

Note Verbale dated 19 June 1995 from the Embassy of Mexico, together
with Written Statement of the Government of Mexico

EMBAJADA DE MÉXICO

PBA-413

The Embassy of Mexico presents its compliments to the President of the International Court of Justice and has the honour to forward the written statement by the Government of Mexico on the request for an advisory opinion submitted to the Court by the Forty-Ninth United Nations General Assembly, through its resolution 49/75 K.

The above-mentioned written statement has been formulated by the Government of Mexico in accordance with the order issued by the Court on February 1, 1995, and in conformity with article 66 of the Statute of the Court.

The Embassy of Mexico avails itself of this opportunity to renew to the President of the International Court of Justice the assurances of its highest consideration.



EMBAJADA DE MEXICO
ROLDANEN, 211001 1 005

The Hague, June 19, 1995.

President of the International
Court of Justice
The Hague

**WRITTEN STATEMENT BY THE GOVERNMENT OF MEXICO ON THE REQUEST
FOR AN ADVISORY OPINION SUBMITTED TO THE INTERNATIONAL COURT
OF JUSTICE BY THE FORTY-NINTH UNITED NATIONS GENERAL ASSEMBLY
(RESOLUTION 49/75K)**

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WRITTEN STATEMENT BY THE GOVERNMENT OF MEXICO ON THE REQUEST FOR AN ADVISORY OPINION SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE FORTY-NINTH UNITED NATIONS GENERAL ASSEMBLY (RESOLUTION 49/75K)

SUMMARY

1. In accordance with the order issued by the International Court of Justice on 1 February 1995, and in keeping with the provisions of Article 66 of its Statute, the Government of Mexico hereby submits to the Court the following written statement in reply to the request for an advisory opinion, formulated by the Forty-Ninth United Nations General Assembly in resolution 49/75K, in regard to the following question:

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

2. This written statement will answer the question presented to the Court in the negative. It will demonstrate that, by contravening the norms of international law currently applicable to the maintenance of international peace and security and international humanitarian law, the use or the threat of use of nuclear weapons is under no circumstance permitted by international law.

3. In this regard, it should be noted that on 9 June 1994 the Government of Mexico submitted a written statement to the International Court of Justice regarding the request for an advisory opinion formulated by the World Health Organization in resolution WHA 46.40, 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?" Although the aforementioned written statement focused on the content of the norms applicable to armed conflicts (*jus in bello*), the question formulated to the Court in United Nations General Assembly resolution 49/75K merits scrupulous analysis of the law on the maintenance of international peace and security.

4. In this written statement, the Government of Mexico will place emphasis on the norms of international law currently applicable to the maintenance of international peace and security, as well as of the law of armed conflicts. These norms are mainly contained in the Charter of the United Nations, in multilateral treaties and in declarations and resolutions adopted by the principal organs of the United Nations. With regard to the latter, the Government of Mexico recognizes the declarations and resolutions quoted in this written statement as norms of general international law, due to the fact that they either reproduce existing customary norms or have contributed to their consolidation.

INTRODUCTION

5. No threat is more imminent to the maintenance of international peace and security and to the survival of mankind itself than the very existence of nuclear weapons. The warlike nature of this type of weapons, their destructive capacity and their effects on all forms of life on earth, are more than enough to justify their disappearance from the world scene.

6. Aware of those dangers, the States have been addressing the issue of nuclear disarmament for several decades. At present, therefore, total elimination of nuclear weapons is one of the international community's priority commitments.¹

7. Despite the fact that international law has been addressing the issue of nuclear weapons for some time, the establishment of an express prohibition on the use of such weapons has yet to meet with success. As will be demonstrated throughout this document, the absence of an express prohibition has proved irrelevant and, consequently, turn out to be insufficient to generate any presumption of the legality of the use or threat of the use of nuclear weapons. The norms applicable to armed conflicts and to the maintenance of international peace and security, which are of a legally binding nature for all the States (*jus cogens*), are more than sufficient to state without question that the use or threat of the use of nuclear weapons is under no circumstance permitted by international law.

EXPEDIENCY OF THE REQUEST FOR AN ADVISORY OPINION

8. By its very nature, the international system frequently faces situations in which the extent of the legal norms applicable to relations between States is not altogether clear. In such situations, delimiting the content of international law becomes an especially important task in which the International Court of Justice makes a highly significant contribution.

9. The need to specify the scope of the norms of international law is particularly evident in the case of nuclear weapons. The increasingly destructive capacity of this type of weapon poses an exceptional threat to international peace and security and also, evidently, to the fulfillment of the Principles and Purposes of the Charter of the United Nations. It therefore comes as no surprise that since the UN initiated its efforts, it has placed special emphasis on promoting disarmament and on seeking the elimination of nuclear weapons and weapons of mass destruction from national arsenals.²

10. Nuclear weapons, however, are regulated by international law in several manners. Rules have been established on prohibiting the use of nuclear weapons in certain regions,³ prohibiting nuclear proliferation,⁴ partially banning nuclear testing,⁵ etc., and it is precisely such wide-ranging regulations that have led States to uphold different positions with regard to the use or threat of the use of nuclear weapons.

