

Letter dated 20 June 1995 from the Ambassador of the
Federal Republic of Germany, together with Written Statement of the
Government of the Federal Republic of Germany

DER BOTSCHAFTER
DER BUNDESREPUBLIK DEUTSCHLAND

The Hague, 20 June 1995

To the
Registrar of the
International Court of Justice
Mr. Eduardo Valencia-Ospina
Peace Palace
Carnegieplein 2
2517 KJ The Hague

Dear Mr Valencia-Ospina,

referring to your letter of February 8, 1995 to the Foreign Minister of Germany respecting the General Assembly's request for an advisory opinion on the threat/use of nuclear weapons, I beg to pass on to you the enclosed statement of the Federal Republic of Germany. The original is accompanied by a translation of courtesy in English.

Sincerely yours

Wolfgang Isenhardt

June 1995

Statement by the Government of the Federal Republic of Germany

for the International Court of Justice

on the request made to it by the United Nations General Assembly for an advisory opinion

on the following question:

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

I.

From the standpoint of the Federal Government there are compelling arguments against the International Court of Justice giving an advisory opinion on the above question.

1. The Federal Government recognizes the aspects which, following a *prima facie* examination of the request, might argue for a substantive reply: Article 96 (1) of the Charter of the United Nations authorizes the General Assembly to request an opinion from the International Court of Justice on "any legal question". The Court has made substantive replies to all previous requests from the General Assembly. It has up to now been rather cautious in interpreting its discretion under Article 65 (1) of its Statute for declining a request. The Court has repeatedly stated that a substantive reply to an organ of the United Nations authorized to make a request should "in principle" not be declined (*ICJ Reports* 1950, 71; 1956, 86; 1989, 189).

2. In this case, however, following a closer examination of the Court's jurisprudence, a different conclusion suggests itself.

a) The Court has unequivocally stated that it may only examine legal questions:

"... the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested" (*ICJ Reports* 1962, 155).

In the view of the Federal Government the question before the Court is basically a political one.

Although the Court has also repeatedly stated that legal questions often have political aspects and that this fact should not hinder it in its mainly judicial task of interpreting a treaty provision (*ICJ Reports* 1948, 61; 1962, 155; 1980, 87), this request by the General Assembly is a different matter. Just as the request formulates a legal question merely at first glance, the reply, too, can only be a seemingly legal one. In reality the Court is being asked to examine what is at heart a highly political issue.

Nuclear weapons are not only a means of warfare like other weapons. Their main purpose is political: they are meant to help prevent any kind of war. Their use cannot be assessed using the norms of international law without such an assessment turning from a judicial into a political one.

While the question by the General Assembly regarding the legality of the "threat or use of nuclear weapons" is formulated as if the eventuality of their use in wartime could be assessed separately from their main political purpose of preventing war, this assumption is misleading. The eventuality of the use of nuclear weapons in wartime has remained hypothetical for decades. This realization has influenced major security policy decisions by states and alliances and will continue to do so in future. It is a realization which can be counted among the basic conditions underlying the relative political stability in international relations.

Were the Court now, against this background, to assess in an abstract legal manner the hypothetical use of nuclear weapons, this advisory opinion could only seemingly be a purely judicial clarification of a legal question. The subject of the assessment would, in the final analysis, be key security policy elements of today's global order. Regardless of the conclusions such an advisory opinion were to reach on the matter, it would be perceived as a reply to a political question.

b) Should the Court nevertheless decide that it has before it an essentially legal question requiring clarification, it would still need to decide how to make use of the discretion allowed in Article 65 of its Statute:

"But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so" (*ICJ Reports* 1962, 155).

The Court has repeatedly emphasized its discretion:

"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" (*ICJ Reports* 1950, 72; confirmed in, for example, *ICJ Reports* 1962, 155).

The Federal Government is aware of the fact that the Court has also emphasized that only "compelling reasons" could cause it to refuse to answer a legal question (*ICJ Reports* 1956, 86; 1989, 191). The Federal Government is of the opinion that such compelling reasons for refusal exist in this case. The "propriety" of judicial involvement with this question is more than doubtful for various reasons, if the Court's own criteria are used:

"... the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions" (*ICJ Reports* 1973, 175).

aa) The Court would be forced to overstep the bounds of its function as the "principal judicial organ of the United Nations" (Article 92 of the Charter). Because of its judicial function the Court is obliged to respect the law-making, in a sense "legislative" prerogative of the states.

Rather than giving an abstract answer to the abstract question of the legality of nuclear weapons, the international community has chosen an entirely different course to deal with the legal aspects of the nuclear risk. It has for decades made efforts to limit the specific risks of nuclear weapons by elaborating new international legal norms. In doing so it has chosen the option of continually developing a special international treaty law devoted to this purpose.

