MEANS OF WARFARE : THE PRESENT AND THE EMERGING LAW *

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I. THE PRESENT LAW

1. TWO APPROACHES. THE GENERAL PRINCIPLE APPROACH

So far States have adopted two different approaches to the banning of weapons. They have either laid down general principles concerning broad and unspecified categories of weapons, or they have agreed upon restraints on the use of specific weapons (1).

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(1) On the prohibition of weapons in international law, see above all : ZORN, *Kriegsmittel und Kriegsführung im Landkriege nach den Bestimmungen der Haager Conferenz 1899,* 4-34 (1902); MCDOUGAL and FELICIANO, *Law and minimum World Order* 614 ff. (1961); MALLISON, « The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars », 36 *George Washington Law Review* 308 ff. (1967-68); BINDSCHEDLER-ROBERT, D., « A Reconsideration of the Law of Armed Conflicts », in *The Law of Armed Conflicts* (Carnegie Endowment for International Peace) 28-37 (1971); FARER, « The Laws of War 25 Years After Nuremberg », 583 *International Conciliation* 18 ff. (1971); BAXTER, R.R., « Criteria of the Prohibition of Weapons in International Law », in *Festschrift fur U. Scheuner* 41-52 (1973); HARRIS, « Modern Weapons and the Law of Land Warfare », 12 *Revue de Droit pénal militaire et de Droit de la guerre* 9 ff. (1973); FLECK, « Völkerrechtliche Gerichtspunkte für ein Verbot der Anwendung bestimmter Kriegswaffen », in *Fleck* (ed.), *Beiträge zur Weiterentwicklung des Humanitären Völkerrechts für Bewaffnete Konflikte* 43 ff. (1973); SIPRI, *The Problem of Chemical and Biological Warfare,* vol. III, *CBW and The Law of War* (1973); MALINVERNI, « Armes conventionnelles modernes et droit international » 30, *Annuaire suisse de Droit international* 23 ff. (1974); BLIX, « Current Efforts to Prohibit the Use of Certain Conventional Weapons », 4 *Instant Research on Peace and Violence,* 21 ff. (1974); RÖLING and SIIKOVIE, *The Law of War and Dubious Weapons,* Sipri (1976).

The former approach is the less satisfactory one. It has led to the formulation of three main principles prohibiting weapons.

Article 22 of the Hague Regulations, which has passed into customary international law, provides that « Belligerents have not got an unlimited right as to the choice of means of injuring the enemy ». At first sight this rule can appear to be pointless, for it does not give any indication as to the weapons which cannot be « chosen ». It cannot be presumed, however, that international legislators intended to lay down in an international treaty a provision devoid of any significance. The interpretative principle of effectiveness (« ut res magis valeat quam pereat »), must induce as to try to give some meaning to that article. According to a learned author Article 22 « imposes on the belligerents the general obligation to refrain from cruel or treacherous behaviour » (2). Neither in the preparatory works (3) nor in the subsequent practice of States is there any evidence corroborating this view. A more correct view seems to be that Article 22 must be construed to the effect that it rules out any *argumentum a contrario;* it excludes the inference that weapons which are not prohibited by the Hague Regulations are *ipso facto* allowed. Such weapons are banned or permitted according to whether or not they are prohibited by *other* rules of international law. This interpretation is also supported by some Military Manuals (4).

Another general principle is the one laid down in Article 23 *e* of the Hague Regulations, whereby « it is particularly forbidden... to employ arms, projectiles or material apt to cause unnecessary suffering ». This provision aims at turning into an autonomous rule the rationale behind the specific prohibition of some means of combat (explosive projectiles weighing less than 400 grammes, dum dum bullets and asphyxiating and deleterious gases). While those specific bans hinged, as it were, on the indication of the objective

(2) BINDSCHEDLER-ROBERT, D., « A Reconsideration of the Law of Armed Conflicts », cit. 28.

(3) Art. 22 was substantially taken over, without any discussion or comment, from Article 12 of the Brussels Declaration of 1874 : see *The Proceedings of the Hague Conferences,* prepared... under the Supervision of J.B. Scott, *The Conference of 1899,* 491, 424, 58 (1920). In Brussels the participating States had substantially accepted the wording proposed in the Russian draft *Actes de la Conférence de Bruxelles, 1874,* 4 (1874) which stated in Article 11 that « Les lois de la guerre ne reconnaissent pas aux parties belligérantes un pouvoir illimité quant aux choix des moyens de se nuire réciproquement » and went on to say in Art. 12 that « D'après ce principe, sont interdits : A) l'emploi d'armes empoisonnées », etc. In the discussion on draft Article 11 the Italian delegate pointed out that it was useful to insert at the beginning of Article 12 the word « notamment » (especially), otherwise one could have thought that the list in Article 12 was exhaustive and no other means of combat was prohibited by Article 11 (« L'article 11 combiné avec l'article 12, semble indiquer que les seules limites imposées aux pouvoirs des belligérants sont celles signalées dans le second de ces articles. Il croit qu'il serait préférable de poser comme principe général qu'il y a des moyens que la civilisation réprouve, puis d'indiquer quels sont *notamment* les moyens interdits aujourd'hui » *ibid.,* 198). The Italian suggestion was supported by the Belgian delegate (who stated that « on pourrait croire, sans cela [scil. l'insertion du mot *notamment*] que tout ce qui n'est pas compris dans l'énumération est licite » *ibid.*). Consequently, the word « notamment » was added in draft Article 12 (*ibid.* 199).

(4) See e.g. the *British Manual (The Law of War on Land* (1958), 40 para 107; the *U.S. Manual (The Law of Wand Warfare* 17, para 33 *b* (1956).

properties weapons must possess for being prohibited, mention is no longer made in Article 23 *e* of these objective properties. The focus is instead on a test (whether or not the injury caused is « necessary »), for the use of which the Article itself provides no indication whatsoever. Taken on its face value, the provision is couched in such vague and uncertain terms as to be barren of practical effects. Furthermore, as I have tried to demonstrate elsewhere (5), neither the preparatory works nor the subsequent practice of States shed any light on the purport of the rule. Also, the way States have attempted to implement Article 23 *e*, either in military manuals or in the few cases where the rule was invoked, shows that no common consent has ever evolved among States as to the actual normative value of the principle. Each State has interpreted the principle in its own way and international disagreement over whether a given weapon fell under the prohibition of the principle has never resulted in the reaching of a common view. It is therefore my opinion that Article 23 *e* as it stands now plays in practice a normative role only in extreme cases (such as cases where the cruel character of a weapon is so manifest that nobody would deny it, or where evidence can be produced of gross, repeated and large-scale violations of the principle). It stands to reason that Article 23 *e* can also play a role as a moral and political standard by which world public opinion assesses how belligerent States behave or misbehave. This meta-legal value of the principle under consideration should not be underestimated; it could turn out to be more important than the merely legal value, for the impact that public opinion can have, through mass-media, on governments. Furthermore, Art. 23 *e* can serve as a very significant source of inspiration inasmuch as it sets forth one of the general humanitarian grounds on which States should endeavour either to refrain from developing new weapons or to ban their use. This is most clearly borne out by the stand taken in 1973-1975, both in the UN General Assembly and at the Geneva Diplomatic Conference on Humanitarian Law of Armed Conflicts, by a number of States which agreed that one of the reasons for forbidding through conventional rules new weapons was their causing unnecessary suffering (6). Even from this point of view, then, Art. 23 *e* constitutes but a reiteration of what was already spelled out in the 1868 St. Petersburg Declaration (which, even in this respect, still remains the best illustration of a proper and realistic approach to the question of weapons) (7).