11. Bearing in mind the importance to the international community of this topic and the differences in the approach taken towards it, the opinion of a judicial organ as important as the International Court of Justice would provide the States with an authoritative answer to a question of international import, and, evidently, with a more effective basis for progress in international co-operation towards nuclear disarmament.

12. It is not hard to perceive the political aspect of the topic submitted to the consideration of the Court. Nevertheless, the essentially legal nature of the question formulated makes the International Court of Justice the competent body in which to elucidate the issue. This is not the first time requests for advisory opinions having a significant amount of political opposition have been submitted to the principal judicial organ of the United Nations,⁶ yet the Court has in every case fulfilled the international community's expectations.

13. The Government of Mexico considers that the Court has been presented with an invaluable opportunity to support other organs of the United Nations in carrying out their duties,⁷ while at the same time contributing to further clarifying the norms

of international law. We are sure that the Court will take the best possible advantage of this opportunity.

THE CONCEPT OF NUCLEAR WEAPONS

14. The question formulated to the Court calls for a definition of the meaning of the term "nuclear weapon." To that end, we may refer to some of the definitions used in the international sphere:

15. Article 5 of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) defines nuclear weapons as "...any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes."

16. The Treaty on a Nuclear-Weapon-Free Zone in the South Pacific (Treaty of Rarotonga) defines as an "explosive nuclear device" any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the objective for which such a weapon may be used.

17. The term is also used in a generic sense in reference to atomic or hydrogen weapons of all types and to their delivery systems.⁸

18. As may be appreciated, although the definitions differ as to terminology, all focus on artifacts of mass destruction which function on the basis of nuclear energy, including their delivery systems. The aim of this document is to analyze the use or threat of the use of such instruments.

POSSESSION OF NUCLEAR WEAPONS

19. Before embarking on the analysis of the illegality of the threat or use of nuclear weapons, it is fundamental to dismiss at the outset that the possession of nuclear weapons by Nuclear Weapons States (NWSNs) permits such States to threaten or use such weapons against other States.

20. Certain States have sought to legitimize the use or the threat of use of nuclear weapons on the grounds that the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) permits the five declared NWSNs to possess such weapons. As will be demonstrated below, possession of nuclear weapons is solely temporary and initial, and does not legitimize the threat or the use of such weapons.⁹

21. Although the NPT is generally perceived as an instrument vital to international security, it led to the establishment of a discriminatory regime among the States parties by permitting the five declared nuclear powers to possess nuclear weapons while prohibiting the remainder to possess them.

22. In order to eliminate this discriminatory regime and attain a balance between the rights and the obligations of the Parties, the States undertook to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty for general and complete disarmament under strict and effective international control (Article VI). Furthermore, the Preamble to NPT calls for the liquidation of all their existing stockpiles and the elimination from national arsenals of all nuclear weapons and their means of delivery.

23. Accordingly, possession of nuclear weapons and, hence, the discriminatory regime of NPT, can only be interpreted as being temporary, until the ultimate goal of

complete elimination of such weapons is attained. On the other hand, possession of nuclear weapons by the five declared NWS had to be tolerated, but never accepted, as an initial step to start therefrom the efforts to achieve the ultimate goal of the Treaty, general and complete disarmament.

24. In this regard, the Decision adopted without a vote at the recent 1995 Review and Extension Conference of the Parties to the NPT,¹⁰ whereby the Parties decided that the Treaty will continue in force indefinitely, could never be taken to mean legitimizing possession of nuclear weapons in an indefinite manner. Mexico's statement at the time of adoption of the decisions adopted by consensus reiterated that an indefinite extension of NPT did not mean the perpetuation of the dichotomy between Nuclear-Weapon States and Non-Nuclear-Weapon States, since the Conference had reaffirmed in that context that the ultimate goal of NPT is the total elimination of all nuclear weapons.¹¹ Thus, by reiterating that goal, the existence of nuclear weapons is clearly not legitimized by the international community and the use or threat of the use of such weapons would be contrary to international law.

25. In point of fact, the programme of action embodied in the Decision on the principles and objectives for nuclear non-proliferation and disarmament¹² contemplates the determined pursuit by the Nuclear-Weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.¹³

26. In this regard, the nuclear disarmament obligations contained in the Treaty have equally taken on indefinite force until they are fully complied with, and the organized international community will continue to work in favour of the abolition of nuclear weapons.

