



UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
GENERAL

A/9215 (Vol. I)
7 November 1973

ORIGINAL: ENGLISH

Twenty-eighth session
Agenda item 96

RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS

Existing rules of international law concerning the prohibition
or restriction of use of specific weapons

Survey prepared by the Secretariat

Volume I*

* This volume contains the introduction and chapters I and II of the survey. Chapter III and the annexes appear in volume II.

73-24650

(210 p.)

/...

CONTENTS

Volume I

	<u>Paragraphs**</u>	<u>Page</u>
INTRODUCTION	1 - 19	8
CHAPTER I. TREATIES	1 - 59	17
PART I. PROHIBITIONS OR RESTRICTIONS OF A GENERAL NATURE . . .	1 - 7	17
SECTION 1. THE PRINCIPLE THAT THE CHOICE OF MEANS AND METHODS OF COMBAT IS NOT UNLIMITED	1 - 2	17
SECTION 2. RULES SPECIFYING THE PRINCIPLE THAT THE CHOICE OF MEANS AND METHODS OF COMBAT IS NOT UNLIMITED	3 - 6	17
A. Unnecessary suffering/superfluous injury . . .	3 - 4	17
B. Indiscriminate effects	5	18
C. Treachery	6	19
SECTION 3. THE MARTENS CLAUSE	7	19
APPENDIX TO PART I	7	20
PART II. PROHIBITIONS OR RESTRICTIONS CONCERNING SPECIFIC WEAPONS	8 - 48	29
SECTION 1. POISON AND POISONED WEAPONS	8 - 9	29
SECTION 2. CHEMICAL AND BACTERIOLOGICAL WEAPONS . . .	10 - 18	29
SECTION 3. PROJECTILES OF VARIOUS KINDS	19	39
SECTION 4. INCENDIARY WEAPONS	20 - 21	40
SECTION 5. NUCLEAR WEAPONS	22 - 32	41
SECTION 6. BALLOONS	33 - 34	68
SECTION 7. MISSILES	35 - 39	69
SECTION 8. NAVAL WEAPONS	40 - 48	80
PART III. PROHIBITIONS OR RESTRICTIONS OF THE USE OF WEAPONS RESULTING FROM THE PROTECTION GRANTED TO CERTAIN PERSONS, AREAS, PLACES OR OBJECTS	49 - 59	94
SECTION 1. CIVILIAN PERSONS	50 - 52	94

** The introduction and all the chapters have each been independently numbered.

CONTENTS (continued)

	<u>Paragraphs**</u>	<u>Page</u>
SECTION 2. UNDEFENDED TOWNS, VILLAGES, PORTS, D WELLINGS AND BUILDINGS	53 - 56	101
SECTION 3. CULTURAL PROPERTY	57	104
SECTION 4. PROTECTED AREAS	58 - 59	112
CHAPTER II. STATE PRACTICE AND DOCTRINE	1 - 209	115
PART I. WEAPONS CLASSIFIED ACCORDING TO THEIR NATURE	1 - 196	115
SECTION 1. POISON AND POISONED WEAPONS	1 - 13	115
A. State practice	1 - 5	115
B. Doctrine	6 - 13	117
SECTION 2. CHEMICAL AND BACTERIOLOGICAL WEAPONS	14 - 45	120
A. State practice	14 - 30	120
(a) The norms of customary international law as related to conventional law, particularly the Geneva Protocol of 1925	14 - 21	120
(b) The types of prohibited chemical and bacteriological weapons	22 - 25	122
(c) The question whether chemical and bacteriological weapons may be used in retaliation or reprisal	26 - 28	124
(d) The question of the types of conflict in which chemical and bacteriological weapons are prohibited	29	126
(e) Incorporation of rules in municipal law	30	126
B. Doctrine	31 - 45	127
(a) The norms of customary international law as related to conventional law, particularly the Geneva Protocol of 1925	31 - 39	127
(i) Chemical warfare	34 - 38	128
(ii) Bacteriological warfare	39	130
(b) Applicability of the conventional and customary law to particular types of weapons	40 - 43	131
(i) Lachrymatory agents	40 - 41	131

