

Written Statement of the Government of Mexico

WRITTEN STATEMENT BY THE GOVERNMENT OF MEXICO ON THE REQUEST FOR AN ADVISORY OPINION SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE FORTY-SIXTH WORLD HEALTH ASSEMBLY (RESOLUTION WHA46.40 ADOPTED 14 MAY 1993).

Summary

1. Pursuant to Article 66, paragraph 2 of the Statute of International Court of Justice and recalling the Court Order of 13 September 1993, the Government of Mexico submits hereby the following written statement on the request for an advisory opinion submitted to the Court per resolution WHA 46.40, adopted by the Forty-sixth World Health Assembly on 14 May 1993, on the 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?"

2. This statement will answer the aforementioned question in the affirmative. It will allege that, in view of its effects on health and the environment, the use of nuclear weapons by a State in war or other armed conflict constitutes a breach of the obligations imposed by international law, including the Constitution of the World Health Organization (WHO), in that it represents a breach of generally-accepted, conventional and customary principles of international law, mainly those that guarantee peace and international security, the right to life and health; the protection to the environment; and the protection to mankind, since the effects of nuclear weapons are genetically passed on to future generations and alter the lives of human beings not yet conceived.

Introduction

3. The definition of health in the Preamble of the Constitution of the World Health Organization as a "state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity", is particularly relevant in asserting the faculty of WHO to request the aforementioned advisory opinion. Since the functions of WHO include to take all necessary actions in order to accomplish its objective of the attaining by all peoples of the highest possible level of health (Article 2), the request for an advisory opinion of this Court does

indeed represent an important measure for achieving such an objective.

4. In compliance with the mandate granted by the World Health Assembly as per its resolution WHA 34.38, since 1981 the World Health Organization has drafted two reports, based on numerous research experiments, on the effects of nuclear war on health and health services. The first, approved in 1983 by resolution WHA 36.28, pertains to scientific aspects of the problem such as characteristics of nuclear explosions and their effects, relief for victims and short and long-term effects of a nuclear war on health services. The main conclusion of this report is that the only approach to treatment of health effects of nuclear explosions is primary prevention of this type of explosions, that is prevention of atomic war. The second edition of the report, approved in 1987 by resolution WHA 40.27, includes among the immediate effects of a nuclear explosion, environmental alteration and climate change worldwide, deaths and injuries caused by explosive and thermal shock, diseases such as radiation syndromes and destruction and deterioration of health services and contamination of crops and cattle from radiation, etc. And in the medium and long-term, there would be health problems as a result of damage to immune system, increased susceptibility to cancer and genetic damage.

5. The effects on climate would have an impact not only on countries involved in armed conflict but on non-combatant countries as well, affecting most of the people in the world. Nuclear explosions would cause enormous fires that might produce serious climate disturbances. The black smoke from these fires would spread through the atmosphere to large areas of the earth. The presence of large amounts of soot in the atmosphere would severely alter the radiant heat balance of the earth and atmospheric surface, since the earth's surface would be cooled and the upper layers of the atmosphere warmed, creating conditions of meteorological inversion and rain shortages over extensive areas of continents. This factor would seriously impair agricultural productivity, which would in turn contribute to a severe food shortage.

6. The use of nuclear weapons would also give rise to many other potentially serious physical and atmospheric disturbances; such as the deposit of radioactive sediments on the earth's surface, release of dust into the air cooling the earth's surface furtherly, reduction of stratospheric ozone, and release of air pollutants and

toxic chemicals from fires and chemical industries. The impact on the environment would be extremely damaging to almost the entire planet.

7. In light of the aforementioned effects of the use of nuclear warfare, this statement shall identify the principles of international law that would be infringed upon in the event of the use of nuclear weapons in an armed conflict. Throughout this statement the term nuclear arm is understood in its broad sense: "A collective term for atomic and hydrogen weapons of all types and their delivery systems" (United Nations. Disarmament Facts: Towards a Nuclear-Test Ban. New York, 1989. p. 21).

8. The relevant scientific data outlined in the reports of the Director-General of the World Health Organization on the effect of nuclear war on health and the environment, approved by resolutions WHA 36.28 of 1983 and WHA 40.27 of 1987, contain sufficient authoritative opinions to produce legal effects within the scope of international law on the subject. A universal reinterpretation is obviously called for in the light of these studies and the advisory opinion of the International Court of Justice would therefore represent a pertinent contribution to the development of international law.