27. The Court may also wish to consider the Final Document of the Tenth Special Session of the General Assembly Devoted to Disarmament of 1978, in whose preamble it was stated:

"The General Assembly,

"Alarmed by the threat to the very survival of mankind posed by the existence of nuclear weapons and the continuing arms race, and recalling the devastation inflicted by all wars..."

Further below, the first operative paragraph of the Final Document declared that:

"...the accumulation of weapons, particularly nuclear weapons, today constitutes much more a threat than a protection for the future of mankind..."

28. Necessarily, once the international community has determined the threat nuclear weapons represent to the survival of mankind, it can be sustained an argument leading to deny that international law permits the possession of such weapons. It is worth mentioning that the Final Document was adopted unanimously and it is so far an obliged reference of the multilateral negotiations taking place in the Conference on Disarmament.

29. The threat posed to the survival of mankind by the existence of nuclear weapons grants to the international community as a whole the right to pronounce itself on the illegality of such weapons and to act accordingly above any sovereign right that a State may claim to acquire any means it deems appropriate to guarantee its defense. Certainly, Nuclear-Weapon States cannot claim that this question belongs to its internal jurisdiction. The Charter of the United Nations undoubtedly

established as its principal purpose the maintenance of international peace and security. The mere possession of nuclear weapons runs contrary to the security of mankind.

PROHIBITION ON THE THREAT OR THE USE OF FORCE IN INTERNATIONAL LAW

30. One of the basic norms for the fulfillment of the Principles and Purposes of the Charter of the United Nations may be found in 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, as contained in paragraph 4 of Article 2 of the above-mentioned instrument.

31. The fundamental obligation of the States is to refrain from using force and to settle their disputes by peaceful means. As may be inferred from the paragraph quoted, the aforementioned prohibition is not only limited to the use of force, but also to the threat, and not only to the territorial integrity or political independence of any State, but also to any other means incompatible with the United Nations. Since those aims include the maintenance of peace and the development of friendly relations among States, the possibility of resorting to the threat or the use of force is practically forbidden. The threat or use of nuclear weapons is necessarily included within the bounds of that prohibition, and its actualization would therefore be contrary to international law.

32. The prohibition on the threat or use of force contained in the Charter has been reaffirmed by numerous resolutions and declarations adopted within the framework of the United Nations. The following are among the most prominent:

a. The Declaration on the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex), reiterates the language of Article 2 (4) of the Charter, and adds:

"Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and shall never be employed as a means of settling international issues."

"A war of aggression constitutes a crime against the peace, for which there is responsibility under international law."¹⁴

b. The Declaration of Manila on the peaceful settlement of international disputes (resolution 37/10, annex) establishes that: "Every States shall settle its international disputes exclusively by peaceful means in such a manner as to ensure that international peace and security, and justice, are not endangered."¹⁵

c. The Declaration on the enhancement of the effectiveness of the principle of refraining from the threat or use of force in international relations (resolution 42/22, annex), in addition to reiterating the content of Article 2 (4) of the Charter, adds that such a principle is universal in character and is binding regardless of each State's political, economic, social or cultural system or relations of alliance.¹⁶ Furthermore, it establishes that no consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter of the United Nations.¹⁷

33. As stated earlier, proscription of the threat or use of force in international relations is a generic prohibition that necessarily includes nuclear weapons. Additionally, the United Nations General Assembly has adopted various resolutions

which expressly state the prohibition on the threat or use of nuclear weapons. The following are among the most important:

a. By virtue of the Declaration on the prohibition of the use of nuclear and thermonuclear weapons (resolution 1653 (XVI)), the General Assembly declared that the use of nuclear and thermonuclear weapons constitutes a violation of the Charter, as acting contrary to the laws of humanity and as committing a crime against humanity and civilization. That condemnation was reaffirmed by means of resolutions 33/71 B, 34/83 G, 35/122 D, 36/92 I, 45/69 B and 46/37 D.

b. The Declaration on international co-operation for disarmament (resolution 34/88) called upon all the States not to use their military power for aggressive purposes, especially by applying force or threatening to apply it against the sovereignty, territorial integrity or political independence of any State.¹⁸

34. The Charter of the United Nations and the aforementioned resolutions make no distinction between the legal status of the threat of use of force and the use of force itself. Both situations are prohibited equally. In practice, however, greater emphasis has been placed on prohibiting the use of force. In cases in which the threat is actualized by the use of force, the attention will necessarily focus on the latter aspect. In any event, proscription of the threat of force will apply even if such a threat has not led to the use of force.