CONTENTS (continued)

	<u>Paragraphs**</u>	<u>Page</u>
(ii) Herbicides	42	132
(iii) Psychochemical weapons	43	132
(c) Other circumstances in which use of chemical and bacteriological weapons is or is not permitted	44 - 45	133
SECTION 3. PROJECTILES OF VARIOUS KINDS	46 - 58	134
A. State practice	46 - 51	134
B. Doctrine	52 - 58	136
SECTION 4. INCENDIARY WEAPONS	59 - 86	138
A. State practice	59 - 72	138
(a) Projectiles of less than 400 grammes which are explosive or charged with fulminating or inflammable substances . .	59 - 62	138
(b) Flame-throwers and other incendiary weapons	63 - 65	139
(c) Napalm	66 - 72	140
B. Doctrine	73 - 86	142
(a) Projectiles of less than 400 grammes which are explosive or charged with fulminating or inflammable substances . .	74 - 77	142
(b) Flame-throwers and other incendiary weapons	78 - 80	144
(c) Napalm	81 - 84	144
C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences	85 - 86	146
SECTION 5. NUCLEAR WEAPONS	87 - 110	147
A. State practice	87 - 100	147
B. Doctrine	101 - 109	155
(a) Nuclear weapons regarded as not in violation of international law	103	156
(b) Nuclear weapons regarded as in violation of international law	104 - 105	157
(c) Strategic and tactical nuclear weapons .	106	161

CONTENTS (continued)

	<u>Paragraphs**</u>	<u>Page</u>
(d) Use of nuclear weapons in reprisal or self-defence	107	162
(e) Consideration of the question by the Institute de Droit International . . .	108 - 109	162
C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences.	110	164
SECTION 6. BOMBARDMENT FROM THE AIR, LAND AND SEA .	111 - 146	165
A. State practice	111 - 124	165
(a) The prohibition on attacking the civilian population as such	113 - 116	165
(b) Permissible and impermissible targets for bombardment	117 - 121	167
(c) Injury to civilians incident to bombardment of military objectives . .	122	169
(d) Target area bombardment	123	170
(e) Bombardment with the intention of terrorizing the civilian population . .	124	170
B. Doctrine	125 - 146	170
(a) The prohibition on attacking the civilian population as such	126 - 128	172
(b) Permissible and impermissible targets for bombardment	129 - 134	173
(c) Injury to civilians incident to bombardment of military objectives . .	135	176
(d) Target area bombardment	136	176
(e) Bombardment with the intention of terrorizing the civilian population . .	137	177
(f) Proportionality between injury to the civilian population and military advantage gained	138	177
(g) Consideration of the question by the Institut de Droit International	139 - 140	177
C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences.	141 - 146	179

CONTENTS (continued)

	<u>Paragraphs**</u>	<u>Page</u>
SECTION 7. FRAGMENTATION BOMBS	147 - 150	186
A. State practice	147	186
B. Doctrine	148 - 150	186
SECTION 8. LAND MINES AND BOOBY-TRAPS	151 - 155	186
A. State practice	151 - 152	186
B. Doctrine	153 - 155	187
SECTION 9. MISSILES	156 - 163	188
A. State practice	156	188
B. Doctrine	157 - 161	188
C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences	162 - 163	190
SECTION 10. DELAYED ACTION WEAPONS	164 - 169	191
A. State practice	164	191
B. Doctrine	165 - 168	191
C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences	169	192
SECTION 11. NAVAL WEAPONS	170 - 192	193
A. State practice	170 - 181	193
(a) Mines	170 - 177	193
(b) Submarines	178 - 181	196
B. Doctrine	182 - 192	197
(a) Mines	182 - 185	197
(b) Submarines	186 - 192	199
SECTION 12. WEATHER MODIFICATION	193 - 196	201
A. State practice	193 - 194	201
B. Doctrine	195 - 196	202
PART II. WEAPONS CLASSIFIED ACCORDING TO THEIR EFFECTS	197 - 209	204
SECTION 13. WEAPONS CAUSING UNNECESSARY SUFFERING	197 - 203	204
A. State practice	197 - 200	204
B. Doctrine	201 - 203	205

