

**Written Statement of the Government of the Federal Republic of  
Germany**

**Exposé écrit du Gouvernement de la République fédérale  
d'Allemagne**

Statement by the Government of the Federal Republic of Germany  
for the International Court of Justice

I.

From the standpoint of the Federal Government, WHO's request for an advisory opinion on the use of nuclear weapons is bound to fail because such a request is not admissible.

The authority to request an advisory opinion from the International Court of Justice, according to Art. 96 (1) of the UN Charter, is in principle restricted to the General Assembly and the Security Council as the main bodies of the United Nations. According to Art. 96 (2) of the UN Charter, other UN organs and specialized agencies may only request advisory opinions from the ICJ if the General Assembly has authorized them to do so and if the legal question arises within the scope of their activities.

It is true that WHO was authorized by the General Assembly (in Art. X (2) of the Agreement between the United Nations and WHO of 10 July 1948) to request advisory opinions of the ICJ. However, in accordance with the wording of Art. 96 (2) of the UN Charter, this authorization, too, is restricted to "legal questions arising within the scope of its competence".

WHO argued in favour of its competence on the issue of the legality of using nuclear weapons on the grounds that such use affects the health of the persons involved, as well as their environment, and thus falls within the scope of its tasks. However, the Federal Government cannot agree with such a line of argument. While Art. 1 of the Constitution of the World Health Organization defines WHO's objective as the attainment by all peoples of the highest possible level of health, this objective in itself cannot be taken as a definition of WHO's functions. As issues from all areas of politics can have an effect on people's health, WHO would, were this clause to be so widely interpreted, cease to be a specialized organization for health issues and become competent in all areas. In particular, the Security Council's primary responsibility for the maintenance of international peace and security in accordance with Art. 24 of the UN Charter, as well as that of the General Assembly pursuant to Art. 10 of the UN Charter, would be impinged upon.

Therefore the broad objective contained in Art. 1 of the Constitution of WHO must, based on its Constitution and its relationship to other specialized agencies, be limited to a specific area of issues, the core of which is WHO's responsibility for improving world health. Art. 2 of the Constitution, which defines the functions of WHO, in any case fails to supply evidence that matters of arms control and the legality of the use of certain weapons could be counted among the many health-policy tasks contained therein. The restriction of WHO's activities to its conventional area of responsibility can, for example, also be seen in its agreement with the International Atomic Energy Agency (IAEA). Although WHO concerns itself with questions of the impairment of health in connection with the peaceful use of nuclear energy, it at the same time recognized the primary responsibility of the IAEA for research, development and application in the field of the peaceful use of nuclear energy (Art. I (2) of the Agreement between the International Atomic Energy Agency and WHO).

Even if the ICJ agreed to take a wide view of WHO's field of activity and recognized its jurisdiction, it should nevertheless reject WHO's request in this case.

In accordance with Art. 65 of the Statute of the Court, the ICJ may give an advisory opinion on a legal question posed by an authorized body or organization. However, it has, at the same time, emphasized that it is not duty-bound to supply this legal advice. (ICJ Reports 1975, 21; 1987, 31). It is true that the elaboration of opinions for UN bodies and specialized agencies is expressly one of the functions of the Court and thus should not be rejected out of hand. In this case, however, there are compelling reasons, according to the ICJ's own consistent practice, in favour of rejecting the request (ICJ Reports 1973, 183). At first sight, the question posed by WHO involves the interpretation of existing international norms which might be relevant for the use of nuclear weapons, and therefore appears to be a legal issue. But the vital interests of many UN member states are also involved, which suggests that particularly strict criteria should be placed on the appropriateness of the ICJ supplying an advisory opinion. Otherwise, the Court's judicial function might be jeopardized or discredited. Thus the ICJ, in this case, should reject the request for an advisory opinion for reasons of judicial restraint.

Even if the intention is to assist the capability of UN bodies to function, the result will still be the same. There is no evidence that the vital function of WHO in the field of health care would be impaired in any way if its legal question were not answered.

## II.

On 5 October 1983, during Question Time in the German Bundestag regarding "principles of the international law of war" and "treaties binding under the international law of war", the Government of the Federal Republic of Germany replied to the question

"In the Federal Government's opinion, can the use of nuclear weapons be permissible under international law under any possible circumstances?"

as follows:

"The use of nuclear weapons, like that of any other weapon, is only permissible under international law in the exercise of the inherent right of individual or collective self-defence against an armed attack.

There are no treaties prohibiting nuclear weapons as such. Neither is there an unwritten ban, otherwise all treaties limiting the proliferation of nuclear weapons or nuclear tests, or seeking to create nuclear-weapon-free zones or to limit the number of nuclear weapons, would be meaningless.

According to general international law, however, attacks on the civilian population are always forbidden regardless of the weapon used. In addition, a distinction must always be made between combatants and civilians, and the latter must be spared as far as possible."

In this connection the Federal Government also pointed out that the principle of proportionality in the law of war equally applies to all use of nuclear weapons and that each individual use of weapons must be judged according to its specific circumstances (German Bundestag, 10th legislative period, Drucksache 10/445, pages 4 and 8).

These principles have always been reflected in NATO's nuclear strategy. The development of this strategy was always characterized by efforts to achieve the most limited possible role for nuclear weapons. In November 1991 the parties to the North Atlantic Treaty adopted a new Strategic Concept envisaging the maintenance of nuclear forces, albeit at a considerably lower level than before. The basic objective of NATO's nuclear forces is political, i.e., to preserve peace and prevent coercion and any kind of war. The Alliance strategy also maintains that the "circumstances in which any use of nuclear weapons might have to be contemplated by them are therefore even more remote". The decisive element is the fundamental principle, also clearly laid down, that the Alliance will never use any of its weapons except in self-defence.

### III.

In addition, from the Federal Government's point of view, the following aspects are also relevant for an overall appraisal of the World Health Organization's request:

The international community has for decades made efforts to limit the specific risks of nuclear weapons by, among other things, 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. In this regard it is vitally significant for the issue in question that a general 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, the desire not to jeopardize 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 contractual 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. This treaty by no means envisages a general ban on nuclear weapons but expressly presupposes the control over such weapons by five nuclear-weapon states. Art. VI, however, pledges the latter to engage in nuclear disarmament. To date 164 countries have become members of this treaty. A conference of States Parties, to be held next year, will decide on its extension. Germany, together with a number of other states, is

keen to see it extended indefinitely, its area of application made universal and the entire network of international norms regarding nuclear non-proliferation strengthened. Only by consistently continuing efforts towards the contractual limitation and reduction of nuclear weapons can the States Parties fulfil the obligation contained in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, "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". Among the significant steps taken by the nuclear powers towards disarmament are the INF Treaty of 1987, the SALT I and II Treaties of 1972 and 1979, and the START I and II Treaties of 1991 and 1993.

At present a further decisive step towards the contractual limitation of nuclear weapons is in the offing: negotiations on a comprehensive nuclear-test ban (CTB) have been going on at the Geneva Conference on Disarmament since January of this year.

In this context the aforementioned desire not to jeopardize what is legally possible takes on a new topicality. The indispensable focusing of all efforts onto the coming nuclear disarmament and arms-control tasks, the significance of which can scarcely be overestimated, would be endangered if an inevitably polemic debate on a hypothetical legal issue were to begin now, which will by its very nature remain politically controversial, thus allowing for no common opinio iuris supporting a universally valid legal reply.