the [World Health] Organization and the United Nations or other specialized agencies".

In respect of other (legal) questions the WHO cannot be considered to be a "body ... authorized by or in accordance with the Charter of the United Nations to make ... a request [for an advisory opinion]" and it follows from Article 65(1) of the Court's Statute that the Court will not be competent to give an advisory opinion on other such (legal) questions.

5. The Netherlands Government is of the opinion that the WHO is not competent to make the above-mentioned request for an advisory opinion from the Court for the following reasons.

6. The question submitted to the Court for an advisory opinion concerns the legality or illegality of the use of nuclear weapons by a State in war or other armed conflict under current international law, including the WHO Constitution.

7. The use of nuclear weapons, to which the WHO request for an advisory opinion relates, constitutes only one, albeit extremely harmful, form of the use of force.

8. In the opinion of the Netherlands Government, the only organs of the United Nations or specialized agencies competent to request an advisory opinion on the legality or otherwise of the use of force, including the use of nuclear weapons are those which by virtue of their powers and

functions take a legitimate special interest in the advisory opinion of the Court on the legal question submitted to the Court. These organs of the United Nations or specialized organizations are, in the view of the Netherlands Government, only those which are competent to

- (i) decide to proceed themselves to resort to the use of force, or
- (ii) authorize other entities (States or international or regional organizations or arrangements) to resort to the use of force.

9. According to the Netherlands Government, of the bodies entitled to request an advisory opinion from the Court, only the Security Council (primarily) and - possibly under certain conditions subsidiarily - the General Assembly of the United Nations are competent in one or more of the ways referred to at section 8.
10. The Netherlands Government believes that a careful examination of the Constitution of the WHO will reveal that in any event the WHO is not competent in any of these ways. In this connection it is also not without importance that, among the many functions of the WHO listed in Article 2 of the WHO Constitution, subparagraph (h) of that article mentions only the function "to promote, in co-operation with other specialized agencies where necessary, the prevention of accidental injuries" (emphasis added).
11. The Netherlands Government submits that it cannot be maintained that the WHO has a legitimate special interest in requesting the Court to pronounce on the question of the legality or otherwise of the use of nuclear weapons. The principal objective of the WHO is "the attainment by all peoples of the highest possible level of health" (Article 1 of the WHO Constitution). Of course, to the extent that an advisory opinion of the Court prohibiting the use of nuclear weapons would make the use of nuclear weapons less likely, the request for such an advisory opinion would promote the protection of health and the environment. It would, however, in the view of the Netherlands Government, not be justifiable to

acknowledge on this basis the existence of a legitimate special interest on the part of the WHO. Having regard to the detrimental effects which the use of nuclear weapons might have on all aspects of life and human society most other specialized agencies could with equal right claim a special interest in the question of the legality or otherwise of the use of nuclear weapons.

12. In the view of the Netherlands Government, neither the WHO nor any other specialized agency has a legitimate special interest in the question. It can by no means be maintained that an advisory opinion on the question of the legality or otherwise of the use of nuclear weapons can reasonably be regarded as necessary, or at any rate as required, for the fulfilment of the purposes of the WHO. The WHO has therefore no legitimate special interest in seeking an opinion on that matter from the Court.
  
13. It may be recalled that under to Article X(2) of the 1947 Agreement between the United Nations and the World Health Organization, the WHO is entitled to request an advisory opinion on "legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the [WH]Organization and the United Nations or other specialized agencies." In the opinion of the Netherlands Government, it could be argued that the preliminary question of whether only the Security Council or the General Assembly of the United Nations is entitled to request the advisory opinion concerned or whether the WHO is also entitled to do so - which question must be solved before the Court may deal with the merits of the request - constitutes a "question [...] concerning the mutual relationships of the [WH]Organization and the United Nations ...". As the merits of the request cannot be dealt with without a pronouncement of the Court on a question concerning the *mutual relationships* of the WHO and the United Nations - a question on which no advisory opinion may be sought by the WHO and with the

result that the Court is not competent to give an advisory opinion - the Netherlands Government submits that the Court should abstain from giving the advisory opinion requested by the WHO.

14. If, in spite of what has been submitted by the Netherlands Government, the Court would nevertheless consider the WHO competent to request, and itself competent to give, the advisory opinion concerned, the Netherlands Government would 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".

15. 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.
16. One important reason, mentioned before in connection with the question of the competence of the WHO to request the advisory opinion, is the absence of a legitimate special interest on the part of the WHO in the advisory opinion. If this fact does not in itself suffice to deny the WHO's competence to request the advisory opinion, it should, according to the Netherlands Government, in any event suffice to deny the advisory opinion on the policy ground that no advisory opinion should be given to bodies which cannot demonstrate a legitimate special interest in the advisory opinion requested.