CONTENTS (continued)

	<u>Paragraphs**</u>	<u>Page</u>
SECTION 14. WEAPONS WITH INDISCRIMINATE EFFECTS . . .	204	209
SECTION 15. WEAPONS THAT KILL TREACHEROUSLY	205 - 209	209
A. State practice	205 - 206	209
B. Doctrine	207 - 209	210

Volume II

CHAPTER III. JUDICIAL DECISIONS	1 - 28
SECTION 1. DECISIONS OF INTERNATIONAL TRIBUNALS . . .	1 - 5
A. The International Court of Justice	1 - 2
B. Spanish Zone of Morocco Claims Arbitration .	3
C. The Greco-German Mixed Arbitral Tribunal . .	4 - 5
SECTION 2. DECISIONS OF NATIONAL COURTS	6 - 10
A. France	6 - 8
B. Germany	8
C. Japan	9
D. The Netherlands	10
SECTION 3. DECISIONS OF MILITARY COURTS	11 - 28
A. The International Military Tribunal at Nuremberg	11 - 13
B. The International Military Tribunal for the Far East	14 - 16
C. British Military Court for the Trial of War Criminals at Hamburg	17
D. United States Military Tribunal at Nuremberg.	18 - 27
E. USSR Military Tribunal of the Primorye Military Area	28

ANNEXES

- I. RESOLUTIONS OF THE GENERAL ASSEMBLY REGARDING THE PROHIBITION OF WEAPONS AND THEIR USE
- II. DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS

INTRODUCTION

1. The present survey of existing rules of international law concerning the prohibition or restriction of use of specific weapons has been prepared by the Secretariat pursuant to the request contained in paragraph 4 of General Assembly resolution 3032 (XXVII) of 18 December 1972. The resolution, entitled "Respect for human rights in armed conflicts", reads as follows:

"The General Assembly,

"Conscious that only complete respect for the Charter of the United Nations and general and complete disarmament under effective international control can bring about full guarantees against armed conflicts and the suffering caused by such conflicts, and determined to continue all efforts to these ends,

"Conscious that the development of many weapons and methods of warfare has made modern armed conflicts increasingly cruel and destructive of civilian lives and property,

"Reaffirming the urgent need to ensure full and effective application of existing legal rules relating to armed conflicts and to supplement these rules by new ones in order to take into account the modern developments in methods and means of warfare,

"Noting with concern that the existing legal rules and obligations relating to human rights in armed conflicts are frequently being disregarded,

"Recalling the successive resolutions adopted by the United Nations relating to human rights in armed conflicts, in particular General Assembly resolutions 2852 (XXVI) and 2853 (XXVI) of 20 December 1971, and resolution XIII adopted by the twenty-first International Conference of the Red Cross, held at Istanbul in 1969, 1/ concerning the reaffirmation and development of the laws and customs applicable in armed conflicts,

"Noting with appreciation the report of the Secretary-General 2/ on the results of the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which was held at Geneva from 3 May to 3 June 1972 at the invitation of the International Committee of the Red Cross,

"Having taken cognizance of the report prepared by the International Committee of the Red Cross on the work of the Conference of Government Experts, 3/

1/ See A/7720, annex I, sect. D.

2/ A/8781 and Corr.1.

3/ Report on the Work of the Conference (Geneva, July 1972).