35. One way of explaining the difficulty involved in determining the existence of a threat of use of force may be found in the mechanism which establishes the existence of a threat to international peace and security, as contained in the Charter. In accordance with Article 39, the Security Council is responsible for determining the existence of any threat to peace, breach of the peace or act of aggression. The right to veto held by the five permanent members of the Council (which at the same time are the five declared nuclear powers), would procedurally hinder determining the existence of a threat, should one of those powers be involved. The impossibility for the Council to determine the existence of a threat of use of force due to the interposition of a veto, does not reduce, however, the legal force of the prohibition on any threat.

36. The Secretary-General of the United Nations, for his part, has indicated that the threat of use of force occurs when a State, in order to impose its will on another State, threatens to use force against that State. He has also specified that such a threat does not necessarily have to be made openly, but that on certain occasions veiled threats could be most effective, yet difficult to prove.¹⁹

37. The International Law Commission has considered the "threat of aggression"²⁰ a crime against the peace and security of mankind and has included it as an article separate from "aggression" within the draft Code of Crimes the Commission is currently working on.²¹ Article 16 of the Code establishes the following:

"1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced."²²

"2. The threat of aggression consists in declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State."²³

38. Characterization of the threat of aggression as a crime against the peace and security of mankind by the International Law Commission reflects the status that the

concept has attained in international law, and is considered by experts to be the codification of a rule of international customary law.

39. Although both the threat of use of force and the use of force itself are prohibited under international law, the legal effects produced by either situation will have implications on the concept of self-defense. The International Law Commission has specified that the "threat of aggression" does not give rise to individual or collective self-defense under Article 51 of the Charter,²⁴ in contrast to aggression itself.

PROHIBITION ON THE THREAT OR USE OF NUCLEAR WEAPONS UNDER ANY CIRCUMSTANCE

40. The concepts set forth above lead to the definitive conclusion that there exists a rule of international law prohibiting the threat or use of force, including by means of nuclear weapons. Nevertheless, the threat or use of force by means of nuclear weapons may arise under various circumstances, which, once reviewed, would make it possible to prove that *the threat or use of nuclear weapons is not permitted in any circumstance under international law.*

First use

41. As a direct consequence of the general prohibition on the threat or use of force, a first nuclear attack would violate the terms of Article 2 (4) of the Charter and would also, therefore, be contrary to international law, whether carried out against another Nuclear-Weapon State (NWS) or a Non-Nuclear-Weapon State (NNWS). The Declaration of the General Assembly on the prevention of nuclear catastrophe (resolution 36/100) sets forth that "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity."²⁵ So far, the People's Republic of China is the only State that has adopted an official no-first use policy.²⁶

42. The hypothesis of a nuclear attack against a NNWS would not only violate the rule contained in Article 2 (4) of the Charter, but also merit stronger sanctions under international law by constituting a breach of the underlying principle of *proportionality* established by the law on armed conflicts.²⁷

43. Security Council resolution 984 (1995) and the declarations of NWSs setting forth positive and negative security assurances,²⁸ represented a step forward towards providing NNWSs with assurances against the use and threat of the use of nuclear weapons. Those security assurances have nevertheless proved insufficient, since they were not granted in a certain, *unrestrictive, unconditional* and non-discriminatory form.

44. Accordingly, the Decision on principles and objectives for nuclear non-proliferation and disarmament,²⁹ adopted without a vote by the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), noting resolution 984 (1995) as well as the declarations of NWSs on positive and negative security assurances, indicated that further steps should be considered to assure NNWSs party to the Treaty against the use or threat of the use of nuclear weapons, which could take the form of an internationally legally binding instrument.

45. Although to date the Conference on Disarmament has been unable to negotiate a legally binding instrument containing assurances of universal scope to NNWSs against the use or threat of the use of nuclear weapons, the purpose of resolution 984 (1995) and the intent of the States parties to the NPT contained in the

Decision mentioned in the above paragraph, implicitly recognize the illegality of the threat or the use of nuclear weapons against a NNWS. Obviously, were the threat or the use of nuclear weapons a legal act, negative security assurances to protect NNWSs would have been unnecessary.

46. Despite the absence of a legally binding instrument on negative security assurances of universal scope, it should be borne in mind that in Additional Protocol II of the Treaty of Tlatelolco, the five declared NWSs undertook not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty.³⁰

The threat of first use

47. A threat of first use could arise in a conflict, either by threatening a preemptive nuclear strike against a perceived threat of nuclear attack, or by threatening a nuclear strike against a possible attack by conventional weapons or by threatening a response to an actual conventional attack.

48. The threat of first use is a violation of the prohibition on the threat of use of force contained in Article 2 (4) of the Charter. The threat of first use is intrinsically a threat against the political independence or territorial integrity of another State. Any State either in current or potential conflict with a nuclear State advocating a policy of first-use recognizes the threat posed by nuclear weapons and the possibility of their being used against it. Due to the unique nature of nuclear weapons, as weapons of mass destruction, they represent a threat of unequalled intimidation which would undermine the political independence of the threatened State.