A general legal ban on nuclear weapons has never been on the agenda in any negotiating forum, even though various states have long demanded such a ban. There have been two main reasons for this: firstly, the recognition that no consensus can be reached on such an aim due to its politically controversial nature; secondly, fear of jeopardizing what is legally and politically possible, since a polarizing argument on an unachievable goal blocks the road to gradual success.

This process of gradually developing treaty law on nuclear disarmament and arms control has proved remarkably successful. One of the most important achievements, apart from the major bilateral disarmament treaties, was the conclusion of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which now has 178 member states and which was recently indefinitely extended. This treaty by no means envisages a general ban on nuclear weapons but rather expressly presupposes the control over such weapons by five nuclear-weapon states, which are, however, pledged

"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" (Article VI of the NPT).

On the occasion of the indefinite extension of the NPT, over 170 States Parties confirmed these aims by consensus on 11 May 1995 and adopted the catalogue of measures entitled "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" (Document NPT/CONF.1995/L.5 of 9 May 1995). This significant document underlines the above-mentioned gradual approach, i.e. to deal with the nuclear threat through treaties, and it contains important objectives for the further development of international treaty law, for example the completion of the negotiations on a Comprehensive Test Ban Treaty "no later than 1996".

In this context it becomes clear why we are concerned about jeopardizing what is legally possible. The indispensable focussing of all efforts onto the coming nuclear disarmament, arms-control and non-proliferation tasks, the significance of which can scarcely be overestimated, could lose its drive if the Court were to supply an advisory opinion on the abstract question of the legality of nuclear weapons. Whatever the Court's reply, it could not fail to have consequences for a sensitive, complex negotiating process which, for good reason, has never included the issue now before the Court.

bb) In addition, were the Court to reply to the request, it could in our view not avoid issuing a number of speculative statements going beyond its judicial function. It is true that one of the Court's tasks is to answer abstract legal questions (*ICJ Reports* 1948, 61; 1954, 51); it may also make findings as to factual issues (*ICJ Reports* 1971, 27). However, should the problems regarding fact-finding be obvious, this may lead the Court to refuse to give an opinion (*ICJ Reports* 1975, 28).

In answering the above request the Court would have to embark upon a host of speculative considerations in order to take account of the variety of differing situations in which the threat or use of nuclear weapons might be conceivable. The Court would be obliged to analyze different types of nuclear weapons and to assess different theories regarding the effects of their possible use. All this would require the Court to analyze a plethora of extremely complex and at the same time controversial hypotheses. This would no longer be judicial fact-finding but rather guesswork regarding hypothetical scenarios.

cc) The General Assembly's request also leads to the question of the Court's integrity, the significance of which is illustrated by the following quotation:

"There are inherent limitations on the exercise of the judicial function which the Court, as a Court of justice, can never ignore... The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*ICJ Reports* 1963, 29).

This question becomes particularly relevant in this case, since there is the danger of a pointless procedure. The Court has described its advisory function as follows:

"The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose" (*ICJ Reports* 1975, 37).

In earlier requests made by the General Assembly, especially regarding constitutional aspects of the Charter, the "practical and contemporary effect" of the Court's advisory opinions was mostly not in doubt. However, the history of a number of General Assembly resolutions on the legality of nuclear weapons has shown that there are highly different but at the same time extremely hardened opinions on this matter and that there are numerical majorities in this conflict of opinions but no signs whatever of consensus.

In other words we are dealing with a legal issue with political implications which by its very nature must remain politically controversial, thus allowing for no common *opinio iuris* supporting a universally valid legal reply. Under such circumstances it is hard to see the purpose of an advisory opinion, since it could scarcely serve to overcome the difference of opinions within the General Assembly. Were an opinion nonetheless to be given, the perception of the Court's integrity might be affected.

3. In 2 a), 2 b) aa), bb) and cc) above the Federal Government has presented four major aspects, any one of which should in its opinion lead to rejection of the request. Should the Court fail to share this view, the Federal Government begs to suggest that in any case the sum total of the above reservations is so weighty that the Court would be well advised to exercise its discretion to reject the General Assembly's request.

II.

In case the Court enters into an examination of the substance of the General Assembly's request, the Federal Government makes reference to section II of its statement of June 1994 on the World Health Organization's question regarding the legality of the use of nuclear weapons. These comments also apply *mutatis mutandis* to the General Assembly's additional question on the legality of the threat of nuclear weapons. Such a "threat" can only be permissible in the exercise of the inherent right to individual or collective self-defence.