"Expressing appreciation to the International Committee of the Red Cross for its dedicated efforts to promote the reaffirmation and development of international humanitarian law applicable in armed conflicts,

"Emphasizing the importance of continued close collaboration between the United Nations and the International Committee of the Red Cross,

"Welcoming the progress achieved at the second session of the Conference of Government Experts,

"Noting with concern, nevertheless, that agreement has not emerged among government experts on drafts concerning a number of fundamental issues, such as:

(a) Methods to ensure a better application of existing rules relating to armed conflicts,

(b) Definitions of military objectives and protected objects, in order to counter the tendency in armed conflicts to regard ever growing categories of objects as permissible targets for attack,

(c) Definitions of protected persons and combatants, responsive to the need for improved protection of civilians and of combatants in modern armed conflicts,

(d) The question of guerrilla warfare,

(e) Prohibition of the use of weapons and methods of warfare which indiscriminately affect civilians and combatants,

(f) Prohibition or restriction of the use of specific weapons which are deemed to cause unnecessary suffering,

(g) Rules facilitating humanitarian relief in armed conflicts,

(h) Definition of those armed conflicts of a non-international character which should be subject to rules additional to those contained in the Geneva Conventions of 1949, 4/

"Considering that substantial progress on fundamental issues such as those enumerated above is indispensable if the efforts to supplement international humanitarian law by new rules are to become significant for the alleviation of the suffering brought about by modern armed conflicts,

4/ United Nations, Treaty Series, vol. 75, Nos. 970-973.

"Welcoming the readiness of the Swiss Federal Council, as communicated to the Secretary-General, to convoke a diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts,

"Believing that the further preparations for that conference as well as its organization must be such that substantial progress is achieved on fundamental issues which are as yet unresolved,

"Expressing its appreciation to the International Committee of the Red Cross for undertaking a series of consultations to ensure the complete preparation for the conference,

"1. Urges all Governments and invites the International Committee of the Red Cross to continue to seek through consultations to achieve a rapprochement in the positions of Governments to ensure that the diplomatic conference envisaged will adopt rules which will mark substantial progress on fundamental legal issues connected with modern armed conflicts and which will contribute significantly to the alleviation of the suffering brought about by such conflicts;

"2. Calls upon all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, 5/ the Geneva Protocol of 1925 6/ and the Geneva Conventions of 1949, and, to this end, to provide instruction concerning these rules to their armed forces and information concerning the same rules to the civilian population;

"3. Requests the Secretary-General to encourage the study and teaching of principles of respect for international humanitarian rules applicable in armed conflicts;

"4. Requests the Secretary-General to report to the General Assembly at its twenty-eighth session on relevant developments concerning human rights in armed conflicts and to prepare, as soon as possible, a survey of existing rules of international law concerning the prohibition or restriction of use of specific weapons;

"5. Decides to include in the provisional agenda of its twenty-eighth session the item entitled 'Human rights in armed conflicts: respect for human rights in armed conflicts'."

2. As opposed to the period before the First World War which may be said to have been one in which war and the use of force in relations between States were

5/ Carnegie Endowment for International Peace, the Hague Conventions and Declarations of 1899 and 1907 (New York, Oxford University Press, 1915).

6/ League of Nations, Treaty Series, vol. XCIV, No. 2138, p. 65.

considered legal means of settling international disputes, contemporary international law is characterized by the prohibition of the threat or use of force in international relations in accordance with the Charter of the United Nations, a principle which constitutes today one of the fundamental legal pillars of the international community. Culmination of an historical development, the principle of the prohibition of the threat or use of force is enshrined in Article 2, paragraph 4, of the United Nations Charter, under which States are bound in their international relations to refrain "from 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". In 1970, the General Assembly formulated the principle and included it in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted as resolution 2625 (XXV) on the occasion of the twenty-fifth anniversary of the United Nations. The principle has likewise been stressed and confirmed by the General Assembly in other resolutions, such as resolution 2160 (XXI) of 30 November 1966 and resolution 2734 (XXV) of 16 December 1970, entitled "Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination" and "Declaration on the Strengthening of International Security", respectively.