A third general prohibition on weapons follows from the general principle whereby « distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible » from the horrors of war (8).

(5) See my paper « Weapons Causing Unnecessary Suffering : Are They Prohibited ? », 58 *Rivista di Diritto Internazionale* 16 ff. (1975).

(6) Cp. my paper quoted at n. 5, 30 ff.

(7) See on this Declaration *infra*, Sect. I, para 3.

(8) The words quoted above were used by the U.N. General Assembly in its resolution 2444 (XXIII), adopted unanimously on December 18, 1968. In 1972 the General Counsel of the U.S.

The argument can be made that a belligerent who knowingly makes use of a weapon which by its very nature cannot but cause injuries both to combatants and civilians, intended to hit civilians or at any rate consciously brought them under his attack. This belligerent would thus be violating the rule forbidding deliberate attack on civilians — a rule that significantly specifies the aforementioned general principle. This argument, however, can hold true only for some extreme cases. We should consider, for example, that there are certain categories of « blind » weapons such as the V.1 and V.2 used by Germans in World War II, which lack precision to such an extent that they cannot be aimed at any specifie target. Such weapons are therefore very likely to strike civilians or civilian objects only. For this reason their use can be equated to the deliberate use of weapons against civilians, and is as such unlawful. This contention is borne out by State practice : suffice it to recall that resort to V.1 and V.2 by Germany was considered illegal in substance, by the British Prime Minister, W. Churchill, in 1944 (9); the same stand is ultimately taken by the Military Manual of the Federal Republic of Germany which considers, however, that those weapons, although inherently illegal, were not illegal when they were actually used, since they were employed by way of reprisal for Allied delinquencies (10).

Far more relevant and frequent is the case of weapons that are not so « blind » and, while they also hit civilians, are primarily aimed at military objectives. The use of these means of warfare necessarily falls under the rule whereby if belligerents resort to methods or means of warfare which result in incidental civilian losses, such losses must not be out of proportion to the military advantage gained. This rule of proportionality represents an important development and specification of the general principle on the distinction to be made between combatants and civilians. It has, however, been widely criticized. Thus, it was contended that this standard « calls for comparing two things for which there is no standard of comparison. Is one, for example, compelled to think in terms of a certain number of casualties as justified in the gaining of a specified number of yards ? Such precise relationship are so far removed from reality as to be unthinkable... One rebels at the thought that hundreds of thousands of civilians should be killed in order to destroy one enemy soldier who may be in their midst. But under more

Department of defense stated that the U.S. regards this principle « as declaratory of existing customary international law » (67 « American Journal of International Law », 1973, 122).

See also the G.A. resolution 2675 (XXV), adopted on December 9, 1970, (« Basic Principles for the Protection of Civilian Population in Armed Conflicts »).

(9) In a statement made in the House of Commons on July 6, 1944, Churchill said *inter alia* : « A very high proportion of these casualties I have mentioned... have fallen upon London, which presents to the enemy... a target 18 miles wide by over 20 miles deep. It is, therefore, the unique target of the world for the use of a weapon of such proved inaccuracy. The flying bomb is a weapon literally and essentially indiscriminate in its nature, purpose and effect. The introduction by the Germans of such a weapon obviously raises some grave questions upon which I do not propose to trench to-day » (« Keesing's Contemporary Archives », 1943-1945, 6536-6537).

(10) « Kriegsvölkerrecht, Allgemeine Bestimmungen des Kriegsführungsrechts und Landkriegsrecht », ZDv 15/10, März 1961, para 90.

reasonable circumstances, how can a proper ratio be established between loss of civilian life and the destruction of railway carriages ? » (11). Admittedly, the proportionality rule is vague and contains loop-holes. Still, it provides a standard for at least the most glaring cases. Moreover, criticisms of this rule are warranted, provided they are aimed at suggesting more workable and safer standards, that better meet humanitarian demands. Otherwise attacks on that rule could paradoxically result in even belittling the protection of civilians it currently provides.

2. MERITS AND INADEQUACIES OF GENERAL PRINCIPLES

The principal advantage of general principles lies in their covering vast categories of weapons. They do not affect only those agencies of destruction existing at the time when they were laid down, but can work also with respect to future means of combat. Consequently, they have a continuing force of espansion and a reach that can broaden with the passage of time. Two elements, however, go hand in hand to erode the value of general principles. First, they are couched in very vague terms; accordingly, they do not amount to safe standards of conduct but are susceptible to divergent interpretations. Their implementation calls for the existence of international bodies capable of verifying impartially whether a given weapon falls within their prohibitory scope, and of enforcing them. It is common knowledge that at present such bodies do not exist in the international society. This is precisely the second element eroding the normative force of the principles under consideration. Their application is left to the belligerents concerned. The resulting picture is distressing. When a belligerent considers that the adversary is using weapons violative of one of the aforementioned principles, he can stop the enemy from such use either by resorting to reprisals or by announcing that he will prosecute as war criminals all those involved in the employment of the weapon. Needless to say, whether this kind of reaction can produce any real effect actually depends on how strong the belligerent resorting to it is. Ultimately, therefore, the implementation of the general principles on weapons turns on the military strength of belligerents : strong States can dodge the bans without fear. The only « sanction » against them is to resort to world public opinion.

3. SPECIFIC BANS. THEIR RATIONALE

So far specific weapons have been prohibited, either through the evolving of customary international rules or by international agreements, for one or more of the following grounds : *a)* they have been considered cruel or such as to cause unnecessary suffering; *b)* they have been deemed treacherous; *c)*

(11) BAXTER, R.R., « Criteria of the Prohibition of Weapons in International Law », cit. 46, 48-49.

they have been regarded as indiscriminate, in that they affect combatants and civilians alike. These three humanitarian grounds on which weapons have been prohibited have never been accurately defined. It is however possible to find some general descriptions of them. Thus, the *« unnecessary suffering » criterion* was set out in the 1868 St. Petersburg Declaration, where it is stated that for the purpose of achieving the legitimate object of war it is sufficient to disable the greatest possible number of enemies; consequently « this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable » (12). A similar general formulation can be found in the 1877 Serbian Instructions, where mention is made of « the general rule that in time of war the depth of suffering and the extent of the losses inflicted upon the enemy should not be in excess of that which is necessary to defeat his forces and that all persons should abstain from cruel and inhumane acts » (13).

The criterion of *treachery* has never been defined in terms. Military manuals, however, give numerous illustrations (14) from which one can infer that combatants behave perfidiously or treacherously whenever they abuse the good faith of the enemy. More exactly, acts of treachery or perfidy are those which invite « the confidence of the adversary with intent to betray that confidence » (15).

Finally, as to the criterion of *indiscriminateness*, it is at first sight self-evident, and seems to need no explanation. On closer consideration, though, it also proves to be uncertain, for it is not clear whether a weapon is considered indiscriminate for the mere fact of not being selective (i.e. capable of hitting combatants only) or because it can entail civilian losses which are out of proportion to the military advantage gained through the use of the weapon.

(12) Text in SCHINDLER and TOMAN, *The Laws of Armed Conflicts* 96 (1973).