49. The only exceptions established by international law to the general prohibition on the threat or use of force in relations between States are to be found in Chapter VII of the Charter. These exceptions are the enforcement measures authorized by the Security Council, and individual or collective self-defense.

Enforcement measures authorized by the Security Council

50. For the mechanism of collective security to enter into effect there must be a threat to peace, a breach of the peace or an act of aggression.³¹ In any such case, the Security Council will be responsible for deciding and following up on the measures to be adopted to restore international peace and security.

51. Once the mechanism of collective security had been activated, it would be impossible for the Security Council to authorize the use of nuclear weapons against a State. Two arguments reinforce the above statement: first, the Security Council, being the organ that holds the primary responsibility for the maintenance of international peace and security, could not contemplate --even theoretically-- authorizing the use of weapons of mass destruction whose destructive effects on all forms of life on the planet have been scientifically determined.³²

52. Secondly, the General Assembly has adopted a number of resolutions declaring that the use of nuclear weapons constitute a violation of the Charter of the United Nations and a crime against mankind (see paragraph 33 a. *supra*). Clearly, if the General Assembly has condemned the use of nuclear weapons, the Security Council is precluded from authorizing their use.

53. Therefore, Security Council resolutions 255 (1967) and 984 (1995), which provide that aggression or the threat of aggression with nuclear weapons against a NNWS would require the Security Council, and above all its permanent members, to act immediately in accordance with their obligations under the Charter, would necessarily have to be applied totally outside the realm of resorting to the threat or use of nuclear weapons.

Individual or collective self-defense

54. Article 51 of the Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security..."

55. The intent of the above-mentioned provision is clear: any State has a legitimate right to make use of force to defend itself when it becomes the victim of an armed attack,³³ and other States may join in assisting the victim while the Security Council acts to fulfill the duties entrusted to it under the Charter.

56. Individual or collective self-defense is conceived as a means of preserving essential rights against irreparable damage when no other means of protection exist, and its exercise is therefore not absolute. Observance of the restrictions international law has imposed on self-defense is indispensable in maintaining its use within a framework of legality.

57. The right of self-defense is actualized only when the need for defense is immediate and overwhelming, and is considered legal when proportional to the armed attack that gave rise to such defense.

58. The International Law Commission has defined proportionality by stating that the size of the measures adopted by an injured State should be comparable to the graveness of the internationally illegal act it is facing and to its effects.³⁴ This means that self-defense cannot be excessive.

59. Necessity is the justification for an action involving the use of force. This means that unless certain measures are adopted against a State that has committed an act of aggression, essential rights of the aggrieved would be destroyed. Nevertheless, justification does not allow discretionality, and only such measures as are strictly necessary to put an end to the attack could be adopted under the title of self-defense.

60. As may be appreciated, the requirements of proportionality and necessity are concurrent. Necessity justifies the action, but that action cannot exceed the limits of proportionality and should cease as soon as no longer necessary. The legitimacy of the actions adopted under the concept of self-defense depends on the observance of the principles mentioned above.

61. The use of nuclear weapons in case of self-defense is not permitted under international law, owing to the fact that such use contravenes the principles of proportionality and necessity on which the legal nature of the aforementioned concept is based. In this regard, and to reaffirm the above, a distinction should be made between two situations in which the use of nuclear weapons could take place under this title: as a result of an act of aggression using conventional weapons or as a reaction against a nuclear strike.

62. In the first case, there is no doubt that a reaction using nuclear weapons to an attack perpetrated with conventional weapons violates the principle of proportionality, which by definition is incompatible with mass destruction.³⁵

63. In the second case, the illegality of the nuclear response would violate other fundamental principles of international law, among the most prominent of which are those applicable to armed conflicts (see paragraphs, 77 and 78 *infra*). Although in theory the use of nuclear weapons could be justified by the provisions of Article 51 of the Charter of the United Nations and by applying the rules of international law

established by *The Carolina Case*³⁶ (any action of self-defense should fulfill the following conditions: an instant and overwhelming necessity for self-defense, leaving no moment for deliberation and no choice of means, and be proportional), such a justification would be highly questionable. Even by actualizing the requirement of absence of deliberation or choice of means, the condition of proportionality would not be respected, since in the case of a nuclear attack the proportionality of a nuclear response would be uncontrollable and would endanger the security of mankind as a whole.

64. Clearly, moreover, there is no possibility of resorting to self-defense to justify a first-use nuclear attack in cases of threat of the use of nuclear or conventional weapons, since, as stated earlier, there is no legal possibility of resorting to self-defense in cases of threats.