Maintenance of international peace and security

9. One of the principal Purposes of the United Nations, as stated in the Preamble of the Charter, is to "...save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind..." This objective would obviously be frustrated if a State had the capacity to resort to nuclear arms, thereby causing mass destruction of life in the attacked state, in the population of other neighboring States and extremely harmful effects on health and the environment in the rest of the world.

10. Additionally, the Charter of the United Nations establishes as one of its Principles the proscription of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations (Article 2, paragraph 4). The proscription of the use of force is applicable regardless the type of arms employed and, therefore, the use of nuclear arms in

violation of Article 2, paragraph 4, would undoubtedly be a breach of international law.

11. International law does also recognize the right of individual or collective self-defence, if exercised in accordance with Article 51 of the Charter. Additionally, international customary law, mainly established in The Carolina Case (US vs Canada, 1837, in Moore, Digest of International Law, Vol.2, p. 409 and McNair, International Law Opinions, vol. ii, p. 221) requires that an action of self-defence satisfies the following requisites: (a) instant and overwhelming necessity, (b) no choice of means, (c) no moment for deliberation, and (d) proportionality. It should also be observed that in any event, military actions in self-defence must also be governed by the rules of international humanitarian law in the same degree as in the case of war or other armed conflict.

12. In case of self-defence against a nuclear attack, it could theoretically be resorted to nuclear arms if the requirements of Article 51 of the Charter and the rules of customary law of The Carolina Case are satisfied. As regards necessity, it must be stressed that it is not an absolute and that it cannot derogate other principles of international law, as explained in paragraphs 26 to 29 *infra*. It could be argued that the requirements of absence of other means or no moment for deliberation could be somehow met, however the requirement of proportionality by no means could be satisfied. In case of a nuclear attack, a nuclear response would be out of control (see paragraphs 18 to 20 *infra*). Therefore, the enforcement of the doctrine of nuclear deterrence contradicts the concept of self-defence as accepted in international law.

13. On the other hand, provisions of Article 51 of the Charter proscribes contrario sensu the concept of preventive self-defence, as sustained by Mexico in San Francisco; that is, the right to self-defence may not be invoked if there has been no act of aggression. Furthermore, for effects of precedents of this Article, it should be recalled that the principle of proportionality was subject of authoritative opinions, as observed in the Lytton Report (Official Gazette of the League of Nations, Special Supplement No. 111, p. 44, quoted by Antonio Cassese in his analysis of Article 51 in La Charte des Nations Unies, Jean Pierre Cot and Alain Pellet, 1985).

14. It is noteworthy that the first resolution adopted by the United Nations General Assembly, only four months after

the dropping of the two atomic bombs over Hiroshima and Nagasaki, acknowledged the danger of nuclear warfare to mankind. In resolution 1653 (XVI), dated 24 November 1961, the General Assembly declared that the use of nuclear or thermonuclear warfare constitutes a violation of the Charter and a crime against mankind and civilization. This condemnation was reaffirmed in resolutions 33/71 B of 14 December 1978; 34/83 G of 11 December 1979, 35/152 of 12 December 1980; and 36/92 I of 9 December 1981.

International Humanitarian Law

15. International law on armed conflict is codified in a body of international legal rules that, by virtue of the principles of proportionality, moderation, discrimination and necessity, ban the use of nuclear arms in the event of an armed conflict. In light of the rules of international law analyzed hereunder, the doctrines adopted by the nations that have developed nuclear arms have no justification whatsoever. In fact, the concept of mutual assured destruction and the doctrine of deterrence run counter to the fundamental principles of international law on armed conflict; the principles of proportionality, discrimination, necessity and moderation, in particular.

16. In addition to the four Geneva Conventions of 1949 and the Protocols of 1977, these principles, closely related to ius cogens, have been reaffirmed in several multilateral instruments, including: the Declaration banning the use of 400 gram weights, 1868; Convention on respecting the laws and customs of war on land, 1899; The Hague Declaration concerning asphyxiating gases, 1899; the Declaration on dum-dum expanding bullets, 1899; Convention on mines automatically detonated by contact, 1907; Convention that prohibits dropping projectiles and explosives from balloons, 1907; Treaty relating the use of submarines and noxious gases in warfare, 1922; The Hague Rules of Air Warfare, 1922/23; Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 1925; the League of Nations resolution on the protection of civilian populations against bombing from the air in case of war, 1938; Draft rules for the limitation of the dangers incurred by the civilian population in time of war, 1956; Declaration banning the use of nuclear and thermonuclear warfare, 1961; the Resolution on human rights in armed conflict adopted by the International Conference on Human Rights convened by the United Nations in Teheran, 1968;

Resolution 2444 (XXIII) of the United Nations General Assembly on the respect of human rights in armed conflicts; Resolution 2603 (XXIV) of the United Nations General Assembly on chemical and bacteriological (biological) warfare, 1969; and many others referred to subsequently.