(13) Para 6. Text in 14 *International Review of the Red Cross* (n. 157) 173 (1974).

(14) See e.g. the British Manual *(The Law of War on Land)* : para 311 n. 1 (« For example, by calling out " Do not fire, we are friends "and then firing; or shamming disablement or death and then using arms... »); para 314 (« In general, it is contrary to modern practice to attempt to obtain advantage of the enemy by deliberate lying, for instance, by declaring than an armistice has been agreed upon when in fact that is not the case... »); para 316 (« To demand a suspension of arms and then to break it by surprise, or to violate a safe conduct or any other agreement, in order to obtain an advantage, is an act of perfidy and as such forbidden »); see also paras 317 and 318. See furthermore the examples given in the *Swiss Manuel des lois et coutumes de la guerre* (under para 36) and in paras 50 and 493 of the *U.S. Manual (The Law of Land Warfare).* Interesting examples are also given in older manuals or military instructions : see e.g. para 13 of the 1877 *Serbian Instructions* and para 57, subparas 9 and 10 of the French *Lois de la guerre continentale* (1913).

(15) See Art. 35 para 1 of the ICRC Draft Additional Protocol to the four Geneva Conventions.

It is stated in para 307 of the British Manual *(The Law of War on Land)* that « Belligerent forces must be constantly on their guard against, and prepared for, legitimate ruses, but they should be able to rely on their adversary's observance of promises and of the laws of war ». Para 308 then lays down that « Good faith, as expressed in the observance of promises, is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties ».

One must not believe, however, that *any* means of combat exhibiting one or more of these features has been banned. In fact, only those weapons have been proscribed which, in addition to having one or more of those characteristics, have not been regarded as *decisive* from a military point of view. In deciding whether to prohibit a given weapon account has always been taken of their military effectiveness. And this factor has indeed always overriden humanitarian grounds. Whenever it has turned out that a means of destruction was really effective, States have refrained from outlawing it. The interplay of humanitarian and military demands was tellingly spelled out in 1899 by the delegate of the United States to the Hague Peace Conference. Speaking in the Subcommission of the Conference concerned with means of warfare, he stated :

> The general spirit of the proposals that have received the favourable support of the Subcommission is a spirit of tolerance with regard to methods tending to increase the efficacy of means of making war and a spirit of restriction with regard to methods which, without being necessary from the standpoint of efficiency, have seemed needlessly cruel. It has been decided not to impose any limit on the improvements of artillery, powders, explosive materials, muskets, while prohibiting the use of explosive or expanding bullets, discharging explosive material from balloons or by similar methods. If we examine these decisions, it seems that, when we have not imposed the restriction, it is the *efficacy* that we have wished to safeguard, *even at the risk of increasing suffering, were that indispensable* » (16).

The same idea had already been expressed in 1868, at St. Petersburg, when several States met in order to ban explosive projectiles (17). The St. Petersburg Declaration is also the best illustration of how humanitarian demands are balanced against military exigencies. Explosive projectiles were banned at the request of the Russian Emperor, who thought that such weapons cause inhumane sufferings when they hit men, whereas they are militarily useful to destroy ammunition cars (« caissons d'artillerie », « voitures à cartouches et munitions d'artillerie ») (18). Although some States advocated a general and complete ban (19), the Russian proposal was eventually adopted and it was therefore decided to outlaw explosive projectiles only insofar as they are fired by rifles and machine-guns (« fusils ordinaires, mitrailleuses, mitraille à canon ») (20), and are thus aimed at hitting combatants individually (21). The same projectiles were instead allowed if fired

(16) *Proceedings on the Hague Peace Conference*, cit., 354 (emphasis added).

(17) See the statements to this effect made by various delegates at St Petersburg, « Protocoles des Conférences tenues à St-Pétersburg », in *Nouveau recueil général de traités*, continuation du *Grand recueil* de G. Fr. de Martens par SAMWER, CH., et HOPF, J., 452 ff. (1873).

(18) See the Russian « Mémoire sur la suppression de l'emploi des balles explosives en temps de guerre » (*ibid.*, 458 ff.).

(19) See e.g. the statements made by the representatives of Austria (*ibid.*, 455) and France (*ibid.*). Cp. also the statement of the delegate of Prussia (*ibid.*, 454), who, however, subsequently took a different stand (*ibid.*, 456 ff.).

(20) See the remarks made by the Russian representative (*ibid.*, 455 and cp. 462).

(21) « Il s'agit de proscrire seulement ceux (projectiles) qui ont pour but d'atteindre isolément les hommes et non des projectiles d'artillerie » (statement by the representative of Prussia, *ibid.*, 455).

by artillery. The weight of 400 grams was chosen as « a minimum for artillery projectiles and as a maximum for the projectiles to be prohibited » (22). Plainly, the fact that an explosive artillery projectile by hitting a man or a group of combatants can inflict horrible wounds on them, was not considered so decisive as to outweigh the military importance of those projectiles.

A few weapons were banned on one ground only. The « unnecessary suffering » criterion was the only rationale behind the prohibition, in 1868, of *projectiles weighing less than 400 grams* which are either explosive or charged with fulminating or inflammable substances (23); and of the prohibition, in 1889, of « bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions » (24). Furthermore, the desire « to safeguard the life and interests of neutrals and non-combatants » lay behind some basic provisions of the VIII Hague Convention of 1907, on the laying of *automatic submarine contact mines* (25).

Most weapons, instead, were banned on several grounds. Thus some means of combat were prohibited both because they affect combatants and civilians alike and because they were regarded as perfidious. This applies, in particular, to the 1899 and 1907 Hague Declaration on the *discarge of projectiles from balloons* (26). *Poison and poisoned weapons* were prohibited

(22) The Russian delegate observed that « l'essentiel lui paraît être de tracer une ligne de démarcation nette entre les projectiles d'artillerie et ceux affectés aux armes portatives. Le chiffre de 400 grammes a été choisi parce qu'il peut être considéré comme le minimum pour les premières et le maximum pour les secondes. Toutes les pièces d'artillerie de moins d'une livre doivent être reconnues inefficaces » (*ibid.*, 469 and cp. also 457).

(23) See the « Mémoire sur la suppression de l'emploi des balles explosives en temps de guerre » sent by the Russian Emperor to the States invited to the St. Petersburg Conference, *ibid.*, 458-467, as well as the statements made at St. Petersburg by the various States (*ibid.* 451 ff.), in particular the statement by the Russian representative (*ibid.*, 451) : « Il y a là d'abord une question de principe sur laquelle nous sommes tous d'accord, un principe d'humanité qui consiste à limiter autant que possible les calamités de la guerre et à interdire l'emploi de certaines armes, dont l'effet est d'aggraver cruellement les souffrances causées par les blessures, sans utilité réelle pour le but de la guerre »).

(24) For the pertinent citations see my paper *Weapons Causing Unnecessary Suffering* etc., cit., 16 ff.

(25) See the statement by the British delegate in the Ist Subcommission of the IIIrd Commission, in *The Proceedings of the Hague Peace Conferences*, edited by J.B. Scott, *The Conference of 1907*, vol. III, 523 (1921). See also, *inter alia*, the statement of the Italian delegate (who spoke of the need to eliminate from the use of « these terrible contrivances » all the fatal consequences that they could have « for the peaceful commerce of neutrals and for fishing », *ibid.*, 522). See also the report submitted by the Ist to the IIIrd Commission (*ibid.*, 459 : emphasis is placed on « the very weighty responsibility towards peaceful shipping assumed by the belligerent that lays mines », as well as on « the principle of the liberty of the sea »).