3. There are, however, cases in which the use of force is lawful under the United Nations Charter. Thus, for instance, Article 51 provides that nothing in the Charter impairs the inherent right of individual or collective self-defence if an armed attack occurs, and under Chapter VII the United Nations itself may lawfully use force as part of its action with respect to the threats to the peace breaches of the peace and acts of aggression for the purpose of maintaining or restoring international peace and security. It must be also taken into account that although the Charter principle refers to the prohibition of the threat or use of force in "international relations", armed conflicts may be non-international as well as international, the dividing line between them not always being easily drawn. Moreover, the principle prohibiting the threat or use of force in international relations as any other legal principle or rule may be unlawfully disregarded or transgressed. In his inaugural address, the President of the General Assembly at the current session recalled that "... according to the 1969 Yearbook of the Stockholm International Peace Research Institute (SIPRI), since the establishment of the United Nations and the entry into force of the Charter there have been 101 armed conflicts, including civil wars with or without outside support, interventions, border clashes and outright wars" and the President added "I am convinced that in all those conflicts one or more of the principles I referred to previously were violated". 7/

4. Those considerations together with the fact that modern developments in weaponry are such that methods and means of warfare are becoming by their very nature or effects increasingly cruel and destructive, have, since a number of years ago, tended to focus attention again on the rules of international law traditionally called "laws and customs of war" - the so-called "law of The Hague" - and "humanitarian law" - the so-called "law of Geneva" - with a view to making an assessment of them and proceeding, eventually, to develop those which might require up-dating in the light of present day conditions. Efforts in this direction have

7/ See A/FV.2117, p. 26.

been undertaken in full realization of the paramount importance of the goal of general and complete disarmament under effective international control. In present-day international law and particularly under the system of the United Nations Charter, developments in areas concerning armed conflicts such as the "laws and customs of war", "humanitarian laws" and "disarmament" become closely interrelated.

5. This has been recognized by the General Assembly in its resolution 2932 A (XXVII) of 29 November 1972. In that resolution the Assembly recalled that "all armed conflicts and the use of any weapons bring suffering and that the only effective means of eliminating this suffering is through the elimination of armed conflicts and through general and complete disarmament", and stated, inter alia, that it was "convinced that the widespread use of many weapons and the emergence of new methods of warfare that cause unnecessary suffering or are indiscriminate call urgently for renewed efforts by Governments to seek, through legal means, the prohibition of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measures of disarmament, the elimination of specific, especially cruel or indiscriminate weapons". The relationship between the rules of international law concerning the prohibition or restriction of the use of specific weapons and the principle of the prohibition of the threat or use of force in international relations in accordance with the United Nations Charter has also been recently underlined by the General Assembly in its resolution 2936 (XXVII) of 29 November 1972, entitled "Non-use of force in international relations and permanent prohibition of the use of nuclear weapons".

6. Within the United Nations, the question of strengthening and modernizing those parts of international law mainly concerned with limiting human suffering in armed conflicts was discussed at the International Conference on Human Rights held at Teheran (22 April-13 May 1968). Subsequently, the General Assembly has periodically considered an item entitled "Respect for human rights in armed conflicts". Outside the United Nations the issue has been dealt with at the International Red Cross Conferences and in conferences and meetings of government experts convened under the auspices of the International Committee of the Red Cross. The draft Additional Protocols to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international and non-international armed conflicts to be considered at the 1974 diplomatic conference convoked by the Swiss Federal Council, contain a certain number of provisions concerning methods and means of combat. 8/

7. The new dimension added to the traditional relationship between the "laws and customs of war" and the "humanitarian law" is easily explained by the development of international law rules concerning human rights and fundamental freedoms pursuant to Article 1, paragraph 3, of the United Nations Charter. The relationship between, on the one hand, the protection and promotion of human rights and, on the other, the development of the laws and customs of war and the humanitarian law is

8/ International Committee of the Red Cross, Geneva 1973. Partly reproduced in annex II, infra.