17. It is important to add that many of these multilateral instruments were ratified at the time by States that are currently nuclear powers, such as the Regulations on laws and customs of war on land of the Convention for peaceful settlement of international disputes, July 1899; Convention for adaptation of the Principles of the Geneva Convention of 22 May 1864 to naval warfare; the Declaration that prohibits dropping projectiles and explosives from balloons or similar means, 1899; the Declaration on the use of projectiles for spreading asphyxiating or noxious gases; and the Declaration on the use of bullets that are easily crushed in the human body.

Principle of proportionality

18. The principle of proportionality prohibits reprisals disproportionate to preceding provocation or to legitimate military targets, or against persons, institutions and resources protected by the international humanitarian law.

19. The IV Geneva Convention of 12 August 1949 prohibits reprisals against protected persons or their property (Article 33). Furthermore, the Protocol Additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts (Protocol I, adopted in Geneva on 8 June 1977), provides that attacks against the civilian population or civilians by way of reprisals are prohibited (Article 51, paragraph 6); civilian objects shall not be the object of attacks or reprisals (Article 52, paragraph i); it is prohibited to make the object of reprisals objects indispensable for the survival of the civilian population - foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water, installations and supplies and irrigation works- (Article 54, paragraphs 2 and 4).

20. In view of special protection to civilians in conflicts, the use of nuclear arms is obviously disproportionate, and therefore illegal.

Principle of moderation

21. International humanitarian law provides for a principle of moderation, whereby the right of belligerents to adopt measures against the enemy is not unlimited. The 1925 Geneva Gas Protocol prohibited the use of asphyxiating, poisonous or other gases and of bacteriological methods of warfare.

22. Furthermore, pursuant to common Article 3 of the four 1949 Geneva Conventions, persons taking no active part in the hostilities shall in all circumstances be treated humanely and protected from violence to life and person.

23. Protocol I to the 1949 Geneva Conventions represents the most extensive confirmation of the principle of moderation. First, it provides that the right of Parties to a conflict to choose methods or means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Article 35). This provision also adds a prohibition against the employment of methods or means of warfare causing widespread, long-term and severe damage to the environment.

24. Thus the use of nuclear arms constitutes a breach of the obligation of belligerents to limit their choice of warfare methods.

Principle of discrimination

25. The principle of discrimination prohibits the use of weapons that fail to discriminate between civilian and military personnel. Mexico, as depositary of the Treaty for the prohibition of nuclear weapons in Latin America and the Caribbean (Treaty of Tlaltelolco) is morally obliged to call the attention of this Court to paragraph 9 of the Preamble to the Treaty, which discriminates between civilian and military personnel: "That nuclear weapons, whose terrible effects are suffered indiscriminately and inexorably, by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species; and ultimately may even render the whole earth uninhabitable."

Principle of necessity

26. The principle of necessity acknowledges a prohibition on using weapons with a scope that exceeds the effect needed to accomplish a legitimate military objective.

27. Some arguments used in armed conflicts have attempted to justify actions based on the fact that accomplishment of a military objective supersedes other principles in order to achieve final victory. Nonetheless, necessity is not an absolute. It would be totally unjustified to prohibit certain weapons or military tactics if their use were subsequently justified by virtue of military requirements.

28. International humanitarian law has proceeded to establishing exceptions under circumstances in which certain principles would fail to apply by virtue of military necessity. For example, Protocol I to the 1949 Geneva Conventions grants Member States an exemption from the prohibition against attacking, destroying, pillaging or disabling goods indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water, installations and supplies and irrigation works, where required by imperative military necessity (Article 54, paragraph 5). Nonetheless, common Article I of the four Geneva Conventions, enjoins High Contracting Parties to respect their provisions "in all circumstances."

29. Therefore, unless the use of nuclear arms were explicitly permitted, States would be banned from resorting to nuclear arms since there would be no place for an exception on the use of nuclear arms justifying an "imperative military necessity", if we bear in mind that international humanitarian law protects civilians in all circumstances.