(26) See the statements made at The Hague, in 1899, by the representative of the United States, who insisted on the fact that those weapons hit combatants and non-combatants alike (*Proceedings of the Hague Peace Conferences, The Conference of 1899*, cit., 354, 280), and the statement by the delegate of the Netherlands, who stressed instead that the launching of explosives from balloons was « perfidious » (*ibid.*, 341-342; see also 288).

because they were regarded as perfidious (27) and cruel (28), as well as — according to the 1877 Serbian Instructions — because « the employment of poison... is not only dishonourable but is also a double-edged weapon that can easily turn against those who resort to it » (29). *Aspyxiating gases* were banned in 1899 because they were considered cruel (30), indiscriminate (31) and because they cause unnecessary suffering (32). *Bacteriological means of warfare* were banned in 1925 and then in 1972 for two reasons : they are « savage » and « horrible » (33), « so revolting and so foul that (they) must meet with the condemnation of all civilised nations » (34); furthermore, they are indiscriminate : as was put by the Polish delegate to the 1925 Geneva Conference, « it is impossible to limit the field of action of bacteriological factors once introduced into warlike operations. The consequences of bacteriological warfare will thus be felt equally by the armed forces of the belligerents and the whole civilian population, even against the desire of the belligerents, who would be unable to restrict the action of the bacteriological weapons to an area decided upon beforehand » (35).

4. MERITS AND INADEQUACIES OF THE SPECIFIC - BAN APPROACH

This approach has three major advantages. First, as a result of drawing up precise rules which prohibit specific weapons by pointing to their objective features, a high degree of *certainty* is provided about the kind of weapon

(27) See e.g. the statements made at The Hague, in 1899, by the representative of the United States (*Proceedings of the Hague Peace Conferences* etc., cit., 356) and of The Netherlands (*ibid.*, 356 and 296). See also para 40 of the Austrian Military Manual [(« Grundsätze des Kriegsvölkerrechts », in *Bundesministerium für Landesverteidigung, Truppenführung 253* (1965)].

(28) See e.g. the diplomatic notes sent in 1868 by the Government of Portugal and Prussia, respectively, to the Russian Emperor (who had proposed to outlaw explosive bullets). Text in *Nouveau recueil général de traités*, etc. cit., 464 and 465. See also the statements made in 1899 at The Hague by the delegate of Russia (*Proceedings of the Hague Peace Conferences*, cit., 366 and 296) and of the United States (*ibid.*, 366). See furthermore many modern military manuals, such as The Netherlands *Rules of the Law of War* [(VR 2-1120/11, Ministerie van Oorlog, Voorlopige Richtlijnen nr 2-1120, Velddienst-Deel 11 - *Oorlogsregelen*, Chapt. III, para 14, at 7 (1958)]as well as The Netherlands *Manual for the Soldier* [(VS 2-1350, Koninklijke Landmacht, *Handboek voor de Soldaat*, Chapt. 7, para 10, at. 7/3 (1974)].

(29) Para 12, in *International Review of the Red Cross*, cit. 174.

(30) See e.g. the statements made in 1899 at The Hague by the representatives of Russia and of Austria-Hungary (*Proceedings of the Hague Peace Conferences*, cit. 366).

(31) See e.g. the statement made in 1899 at The Hague by the representative of Denmark (*ibid.*, 366) and by the delegate of the Netherlands (*ibid.*, 283).

(32) See e.g. the statement made in 1899 at The Hague by the representative of Russia (*ibid.*, 283).

(33) See the statement made by the delegate of Poland in the 1925 Geneva Conference : League of Nations, *Proceedings of the Conference for the Supervision of the International trade in Arms and Ammunition and in Implements of War 340.*

(34) See the statement made in 1925 by the delegate of the United States, 1925 *Geneva Conference Proceedings*, cit., 341.

(35) *Ibid.*, 340.

which is outlawed. Secondly, certain instruments of destruction are proscribed *in any circumstance*, regardless of the quality and quantity of the medical or relief resources of the belligerents or of the degree of their technological development (36). Thirdly, thanks to its specific and precise formulation which makes reference to objective connotations of the forbidden weapons, the prohibition is capable of providing a safe normative guidance which is effective *even though no enforcement authority exists :* this is clearly evidenced by the fact that the existing prohibitions of specific weapons have been normally respected even though they were at times violated by one of the belligerents.

The drawbacks of this approach, however, are no less apparent than its merits. Specific bans can be easily by-passed by elaborating new and more sophisticated weapons which, while they are no less cruel than the proscribed ones, do not fall under the prohibition owing to their new features. It was rightly noted that « since we cannot always predict context and technological change, the effort to ban specific weapons is an effort geared to the past » (37). What can turn out to be more important is that the States more likely or capable of dodging the ban are the more industrialized ones, for they possess the technological resources which are needed to manufacture more sophisticated weaponry. As a result, the gap between technologically developed States and less advanced countries could be widened also in this field.

5. STATE PRACTICE

On many occasions States have claimed, in recent years, that some weapons used by the adversary, or at any rate by other States, were unlawful as violative of general principles of the laws of war. As in this paper I cannot enter into details (38), I shall confine myself to pointing to some general conclusions which can be drawn from a survey of practice.

First, State practice is indicative of the fact that in the view of a number of States some weapons are contrary to international law, because they are indiscriminate or perfidious, or cause unnecessary suffering. As even those States that opposed this view did not go as far as to reject the general principles on weapons, the clear inference is that all States have upheld those general principles. The importance of this conclusion is somewhat belittled, however, by the second and third conclusions to be drawn from State practice. The second conclusion is that when it was contended by a State that a

(36) May I refer to my paper on *Weapons Causing Unnecessary Suffering* etc. cit., 18 ff.

(37) Paust, « Remarks on Human Rights and Armed Conflicts », in *Proceedings of the 67the Annual Meeting of the American Society of International Law* 163 (1973).

(38) For the practice of States concerning the application of the principle on unnecessary suffering, see my paper *Weapons Causing Unnecessary Suffering* etc. quoted above at nt. 5, p. 23 ff. For the practice relating to the principle on indiscriminate weapons, see my paper *The Prohibition of Indiscriminate Means of Warfare*, in « Liber Amicorum Discipulorumque B.V.A. Röling » (forthcoming).

certain weapon ran counter to a general principle, in no case did the State against which that contention was made acknowledge the violation. This is only natural, because no State is ready to openly admit violating international law. What, however, is lacking, at least in the case of conventional weapons, has been the *repetition of protests by a great number of States* and the affirmation *by some international body representative of the world community* that the weapons at issue are contrary to international law. Criticism and protests against the use of certain weapons have remained therefore « unilateral » moves and have not been able to elicit the agreement of a vast number of States. Thirdly, no State has thus far discontinued the use of any weapon as a result of allegations by other States that weapon is illegal. If in a few instances (39), charges resulted in the State accused dropping the use of the weapon, this was mainly due to the surrounding circumstances of the war (i.e., the State accused was about to lose the war) and to the warning that military personnel using those weapons would be tried as war criminals, if captured.