65. It should be borne in mind that the principal purpose of the United Nations, according to 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 purpose would clearly be frustrated if a State which had been subjected to nuclear attack were to retaliate in kind, since the likely outcome of such an exchange would be the massive destruction of life in both States, on the population of neighbouring States and excessively harmful effects on health and the environment in the rest of the world. Therefore, the second use of nuclear weapons is not permissible, whether in retaliation or self-defense, since defensive military actions is subject to the law of armed conflicts to the same extent as offensive actions.

66. With regard to the use of nuclear weapons as a means for reprisals, self-help, countermeasure, or, broadly speaking, in response to a violation by a State of an obligation stipulated in international law, it is possible to state that such use runs counter to international law and is inconsistent with the Principles and Purposes of the Charter of the United Nations.

67. The Security Council has stated on a number of occasions³⁷ that reprisals involving the use of force are prohibited under international law. Furthermore, the Declaration on the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (resolution 2625(XXV), annex), indicates that States have a duty to refrain from acts of reprisal involving the use of force.

68. The International Law Commission, for its part, has provided that contemporary international law does not permit neither reasonably armed reprisals, nor forms of self-help involving the use of force, nor armed intervention based on necessity.³⁸

69. Finally, the International Court of Justice rejected arguments of self-help or self-protection in the Case of the Corfu Channel,³⁹ considering them contrary to international law.

70. There being no further need to enlarge on the subject, suffice it to say that save for the exceptions to the prohibition on the use of force contained in the Charter of the United Nations (see paragraphs 50 to 65 *supra*), any unilateral action, regardless of its nature, involving the use of force, is prohibited by international law.

PROHIBITION ON THE USE OF CERTAIN WEAPONS IN INTERNATIONAL LAW

71. The notion of expressly prohibiting the use of certain weapons first arose in the Declaration of Saint Petersburg of 1868. That document stated that the

progress of civilization should have the effect of mitigating the calamities of war as much as possible, and prohibited the use of any projectile weighing less than 400 grammes or loaded by means of fulminating or inflammable substances.

72. The Declaration of Saint Petersburg was followed by a series of international instruments in which the idea of preventing unnecessary suffering and superfluous damage to the enemy led to a prohibition on the use of certain weapons. Such instruments included The Hague Conventions of 1899 and 1907, which prohibited the use of poisoned or poisonous weapons and of arms, projectiles or materials causing unnecessary suffering; the Protocol of 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (The Geneva Gas Protocol); and the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction of 10 April 1972, etc.

73. All the above-mentioned instruments have made it clear that the right of the parties in an armed conflict to choose the means of harming the enemy is not unlimited and is, in fact, subject to restrictions. In this regard, it is worth highlighting Article 35 of the Protocol Additional I of 1977 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, which reaffirms that the right of the Parties to an armed conflict to choose methods or means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. It also adds a prohibition against the employment of methods or means of warfare causing widespread, long-term and severe damage to the natural environment.

74. Certain States consider that the provisions of Protocol Additional I exclude nuclear weapons from their scope of application. It is held, however, that such an affirmation is unfounded. In the first place, because such an exclusion does not follow from the text of the said instrument, and even if it did, international humanitarian law has evolved in such a manner since the adoption of Protocol Additional I that it is impossible to affirm that its provisions merely extend to conventional weapons. In the second place, even if a reservation in relation to nuclear weapons did exist, it would be incompatible with the object and purpose of the instrument.⁴⁰

75. The international community considers that certain types of armaments should be prohibited on account of their inhumane effects on individuals. However, none of the effects produced by the weapons expressly prohibited by international law can compare with those stemming from the use of nuclear weapons. Clearly, if weapons with lesser effects than those of nuclear weapons have been banned, all the more reason to extend such a ban to nuclear armaments.

76. To consider that the absence of a prohibition in international law directed specifically at nuclear weapons means that their use might be lawful, is not only unacceptable, but also queries the credibility of the international legal system.⁴¹

INTERNATIONAL HUMANITARIAN LAW

77. It is also important to analyze the rules of international humanitarian law in order to confirm the illegality of the threat or the use of nuclear weapons. Clearly, if we accept the principle by which the use of any weapon is legitimate only as far as it is employed to defeat the enemy, whether or not in self-defense, we could not even think that international law permits the possibility to defeat the whole of mankind. The nature of the effects stemming from the use of any kind of nuclear weapon stands as one of the strongest arguments to support on the illegality of the threat or

the use of nuclear weapons. International humanitarian law has elaborated on the principles mentioned below, all of which will lead to the conclusion that the threat or the use of nuclear weapons is not permitted in any circumstance in international law, including in case of an armed conflict.

a. *The principle of moderation.* According to this principle the right of belligerents to adopt means of injuring the enemy is not unlimited. This principle is contained in Article 22 of the Regulations annexed to the The Hague Convention IV of 1907 and Article 35 of Protocol Additional I of 1977 to the Geneva Conventions of 12 August 1949.

b. *The principle of humanity (De Martens Clause).* By virtue of the De Martens Clause⁴² the provisions of the Protocol Additional I and the Geneva Conventions are applicable in any circumstance regardless of the unfavorable nature or origin of the armed conflict or in the causes invoked by the Parties to a conflict. Therefore, the first use of nuclear weapons would be encompassed under the scope of the above mentioned instruments in accordance with the Clause.