Right to life and health

30. Both conventional and customary international law guarantee the right to life and health. Obviously, any threat or use of nuclear warfare would make an attempt against these legally-protected goods. Likewise, the design, testing, manufacture, possession and deployment of nuclear weapons represent a threat to the right to life and health, which might be actualized not only in an armed attack but also in the event of human error.

31. Article 3 of the Universal Declaration of Human Rights of 1948 provides for the right to life, freedom and

security of person. Article 6, paragraph 1 of the International Covenant on Civil and Political Rights stipulates that every human being has the inherent right to life.

32. In so far as the right to health is concerned, the 189 WHO Member States are obliged to respect the Principles laid down in the WHO Constitution, especially the fundamental right of every human being to the enjoyment of the highest attainable standard of health (paragraph two of the preamble); that the health of all peoples is fundamental to the attainment of peace and security (paragraph three of the preamble); and that governments have a responsibility for the health of their peoples, which can be fulfilled only by the provision of adequate health and social measures (paragraph nine of the preamble).

33. The use of nuclear arms by a WHO Member State in a war or armed conflict, would constitute a breach of the obligations laid down in the Constitution of WHO, impairing compliance with the Principles outlined in the preceding paragraph, the objective of WHO of the attaining by all peoples of the highest possible level of health (Article 1) and the functions of WHO to act as the directing and co-ordinating authority in international health work (Article 2 (a)); to promote the prevention of accidental injuries (Article 2 (h)); to make recommendations with respect to international health matters (Article 2 (k)); and to take all necessary action to attain the objective of the Organization (Article 2 (v)).

34. Conclusions of the reports of the Director-General of the World Health Organization on the effects of nuclear war on health and the environment, approved by resolutions WHA36.28 of 1983 and WHA40.27 of 1987, are proof of the state of insufficiency that the WHO would encounter to fulfill its functions in the event of the effects of the use of nuclear arms in an armed conflict. Thus the direct actor of this artificial state of insufficiency would be breaching its fundamental obligations under the WHO Constitution.

Protection of the environment

35. Likewise, there is a consolidated body of environmental law, whereby the threat or use of nuclear arm in an armed

conflict would constitute a breach of principles of international environmental law generally accepted.

36. A starting point in the analysis of the rules integrating such a body of law is the Declaration adopted by the United Nations Conference on the Human Environment, held in Stockholm in 1972. Principle 21 of the Stockholm Declaration embodies a general principle of international law whereby all States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States and areas beyond the limits of national jurisdiction. Thus Principle 21 provides for a limit on a presumed absolute right to territorial integrity as a legal basis for nuclear tests or explosions, which would have a harmful impact on other States.

37. Principle 21 was also included at the United Nations Conference on the Environment and Development, held in Rio de Janeiro in June 1992. In fact, Principle 2 of the Declaration adopted on that occasion reproduces and reiterates Principle 21 of the Stockholm Declaration. Further, Principle 1 of the Declaration of Rio provides that human beings are at the center of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature. Principle 25, which provides that peace, development and environmental protection are interdependent and indivisible, is equally important.

38. Furthermore, it must be borne in mind that, given its effects on the ozone layer and on the world climate, the use of nuclear arms might also infringe upon the principles outlined in the Framework Convention on Climate Change, adopted 9 May 1992, which in Article 3, paragraph 1, provides for the obligation of Parties to protect the climate system for the benefit of present and future generations.

39. Finally, it is worth noting that international humanitarian law protect the environment during the course of hostilities. Protocol I of the 1949 Geneva Conventions provides several obligations. It mainly prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment (Article 35, paragraph 3). Furthermore, it provides for the obligation to safeguard protection of the natural environment against widesperad,

long-term and severe damage in warfare (Article 55, paragraph 1).

40. Although the Convention on the prohibition of military or any other hostile use of environmental modification techniques, adopted on 18 May 1977, does not sufficiently protect the environment in case of war, it does contain obligations aiming at preventing the effects of environmental degradation by the use of warfare techniques, such as those produced in the event of the use of nuclear arms. Article I, paragraph 1 of the Convention provides for the obligation of Parties not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

Conclusion

41. In the light of the legal arguments mentioned above, it is concluded that the use of nuclear arms in war or other armed conflict constitute a breach of both conventional and customary international law, including the Constitution of the World Health Organization.

Mexico, D.F., 9 June 1994