In short, a survey of State practice proves that while no State denies the existence and the binding value of the general principles, no agreement (outside treaty stipulations) has as yet evolved on the concrete application of those principles to specific weapons. This amounts to saying that the prohibitory intent of those principles has proved scarcely effective.

II. THE EMERGING LAW

1. GENERAL

The present legal situation is no doubt very unsatisfactory. Since the last world war, States have constantly been developing and occasionally using new and very cruel weapons : suffice it to mention incendiary weapons containing napalm and phosphorus, which produce dreadful burnings, and other conventional weapons such as fragmentation and cluster bombs, as well as hypervelocity bullets, which become completely unstable on impact, tumbling in the wound and producing a large cavity. In addition, States have steadily been perfecting nuclear weapons of various sizes and have been manufacturing new chemical weapons of increasing effectiveness. The existing rules of international law are obviously inadequate to cope with these

(39) Thus, it may be recalled that on April 24, 1975, the Provisional Government of South Vietnam and the Democratic Republic of Vietnam protested the use by the Saigon authorities of CBU 55 bombs. They claimed that these weapons were contrary to international law because they were inhumane, indiscriminate and terrorized the population; they therefore warned South Vietnam that they would bring to trial as war criminals those pilots who would not refuse to use such weapons. It seems that after this stern warning, the Saigon authorities discontinued resort to CBU bombs (*L'Unità*, April 25, 1975, at 20; cf. *Le Monde*, February 5, 1975, at 6 and April 24, 1975 at 3).

new agencies of destruction. It is therefore legitimate to ask what the ICRC and the international community are doing to outlaw or at least to curb the use of such weapons.

Three major trends are discernible. First, a wide tendency has emerged to *reaffirm and develop* the existing general principles referred to above [*supra*, para I (1)] and, by the same token, to broaden their scope. Secondly, both the States participating in the Geneva Diplomatic Conference and the ICRC have suggested extending the application of those principles to *non-international armed conflicts.* Thirdly, most States have expressed doubts about whether conventional means of warfare, such incendiary weapons, delayed-action weapons, fragmentation bombs, high-velocity bullets etc. come under the purview of the existing general principles proscribing weapons. Consequently, a large majority of States strongly press for the formulation of *specific bans* on some of these weapons.

In the following pages I shall expatiate on each of these trends (40).

2. THE REAFFIRMATION AND DEVELOPMENT OF GENERAL PRINCIPLES

Most States have deemed it advisable to reiterate the existing general prohibition on weapons causing unnecessary suffering. Consequently, Draft Protocol I includes a provision to that effect (article 33 para 2) (41). The reaffirmation of the general rule restricting the choice of means of combat has also been regarded as appropriate, and to this end a provision was included in the same Protocol (Article 33 para 1) (42).

This approach, however, was not considered sufficient. The aforementioned provisions were eventually adopted in 1975, by Committee III, after being supplemented *in three ways.* First, they were expanded so as to include other general prohibitions, namely the prohibition of *indiscriminate* means of

(40) On the current efforts to enact new international rules on weapons see in general : BLIX, « Human Rights and Armed Conflicts, Remarks », *Proceedings of the 67th Meeting of the American Society of International Law* 152 ff. (1973); BAXTER, « Perspective : The Evolving Laws of Armed Conflicts », *99 Military Law Review* 99 ff. (1973); BAXTER, « Criteria of the Prohibition of international Law », cit. 46 ff.; KALSHOVEN, « Human Rights and Armed Conflicts, Remarks », *Proceedings of the 67th Meeting of the American Society of International Law* 160-162 (1973); KALSHOVEN, *The Law of Warfare. A Summary of its recent History and Trends in development* 87 ff. (1973); BLIX, « Current Efforts to Prohibit the Use of Certain Conventional Weapons », 4 *Instant Research on Peace and Violence* 21 ff. (1974); CASSESE, « Current Trends in the Development of the Law of Armed Conflicts », 24 *Rivista Trimestrale di Diritto Pubblico* 1426-1429 (1974); MALINVERNI, « Armes conventionnelles modernes et droit international », cit. 39 ff.; BAXTER, « Humanitarian Law or Humanitarian Politics ? The 1974 Diplomatic Conference on Humanitarian Law », 16 *Harvard International Law Journal* 22-24 (1975).

(41) « It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in ail circumstances ».

(42) « The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited ».

warfare and of means of *ecological warfare*. As for the first category, the ICRC proposed a provision (Article 46 para 3) stipulating that

> « the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants or civilian objects and military objectives, are prohibited ».

This suggestion received wide support, and elicited proposals for improvements by various States (43). After lengthy debates, Committee III adopted by consensus, in 1975 (44), a text (Article 46 para 3), which reads as follows :

> Indiscriminate attacks are prohibited. Indiscriminate attacks are those which are not directed at a specific military objective; or those which employ a method or means of combat which cannot be directed at a specific military objective, or the effects of which cannot be limited as required by this Protocol, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. Among others, the following types of attacks are to be considered as indiscriminate :
>
> *(a)* An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects; and
>
> *(b)* An attack of the type prohibited by Article 50 (2) (a) (iii)
>
> ≠ under this provision, in conducting military operations, those who plan or decide upon an attack, « shall refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated ». ≠.

This rule among other things elaborates the prohibition of indiscriminate weapons, in two respects : (1) by specifying what must be understood by « blind » weapons; (2) by developing the rule of proportionality. As far as the first point is concerned, the provision is no doubt a great improvement over the existing law, for lett. (a) specifies in clear and unambiguous terms the circumstances under which a means of combat is illegal for its indiscriminateness. The first and clearest inference from this provision is that non « tactical » atomic and nuclear weapons (provided of course that « tactical » ones are capable of hitting military objectives only) are prohibited. There could, however, be some elements pointing to a contrary conclusion (45).

Less felicitous appears to be the second part of the provision, which elaborates the rule of proportionality. It seems that the main focus is placed on the *subjective evaluation*, by belligerents, of the destructive effects of

(43) See above all doc. CDDH/III/8; DCCH/III/27 and CDDH/III/43.

(44) See CDDH/III/SR.24, at 3-4; CDDH/III/SR.31, at 2-3.

(45) In its introduction to the Draft Additional Protocols, the ICRC states : « It should be recalled that, apart from some provisions of a general nature, the ICRC has not included in its drafts any rules governing atomic, bacteriological and chemical weapons. These weapons have either been the subject of international agreements such as the Geneva Protocol of 1925 or of discussions within intergovernmental organizations » ICRC, « Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary », Geneva, October 1973, at 2.

attacks or of the use of means of warfare. For it is stated there that a belligerent must refrain from launching attacks which *may be expected* to cause damages to civilians disproportionate to the military advantage *anticipated* by that belligerent. Instead of establishing that the possible disproportion must be *objective* (i.e. that the actual incidental damage of civilians must not be out of proportion to the military advantage actually gained), the provision hinges on how a belligerent perceives and anticipates the effect of its attack. It would seem that the provision therefore lends itself to subjective interpretations. Thus, for instance, faced with a glaring disproportion of civilian loss to the military advantage, a belligerent could claim that when he planned the attack he did not expect or anticipate such a great disproportion. How could one assess the decision-making process of belligerents and the manner by which they weigh the various alternatives and make the final choice ? The difficulty of looking into such imponderable elements to determine whether a belligerent *should have expected* disproportionate damages to civilians could result in rendering the practical application of that rule very difficult.