acknowledged in resolution XXIII of the International Conference on Human Rights, held at Teheran in 1968. 9/ By that resolution the Conference considered that "peace is the underlying condition for the full observance of human rights and war is their negation" but, at the same time, stressed that "even during the periods of armed conflict, humanitarian principles must prevail". In this connexion, attention is drawn to the fact that some existing agreements concerning human rights, such as for instance, the Convention on the Prevention and Punishment of the Crime of Genocide, expressly provide for protection "in time of peace or in time of war", while other human rights instruments which make provision allowing for their partial abrogation in certain situations - including those which may be characterized as armed conflict - do so only in more or less limited respects (for instance article 4 of the International Covenant on Civil and Political Rights, article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 10/ and article 27 of the Inter-American Convention on Human Rights). Other human rights instruments are silent on the point. The need to respect the essential and inalienable human rights "even during the vicissitudes of war" has been recognized by the Security Council in its resolution 237 (1967) of 14 June 1967.

8. The humanization of armed conflicts responds to certain fundamental principles long recognized by international law and frequently reaffirmed. Such principles may be studied in a broad perspective or, for reasons of convenience, by mere reference to one or more of the aspects involved in armed conflict. The present survey deals technically with one of those aspects only, namely, the prohibition or restriction of the use of weapons in armed conflict, as requested by the General Assembly.

9. Any legal evaluation of problems related to different aspects of the prohibition or restriction of the use of weapons in armed conflicts must proceed from the principle that the choice of means and methods of combat is not unlimited. This principle, the rules which specify it by forbidding weapons which cause unnecessary suffering, weapons with indiscriminate effects and treacherous weapons, and the maxim embodied in the so-called Martens clause are well established in international law. Those principles and rules are designed to restrict arbitrary behaviour by the parties to the conflict in order to make the latter as less inhumane as possible. Already present mostly in the St. Petersburg Declaration to the effect of prohibiting the use of certain projectiles in wartime of 29 November/11 December 1868, those principles and rules were later embodied explicitly or by implication in the 1899 and 1907 Hague Regulations respecting the laws and customs of war on land and other conventional instruments and, subsequently, recognized by State practice, judicial decisions and the most authoritative doctrine as forming part of customary international law. Their universal validity seems to be beyond any reasonable doubt in contemporary international law. The treaty provisions formulating them are today merely

9/ Final Act of the International Conference on Human Rights (United Nations publication, Sales No.: E.68.XIV.2), p. 18

10/ United Nations, Treaty Series, vol. 213, No. 2889, p. 221.

"declaratory" of customary law. Problems arising out of the "general participation clause" contained in some of those instruments are therefore in this respect superseded.

10. In addition to the general principles and rules referred to in the preceding paragraph, a series of provisions concerning prohibitions or restrictions of the use of specific weapons have been included in treaties. Well-known examples of the period preceding the First World War are the St. Petersburg Declaration of 1868 which, inter alia, provided for the renunciation of the employment of projectiles of less weight than 400 grams which are explosive or charged with fulminating or inflammable substances and the Hague Declaration (IV.3) of 1899 concerning the abstention from the use of weapons which expand or flatten easily in the human body ("dum-dum" bullets). During the time of the League of Nations an outstanding achievement was the conclusion of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925. 11/ Since the establishment of the United Nations, a number of treaties dealing with specific weapons have been concluded as a result of negotiations on disarmament. Most of those treaties deal with the regulation of activities such as the manufacturing, testing, stockpiling, transferring, etc. of weapons rather than with their uses in armed conflict. They are, nevertheless, highly relevant for purposes of determining the context in which the subject-matter of the survey should be seen in present-day conditions. Among those treaties, reference may be made to the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, 12/ the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction. Regional and bilateral treaties concerning specific weapons have also been concluded such as the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the United States-USSR agreements of 1971, 1972 and 1973 on measures to reduce the risk of the outbreak of nuclear war, on certain measures with respect to the limitation of strategic offensive arms, on the limitation of anti-ballistic missile systems and on the prevention of nuclear war.