On the other hand, the principle of humanity, contained in the Preamble of The Hague Convention IV of 1907 and in Article 1.2 of the Protocol Additional I, establishes that in those cases not expressly foreseen in such instruments, civilians and belligerents are under the protection of the law of nations stemming from the usages, the principles of the humanity and the dictates of public conscience. Therefore, the illegality of nuclear weapons depends on the principle of humanity. There are sacred rules that cannot be violated, even if the enemy has breached them previously. Thus, Pictet when speaking of the prohibition on all reprisals against protected persons by the Geneva Conventions says: "*L'interdiction des represailles ainsi établie a un caractère absolu. Elle vaut même si la violation à laquelle on prétend répondre s'est produite dans le champ des Conventions de Genève*".⁴³

c. *The principle by which it is forbidden the use of weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.* It is worth highlighting that regardless of the degree of improvement of nuclear weapons, due to the suffering infringed upon the belligerents and the civilian population, these weapons will always cause excessive damages and will have indiscriminate effects, even in sites far from the scene of operations (See Article 23 of the Regulations annexed to The Hague Convention IV of 1907 and Article 35 of Protocol Additional I of 1977).

It is also relevant the fact that the Protocol of 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (The Geneva Gas Protocol) is applicable to nuclear weapons even if it was adopted before those weapons were created. George Schwarzenberger points out: "If it could be established that the use of all nuclear weapons involved necessarily the discharge of gases enumerated in the Protocol, it would settle matters conclusively between the Parties to the Protocol. Even if the words "all analogous liquids, materials or devices" are so comprehensively phrased as to include any weapons of analogous character, irrespective of whether they were known or induced at the time of the signature of the Protocol. If the radiation and fall-out effects of nuclear weapons can be likened to poison, all the more can they be likened to poison gas which is but an even more closely analogous species of the genus poison".⁴⁴

d. *The principle by which the civilian population enjoys general protection and the prohibition to carry out indiscriminate attacks.* In accordance to international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians. Nuclear weapons are essentially weapons of indiscriminate

effects, irrespective of the concrete circumstances of its use (Article 51 of Protocol Additional I of 1977).

78. In light of the aforementioned considerations, in the opinion of the Government of Mexico the general principles codified in the Regulations annexed to The Hague Convention IV, the Protocol Additional I of 1977 to the Geneva Conventions of 1949 and in the Preamble of the Convention on prohibition or restriction on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects of 1980, are peremptory norms of general international law (*jus cogens*) as established by the Vienna Convention on the Law of Treaties of 1969.

CONCLUSIONS

79. The above paragraphs lead to the conclusion that in accordance with international law relating to the maintenance of international peace and security, to armed conflicts and to other obligations subscribed by the States on disarmament issues, the threat or use of nuclear weapons is not permitted by international law under any circumstances. The scope of the obligations that constitute the grounds for this conclusion make it evident that no circumstance whatsoever would justify the threat or use of nuclear weapons.

80. The body of international law on which such a prohibition is based is made up of conventional and customary norms, including peremptory norms of general international law by virtue of which the threat or the use of weapons of mass destruction could not be legitimized. On the contrary, the treaties and resolutions of United Nations organs, reinforced by the current status of applicability of norms on the maintenance of international peace and security, point to the ultimate goal of total elimination of all nuclear weapons.

NOTES AND QUOTATIONS

1. See, for example, the Preamble and Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968).
2. See, for example, Article 11 of the Charter of the United Nations and resolution 1(I) of the General Assembly, adopted unanimously on 24 January 1946.
3. Among them, the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (14 February 1967) and the Treaty on a Nuclear Weapon-Free Zone in the South Pacific (6 August 1985).
4. Treaty on the Non-Proliferation of Nuclear Weapons.
5. Treaty banning nuclear weapon tests in the atmosphere, in outer space and under Water (5 August 1963).
6. See Rossene Shabtai: *The World Court: What it is and how it works*, 1989, p. 106.
7. In particular, the First Committee of the General Assembly and the Conference on Disarmament.
8. United Nations. *Disarmament Topics: Towards a Nuclear Test Ban*, New York, July 1989, p. 22.
9. Therefore, it should be rejected the argument presented by some NWSOs by which it is claimed that the possession of nuclear weapons may imply its use or threat of use. See the written statements presented by France and the United Kingdom regarding the request of an advisory opinion formulated by the WHO in resolution WHA 46.40 (International Court of Justice, *legality of the use by a State of nuclear weapons in armed conflict: written statements (originals)*, September 1994).
10. Decision adopted on 11 May 1995, document NPT/CONF.1995/L.6. The Conference was held in New York, N.Y., from 17 April to 12 May 1995.
11. Statement Mexico in document NPT/CONF.1995/PV.18, pp. 9-10.
12. Document NPT/CONF.1995/L.6 adopted without a vote by the Conference on 11 May 1995.
13. Paragraph 4 d).
14. Section I.
15. Paragraph 2.
16. Paragraph 2.
17. Paragraph 3.
18. Section II.
19. Report of the Secretary General on the question of defining aggression (document A/2211 of 3 October 1952). cfr. in: Henkin, Louis et al. *International Law*, 1987. p. 681.