Besides developing and specifying the general principles on indiscriminate weapons, the Geneva Diplomatic Conference has taken another significant step. Aware of the fact that in modern wars belligerents (or, more appropriately, technologically advanced belligerents) tend to use weapons which eventually affect civilians in that they bring about severe damage to the environment, the States assembled at Geneva adopted Article 33 para. 3, a provision which prohibits means of ecological warfare (46). It reads as follows :

> It is forbidden to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.

This provision is of necessity rather vague. Especially the time element (« long-term... damage ») can lend itself to subjective interpretations. Some light is shed, however, by the debates preceding its adoption. As is stated in the Report submitted by Committee III to the Conference,

> It was generally agreed that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision. What is proscribed, in effect, is such damage as would be likely to prejudice over a long-term the continued survival of the civilian population or would risk long-term, major health problems for it (47).

(46) While the ICRC had made no proposals on the matter, some States put forward at Geneva proposals aimed at strengthening the protection of the environment from the damages of war : see the amendments by Finland (CDDH/III/91), by Egypt, Australia, Czechoslovakia, Finland, GDR, Hungary, Ireland, Norway, Yugoslavia, Sudan (CDDH/III/222), by the Democratic Republic of Vietnam (CDDH/III/238).

(47) CDDH/III/286, at 9.

Protection of the natural environment against damages of warfare is also provided in Art. 48 bis, which reads as follows : « 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. Such care includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisal are prohibited ».

The second way of supplementing and strengthening the existing general principles consists in *linking them with the enactment of specific bans.* This link was stressed by various States, which pointed out that the reformulation and expanding of general principles would be of little value without their being implemented through the elaboration of specific bans. Many States therefore underscored the close relationship existing between the works of Committee III of the Diplomatic Conference on Humanitarian Law (concerned *inter alia* with the general principles on means of combat) and the *Ad Hoc* Committee on conventional weapons, of the same Conference. By taking such a stand, States intended to bring out that specific bans are the indispensable corollary of general principles — or to put it differently, that general principles *per se* can primarily serve as guidelines for outlawing single weapons through specific provisions. This position is illustrated, *inter alia*, by the following statement of the delegate of Mauritania, made in 1975 :

> His delegation considered that the provisions of Article 22 and 33 (e) of the Regulations respecting the Laws and Customs of War on Land, which appeared in The Hague Conventions of 1899 (II) and 1907 (IV) and were to be found in the Preamble to the Saint Petersburg Declaration of 1868, as well as the report of the Secretary-General of the United Nations, clearly showed that the use of certain categories of weapons *should be generally prohibited* for the well-being of all mankind (48).

Another statement which is worth citing was made in 1975 by the delegate of Algeria, who observed in the *Ad Hoc* Committee on Conventional Weapons that

> While other committees were trying to draw up provisions which would take account of the legitimate requirements of the international community with respect to humanitarian law in situations of modern armed conflicts, it was natural that Committee IV should be given the task of harmonizing the use of certain weapons with those requirements. Would it not, in fact, be useless to include such provisions as those contained in article 33 about the prohibition of unnecessary injury and in article 34 about new weapons if the Committee proved to be too hesitant in taking a concrete approach to those provisions ? The Committee had an exceptional opportunity to carry out a truly humanitarian task in the tradition of the St Petersburg Declaration of 1868 and The Hague Rules of 1907, which had resulted in the prohibition of the dum-dum bullet and poison gases (49).

The third way of making general principles effective lies in imposing on States the duty of *verifying* whether new weapons, that they develop or manufacture, are in keeping with international standards. To this end, the

(48) CDDH/IV/SR.11 at 4 (emphasis added).

(49) CDDH/IV/SR.16, at 6. See also the statement made by the delegate of New Zealand (« According to those principles (*scil.* certain long-established principles of law) — which were also being considered in the Third Committee — the use of weapons apt to cause unnecessary suffering or to have indiscriminate effects was prohibited. The concept of perfidy or treachery must also, however, be borne in mind. The elaboration and application of those principles required a process of a particular kind : a dialogue in which there was a close assessment of the effects and advantages of the categories of weapons. The New Zealand Delegation... welcomed the fact that dialogue was now well under way » (CDDH/IV/SR.10, at 4). See also the statement by the representative of Sudan (CDDH/IV/SR.15, at 21).

ICRC proposed a new rule, Article 34, which provides that « In the study and development of new weapons or methods of warfare, the High Contracting Parties shall determine whether their use will cause unnecessary injury ». After considering various amendements, Committee III of the Diplomatic Conference on Humanitarian Law adopted by consensus, in 1975, the following text (Article 34) :

> In the study, development, acquisition, or adoption of a new weapon, means, or method of warfare a High Contracting Party is under an obligation to determine whether its employment would, under some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Under this provision contracting States are not bound to disclose anything about the new weapons they are studying or developing. They are therefore not required to assess publicly the legality of new weapons. It follows that other contracting States have no possibility of verifying whether the obligation laid down there is complied with. It could be argued, however, that Article 34 actually imposes both the duty to set up domestic procedures for exploring the issue of legality of new weapons and the duty to concretely use these procedures with respect to each new means of combat. While compliance with the former duty can be made subject to international scrutiny by other contracting States (which could request to be informed about these procedures) (50), implementation of the latter duty is left — in actual practice — to the discretion of the contracting State which studies or elaborates a new means of warfare.

3. THE EXTENSION OF GENERAL PRINCIPLES TO NON-INTERNATIONAL ARMED CONFLICTS

The text of Draft Protocol II proposed by the ICRC contains several provisions (to be found in Articles 20 and 26) extending to civil strifes the application of general principles on the use of weapons. Article 20 para 1 states :

> The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited.

Para 2 of the same article provides :

> It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in ail circumstances.

(50) It can be mentioned that some States have already set up procedures for verifying whether new weapons comply with international standards (see e.g. the US Department of Defense *Instruction* n° 5500.15 of October 16, 1974 on « Review of Legality of Weapons under International Law ». Reference to such instruction was made by the US delegate in 1975 at Geneva : CDDH/IV/SR.15, at 14). Other States could always request a certain State to disclose in general terms what procedures it has set up.

The importance of these provisions should not be underestimated. The only treaty rules concerning civil strifes at present in force, namely Article 3 common to the four 1949 Geneva Conventions, do not cover the behaviour of combatants. This matter is only governed by a few rules of customary international law which evolved during the Spanish Civil War (1936-1939) (51). Such rules, however, are mainly concerned with the protection of civilians, and do not affect *directly* the use of means of warfare. If the two aforementioned provisions proposed by the ICRC will be adopted by the Diplomatic Conference, for the first time treaty rules would cover an area of civil strifes which so far has not been directly governed by international law. However vague and general these rules may be, their extension to internal armed conflicts would no doubt constitute a step forward, in this area. Although only a few States have pronounced themselves on the text of Article 20 proposed by the ICRC, it would seem that the general tendency is to accept its substance (52).

While Article 20 still awaits consideration, the Geneva Diplomatic Conference (more correctly, Committee III of the Conference) has already adopted two very important provisions. One is Art. 26 para 3, which states :

> The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives are prohibited.
>
> An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, village or other area containing a concentration of civilians or civilian objects is to be considered as indiscriminate.