17. In the opinion of the Netherlands Government, there is also reason to fear that whatever reply the Court may give to the request submitted by the WHO, it will create a real danger of undermining the operation of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Treaty Series of the Kingdom of the Netherlands 1968 No. 126), which forms the cornerstone of international efforts to prevent proliferation of nuclear weapons.
18. The Netherlands Government attaches great value to the Non-Proliferation Treaty and to the unconditional extension of its operation for an indefinite period of time in 1995. 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).
19. A judgment of the Court declaring the use of nuclear weapons illegal might jeopardize the extension of the operation of the Non-Proliferation Treaty in 1995. On the other hand, a judgment of the Court declaring the 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.
20. The Netherlands Government believes that the risks involved in the possession and use of nuclear weapons can be more effectively countered through further efforts in the field of disarmament and non-proliferation of nuclear weapons. The problem of increased radioactivity in the world can also be better addressed by action to improve the safety of nuclear power stations and by promoting the conclusion of a comprehensive nuclear test ban treaty.

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

21. Should the Court nevertheless decide that the WHO is competent to request the advisory opinion and consider the request admissible, and should the Court therefore be willing to examine the merits of the legal question submitted by the WHO, the Netherlands Government would like to make the following observations.
22. The legal question submitted by the WHO to the Court is couched in extremely general terms. More particularly, the question concerns the possible illegality under current international law, including the WHO Constitution, of the use as such, i.e. each use regardless of the manner of use, of any nuclear weapon by a State in war or other armed conflict regardless of the effect of that use on health and the environment.
23. In the opinion of the Netherlands Government the question of the illegality of the use of nuclear weapons, if phrased in such general terms can only be answered in the negative.
24. 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.

25. 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. Other 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.
26. 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".
27. 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.
28. 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.

29. 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.
  
30. The Netherlands Government further wishes to emphasize that the negotiating 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 contained in 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 of Protocol I relating to the use of weapons were intended to apply and consequently would apply solely to conventional weapons without any prejudice to any other rules of international law applicable to other types of weapon.
  
31. The 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.

32. 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 74 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.

33. 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.
34. 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).
35. The unlikelihood of a general prohibition of the use of nuclear weapons under existing international law would, the Netherlands Government believes, 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 would seem to be difficult to reconcile with the idea that the use of those weapons is unlawful in itself.
  36. 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 - such as the requirement of proportionality - set by international law for the taking of lawful reprisals.
  37. 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.
  38. Thus the use of weapons, and hence of nuclear weapons, is permissible only in self-defence.
  39. 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.

40. The WHO has also asked the court to examine the legality of the use of nuclear weapons by a State in war or other armed conflict in the light of the obligations of that State deriving from the WHO Constitution.
41. As previously noted, the Netherlands Government fully realizes that the use of nuclear weapons may - depending on the manner and the circumstances in which they are used and the nature of the targets of such use - have serious consequences for health and the environment. Accordingly, the use of such weapons - though this applies in fact to the use of all weapons - cannot be reconciled with the principal objective of the WHO, i.e. "the attainment by all peoples of the highest possible level of health" (Article 1 of the WHO Constitution).
42. Apart from a general implied obligation of member States of the WHO to contribute to the achievement of this objective of the WHO and to cooperate with one another to that effect, explicit normative standards for WHO member States in respect of the protection of health are to be found in the Preamble of the WHO Constitution which - in addition to a

number of principles which seem to express desired goals or factual statements rather than rights or obligations - inter alia provides that "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social matters" or that "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition". Explicit obligations for WHO member States in respect of the protection of health may further only follow from their explicit acceptance of conventions or agreements which have been adopted by the World Health Assembly (Article 20 of the WHO Constitution) or from Regulations adopted by the Health Assembly, which Regulations, however, cannot by virtue of their subject matters (Article 21 of the WHO Constitution) affect the legality of the use of nuclear or other weapons.

43. It is the opinion of the Netherlands Government that the implied general obligation of WHO Member States to contribute to the achievement of the principal objective of the WHO and to co-operate to that effect cannot encroach upon the right of individual or collective self-defence to which States are entitled under Article 51 of the Charter of the United Nations.
44. According to the Netherlands Government, the exercise of this right by States is exclusively governed by the UN Charter and the rules and principles of the jus in bello discussed above and any other rule or principle of international law specifically concerning the use of force in armed conflict which States may have agreed to. It is clear that the implied general obligation of member States of the WHO to contribute to the achievement of the principal objective of the WHO and to co-operate with one another to that effect does not fall into that category.