20. The definition of aggression is contained in General Assembly resolution 3314 (XXIX): "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...". According to the above-mentioned resolution, not all forms of the use of force constitute an act of aggression, but aggression is the most serious and dangerous form of the illegal use of force (preambular paragraph 5 of the resolution).
21. Report of the International Law Commission on the work of its forty third session. Supplement No. 10 (A/46/10).
22. Although the draft Code places the responsibility on the individual, it has also provided that prosecution of the said individual for a crime against the peace and security of mankind should not exonerate the State in question from any responsibility, according to international law, for any act or omission attributed to it (Article 5).
23. The International Law Commission has indicated that the word "threat" means acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State. A threat may take the form of declarations (expressions made public in writing or orally), communications (messages sent by the authorities of one Government to the authorities of another Government, by no matter what means of transmission) and shows of force (e.g. concentrations of troops near the frontier). See: Yearbook of the International Law Commission, Vol. 2, Part 2, p.68, document A/CN.4/SER.A/1989/Add.1.
24. See development of the concept of individual and collective self-defense in paragraphs 54-65 *infra*.
25. Paragraph 1.
26. See declaration formulated by China on 5 April 1995, document S/1995/265.
27. See paragraph 63 *infra*.
28. The declarations of the five nuclear powers formulated on 5 and 6 April 1995 are contained in documents S/1995/261, S/1995/262, S/1995/263, S/1995/264 and S/1995/265.
29. *Ibid.* note 11 *supra*.
30. Article 3 of Additional Protocol II.
31. Article 39 of the Charter of the United Nations.
32. *Effects of nuclear war on health and health services*, Geneva, World Health Organization, 1987; *International Physicians for the Prevention of Nuclear War, Radioactive heaven and earth*, Apex Press, 1991; Institute of Medicine, National Academy of Sciences, *The medical implications of nuclear war*, Washington D.C., 1986, among many other scientific studies.
33. The International Court of Justice has indicated that self-defense is limited only to a case of armed attack (*Military and paramilitary activities in Nicaragua and against Nicaragua*, 26 November 1984).

34. See article 13 of the draft on responsibility of States being prepared by the International Law Commission in the report of the Commission on the work of its forty-fourth session. Supplement No. 10 (A/47/10), pp. 75-78.
35. H. Meyrowitz, *Le statut des armes nucléaires en droit international*, Y.I.L. 219, 1982.
36. The Carolina Case, in Moore, *Digest of International Law*, Vol. 2, p.409.
37. Resolutions 56 (1948), 188 (1964) and 228 (1966), among others.
38. Report of the International Law Commission on the work of its forty-fourth session. Supplement No. 10 (A/48/10), p.82.
39. Judgement of 9 April 1949.
40. In this regard, it could not be accepted the argument presented by the Government of the Russian Federation regarding the request of an advisory opinion formulated by the World Health Organization in resolution 46.40, by which it mentioned that reservations to Protocol Additional I show that the question of legitimacy or non-legitimacy of the use of nuclear weapons is not regulated by international law. (International Court of Justice, *legality of the use by a State of nuclear weapons in armed conflict: written statements (originals)*, September 1994).
41. Therefore, the Government of Mexico cannot agree with the conclusion contained in the written statements of the Governments of the United Kingdom and the United States of America regarding the request of an advisory opinion formulated by the WHO, by which it has affirmed that there is no rule contained in either customary international law or treaty which expressly prohibits all use of nuclear weapons (International Court of Justice, *op. cit.*)
42. The De Martens Clause establishes that the inhabitants and the belligerents remain under the protection of the rule of the principles of the law of nations, as they result from the usages established among civilized peoples from the laws of humanity and the dictates of the public conscience, until a more complete code of the laws of war has been issued.
43. Jean Pictet, cfr. in: Sandoz, Yves, *Des armes interdites en droit de la guerre*, Université de Neuchatel, 1975, p. 69.
44. Cfr. in Yves Sandoz, *ibid.*, p. 64-65.