While the first part of this paragraph merely extends to civil wars the general principle on indiscriminate weapons, the second part specifies and develops it in a very important respect, thereby making the general principle more effective (although it eventually proscribes, more than single means of warfare as such, the indiscriminate way they are used). It is to be regretted that the Geneva Conference did not take up another provision proposed by the ICRC (Article 26 para 3, litt. *b* of Draft Protocol II), which laid down the principle of proportionality, thus usefully supplementing the rule prohibiting target area bombings. Furthermore, one may hope that the adoption of the aforementioned provision by a weak majority (44 votes to none, with 22

51) May I refer to my paper « The Spanish Civil War and the Development of Customary Law Concerning International Armed Conflicts », in *Cassese* (ed.), *Current Problems of International Law* 298 ff. (1975).

(52) Two States (Finland and Brazil) submitted amendments primarily aimed at a technical improvement of those provisions (CDDH/III/91 and CDDH/III/215, respectively). The German Democratic Republic, on its part, proposed an amendment (CDDH/III/87) that would greatly expand the scope of the Article, by adding three prohibitions : 1) of « other particularly cruel means and methods » of warfare; 2) of indiscriminate weapons; and 3) of means of war that « destroy natural human environmental conditions ». This amendment was strongly supported by the Soviet Union (CDDH/III/SR.32, p. 6).

abstensions) will not result in this provision being changed in the plenary, or in the entering of a large number of reservations, once the Protocol is adopted.

The other important provision concerning means of warfare adopted in Committee III is Art. 28 bis, on protection of the natural environment. It states :

> It is forbidden to employ methods or means of combat which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

This provision is almost identical to Art. 33 para 3 of Draft Protocol I, referred to above. The remarks made with respect to that provision hold therefore true for Art. 28 bis as well. It is worth stressing that while Art. 33 as a whole was adopted by consensus, Art. 28 bis was adopted by 49 votes to 4, with 7 abstentions.

4. THE ELABORATION OF SPECIFIC BANS

a) *Different Categories of Weapons. The Question of the Forum Competent for their Banning*

Most States agree that there are two categories of weapons — nuclear and chemical — which call for special solutions. Owing to their strategic importance, their possible banning or restriction can only be discussed in a disarmament forum, where manufacturing and stockpiling are also considered as well as procedures for verifying whether possible prohibitions are complied with. The international forum which is now being used to this effect is the Geneva Conference of the Committee for Disarmament (CCD) in which a limited number of States, including the Soviet Union, the United States and the United Kingdom, take part.

The opinions of States are divided about incendiary and other conventional weapons, as well as any future types of weapons. A group of States, made up of Afro-Asian countries, a few Latin American countries and some Western States (such as Sweden), strongly advocate that an ad-hoc diplomatic conference should ban at least some incendiary and other conventional weapons. At the 1974 Session of the Geneva Diplomatic Conference six States, namely Egypt, Mexico, Norway, Sweden, Switzerland and Yugoslavia, submitted a working paper proposing that the use of some of those arms be restricted or prohibited, because they are either indiscriminate in their effects or cause unnecessary suffering, and also because they have no great military value (53). Some Western countries took — at the outset — a rather cautious stand on the subject; they pointed out that, should the possible banning of those weapons be discussed, the only appropriate forum would be

(53) See CDDH/DT/2, at 311. This document was revised and updated in 1975 (see doc. CDDH/IV/201).

the CCD (54). The Soviet Union and other socialist countries strongly supported the Third World requests that napalm and new conventional weapons be prohibited. They tended to join, however, the major Western countries in maintaining that the examination of this matter should be taken up by an international forum directly concerned with disarmament, such as the CCD (55).

The implications of the adoption of either solution are evident. In an ad hoc diplomatic conference those States which at present oppose the CCD solution would command a solid majority, and would fairly easily succeed in adopting sweeping bans on several weapons despite any possible resistance or opposition by great powers. The ensuing treaty or treaties would, however, run the risk of remaining a dead letter if they are not acceded to by great powers. The CCD, on the other hand, would be likely to take a more cautious and realistic stand. Nonetheless, the fact that it is composed of a limited number of States and that its wary attitude could cause great delays in reaching any agreement on the subject is looked upon adversely by Third World countries.

b) *Considerations Underlying the Possible Outlawing of Conventional Weapons*

It is apparent from the debates at the Geneva Diplomatic Conference that two sets of motivations guide States while considering which conventional weapons should be forbidden : *a)* the traditional intent to reconcile humanitarian demands with military effectiveness; *b)* the need to carefully consider how the military balance presently existing among various groups of States could be affected by new bans.

That the first category of considerations is constantly borne in mind by States as much now as it was in the past, is *inter alia* demonstrated by several statements of States. It is worth quoting here a statement by the delegate of Sweden, which is all the more significant because this neutral State is among the most outspoken advocates of strict and wide bans on conventional weapons. The Swedish delegate stated in 1975 that

> « where a weapon could cause a high degree of suffering and was shown to be of relatively little military value, the case for a ban on use was obviously strong » (56).

(54) See e.g. the Comment by Canada and Denmark on the Reports of the UN Secretary-General on Respect for Human Rights in Armed Conflicts, UN Doc. A/8313 (15 June 1971), respectively at 13 and 22, 24-25. The same stand was taken in 1974 by some Latin American countries, such as Brazil (CDDH/SR.10, at 11).

It would seem, however, that many Western countries are gradually changing their attitude, and tend now to favour consideration of new weapons by other international fora than the CCD.

(55) Ukraine (CDDH/SR.11, at 19), Hungary (*ibid.*, 22), USSR (*ibid.*, SR.12, at 8), Byelorussia (*ibid.*, SR.14, at 14).

(56) See CDDH/IV/SR.9, at 12.

The second order of motives lying behind the attitude of States towards the possible banning of weapons is but a *corollary* of the first one. States want to ensure that the outlawing of specific conventional weapons do not affect adversely the military effectiveness of particular groups of States. This attitude is best illustrated by the statements of such differing States as the Soviet Union and Switzerland. Speaking of incendiary weapons, the Soviet delegate observed in 1975 that

> International relations were based on the security of nations. Some countries manufactured low-cost incendiary weapons for their own defence. If the use of such weapons was banned, a small country would become unable to defend its territory and would be in a position of weakness vis-à-vis large countries which produced costlier and more efficient weapons. He therefore felt it was difficult to ban a particular category of weapons and he appealed to the *Ad Hoc* Committee to co-ordinate and draw up fair rules to govern the prohibition and restriction of certain weapons (57).

Also in 1975, the Swiss delegate observed :

> As to weapons not subject to the prohibition (para B.1), ... smoke-producing weapons contained white phosphorus, which caused extremely painful burns; there could be no question of banning them, however, since to do so would place small armies at a disadvantage to large ones (58).

c) *Trends Emerging in the Current Efforts for the Outlawing of Specific Weapons*

Four main aspects of the debates in the Geneva Diplomatic Conference should be stressed.

First, although no State challenges the binding force of the existing general principles prohibiting weapons, many States tend to consider that the new conventional weapons currently under discussion, such as incendiary weapons, **anti-personel** fragmentation weapons, etc. are not forbidden by those principles. They maintain that, at the most, those general principles can point to the criteria (causing unnecessary suffering, indiscriminateness, etc.) for enacting new prohibitions; they, however, do not actually have such a wide and precise scope as to forbid or restrict the use of new weapons. Consequently, for most States (59) the only realistic and proper approach to such weapons consists in considering whether it is feasible to elaborate new rules forbidding or restricting their use.

Secondly, the overwhelming majority of States agree upon the legal criteria for banning conventional weapons. These criteria are : 1) the causing of unnecessary suffering; 2) the indiscriminateness of a weapon; 3) the treacherous character of a weapon. There is agreement that any means of de-

(57) See CDDH/IV/10, at 20.

(58) See CDDH/IV/SR.10, at 17.

(59) For citations, see my paper « Current Trends in the Development of the Law of Armed Conflict », cit.,

struction that meets at least one of such criteria should be prohibited — provided, of course, that this does not run counter to overriding military exigencies.

Thirdly, it is apparent, however, that the consensus among States no longer exists when the question arises of how the three legal criteria referred to above should be applied to new weapons, and which weapons should accordingly be forbidden. Without entering into the details of the Geneva debates, it can be observed that at least some major Western countries as well as the Soviet Union tend to stress the difficulty of concretely determining whether or not a specific weapon meets one of the aforementioned legal criteria. They therefore suggest that more study and thought should be devoted to these problems (60). By contrast, a few Western countries led by Sweden, and a number of Afro-Asian States claim that sufficient consideration has been given to the technical, military, and medical aspects of the weapons concerned, for the States to be able to make up their minds and agree upon rules for banning some of those weapons, or restricting some of their uses. In this connection emphasis must be placed on the aforementioned working paper (CDDH/DT/2) submitted in 1974 by six countries (Egypt, Mexico, Norway, Sweden, Switzerland and Yugoslavia) for the purpose of concretely indicating some conventional weapons whose use should be prohibited or restricted. This document was somewhat revised in 1975 in the light of the discussions of the Lucerne Conference on Weaponry, and resubmitted as doc. CDDH/IV/201. Although it elicited much support among various States, which even decided to co-sponsor it (61), so far no agreement has been reached on it. For the time being it therefore seems very arduous to foresee whether any major breakthrough will ever be achieved on this matter.

A fourth trend is discernible in the Geneva debates. States become increasingly aware that, even assuming that it is possible to arrive at the enactment of specific bans, such bans could be easily dodged by manufacturing new and even more inhuman weapons. A growing number of States therefore suggest that machinery should be set up for the purpose both of keeping new developments in conventional weapons under review and of assessing new weapons in the light of humanitarian principles. Such machinery should thus ensure that States do not devise new weapons capable of by-passing existing bans. In the aforementioned working document CDDH/IV/201 the need for such a continuous scrutiny was forcefully spelled out, although no actual mechanisms for review were suggested (62). In the course of the debates in Committee IV, in 1975, the Austrian delegate put forward some very interesting suggestions. He proposed that all States parties

(60) See e.g. the statement by the delegates of the Soviet Union (CDDH/IV/SR.10, at 20, and SR. 15, at 20) and of the United States (CDDH/IV/SR.10, at 10-12 and SR.13, at 7-8).

(61) Sudan, Algeria, Lebanon, Mauritania, Venezuela, Mali (CDDH/IV/201, Add. 1-6).

(62) See CDDH/IV/201, at 6.

to Additional Protocol III (on weaponry), should be entrusted with the task of collecting the necessary information concerning scientific and technological developments in the field of conventional weapons. The study of this information for the purpose of determining whether any new weapon causes superfluous injuries or has indiscriminate effects should be entrusted to a Conference of governments experts. Subsequently, a plenipotentiary conference — to be convened at the request of one-third of the parties to the Protocol or after a specified number of years has passed — could enact provisions for the banning of any new weapon found to be contrary to the aforementioned basic requirements (63).

This suggestion received wide support in the *Ad Hoc* Committee (64) and it is not unrealistic to believe that, after being somewhat improved, it can eventually be adopted by the Conference.

III. CONCLUDING REMARKS

The present international law on means of warfare no doubt greatly benefits *major powers*. It includes only a few general principles, which are so vague that they have little value as a yardstick for the assessment of the conduct of belligerents. In addition, the limited number of specific bans at present in force only covers minor weapons, or arms (such as bacteriological weapons) which were prohibited mainly because they could also affect the belligerent using them. Instead, really important weapons such as nuclear bombs or new conventional weapons, do not fall — in the opinion of most States — under any prohibitory rule of international law.

Can it be argued that the tendency of favouring, in this area of the laws of war, major powers, is in the process of being reversed ? Small and medium-sized States are no doubt stronger now than before, if only because they are very vocal in international gatherings and passionately advocate new and more sweeping bans. They are, however, aware that any new treaty in this area would be pointless if it were not endorsed by major military powers. They are therefore compelled to narrow the range of their demands. In addition, all those States which are dependent for their military security on arms supplied by great powers are not eager to see possible bans imposed on

(63) See CDDH/IV/SR.15, at 2-6.

See also the « informal proposal » on a review mechanism submitted by the Austrian experts to the 1976 Lugano Conference of Government Experts (doc. COLU/GG/LEG/201). This proposal was discussed at Lugano by the Working Group on General and Legal Questions (see the Report of this Group, COLU/GG/LEG/Rep/1 Rev. 1, at. 6-8).

(64) See in particular the statements by the representatives of Sweden (CDDH/IV/SR.15, at 7-10), Venezuela (*ibid.*, at 11-13), Sudan (*ibid.*, at 21), Egypt (SR.16, at 3), Sri Lanka (*ibid.*, at 3), the Netherlands (*ibid.*, at 13-14). Cp. also the cautious remarks of the Soviet delegate (SR.15, at 19).

those very arms they need for their self-preservation. Furthermore, any new prohibition or restriction on arms cannot but affect the present world military balance (or inbalance).

It can be safely said, however, that all trends of the Geneva works identified above are highly commendable from a humanitarian viewpoint. The majority of States have chosen the right approach for making war — both international and civil wars — less inhumane. In short, they have realized that the battle, as it were, must be fought on several fronts : what is needed is both to restate and develop general prohibitory rules and to enact new bans concerning specific weapons; by the same token, it is necessary to set up supervisory machinery to ensure that such bans are not evaded and furthermore to extend the bans to internal armed conflicts, to take account of the fact that these conflicts are more and more widespread in international society.

The choice of the right path does not necessarily mean, however, that it will be easily trodden : it remains to be seen, for instance, if it will be possible to achieve satisfactory restraints on the use of some specific weapons and if, in addition, review mechanisms will actually be established. Many States still resist any major limitation on their military strength. It will be useful to recall what was tellingly stated in 1973 by the head of the U.S. delegation to the Geneva Conferè Fce, M[r] G.H. Aldrich : « States which rely more on massed manpower for military strength than on firepower and mobility would be likely to see security advantages in prohibiting many weapons ». However, « many governments — and particularly those of the technologically most advanced States — hesitate to submit questions of fundamental importance to their national security to negotiations designed to supplement and improve the 1949 Red Cross Conventions » (65). Although some major States seem now less reluctant to move the discussion of weaponry from the Conference of the Committee on Disarmament to other international fora there is still much opposition to the enactment of new bans. It is therefore to be hoped that those countries which more strenuously advocate the need to strengthen and expand the outlawing of indiscriminate, cruel or trechearous weapons will persevere in their efforts, however difficult their task may be.

(65) Statement made by M[r] G.H. Aldrich in the House of Representatives : see *Hearings before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs*, House of Representatives, Ninety-third Congress, First Session, Washington 1974, at 99.