11. It has been argued that, in an age characterized by the scientific and technological revolution, it is becoming increasingly difficult to distinguish between human and inhuman means or methods of warfare by reference to notions such as "unnecessary suffering" or "indiscriminate effects" in the presence of weapons of mass or large-scale destruction. In addition to being cruel these weapons tend to obliterate the fundamental distinction between combatants and civilian population and between military and non-military objectives. Furthermore, it may be pointed out that the principles and rules concerned were intended to govern behaviour in armed conflicts at a stage in the development of international

11/ League of Nations, Treaty Series, vol XCIV, No. 2138, p. 65.

12/ United Nations, Treaty Series, vol. 480, No. 6964, p. 43.

relations when concepts such as collective security and disarmament through a permanent universal organization entrusted with the task of maintaining international peace and security had not yet found concrete expression.

12. The complexities of disarmament and its close link with the maintenance of international peace and security have made it necessary to proceed by stages towards the attainment of the stated goal of general and complete disarmament under effective international control. In this process of negotiation major attention has been paid to reaching agreement on activities concerning weapons of mass or large-scale destruction. However, modern technological developments have also made other kinds of weapons increasingly cruel and destructive, as has been recently pointed out. 13/ In these circumstances the permanent and general value of the principles and rules concerning the prohibition or restriction of the use of weapons in armed conflict cannot but be recognized. At the very least such principles and rules continue to fulfil their civilizing role of providing an objective legal test for appraising subjective assertions of military necessity.

13. The survey is intended to be an informative document limiting itself to presenting in a systematic and non-exhaustive manner relevant materials and information gathered by the Secretariat during its research. 14/ Technical and descriptive in character, it avoids any independent assessment of the legal value of the materials referred to and the formulation of conclusions.

14. The materials consist of treaties, State practice, individual or collective, judicial decisions and doctrine. Most of them originated during the present century. In particular, the State practice and doctrine alluded to is for the most part of Second World War origin. The materials are presented in three chapters and two annexes, each chapter constituting an autonomous unit for the purpose of the presentation.

15. Chapter I, devoted to treaties, contains the texts of relevant treaties or treaty provisions grouped in three different parts relating to prohibitions or restrictions of a general nature (part I), prohibitions or restrictions concerning specific weapons (part II) and prohibitions or restrictions of the use of weapons resulting from the protection granted to certain persons, areas, places or objects (part III). Each part is subdivided in appropriate sections and subsections.

16. Chapter II, on State practice and doctrine, consists of two parts. Part I has 12 sections (sections 1 to 12) dealing with specific rules and developments concerning particular weapons according to their nature. Each of these sections is divided into two subsections containing, respectively, information on the practice of States and on doctrine relevant to the type of weapons covered. In some cases a third subsection has been included concerning the practice of international

13/ International Committee of the Red Cross, "Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts" (Geneva 1973).

14/ No materials were requested from Governments.

organizations shedding light on the standing of the weapon or weapons system under international law. Part II consists of three sections (sections 13 to 15) dealing with the classification of weapons according to their effects. As these three categories are simply another way of looking at weapons, there is a degree of overlapping between part I and part II which explains the shortness of the sections of the latter.

17. Chapter III contains extracts from judicial decisions which relate to the survey's subject-matter. The selected extracts cover various aspects from dicta concerning the interpretation of certain treaties or rules of general international law to cases in which the factual circumstances directly invoke the use of a specific weapon. The chapter has been divided into three sections: "Decisions of international tribunals" (section 1), "Decisions of national courts" (section 2) and "Decisions of military courts" (national and international) (section 3).

18. The first of the two annexes reproduces resolutions of the General Assembly regarding the prohibition of weapons and their use and the second, selected provisions of the draft Additional Protocols to the Geneva Conventions of 12 August 1949, prepared by the International Committee of the Red Cross.

19. Finally, it must be noted that in chapters I and II specific weapons of the same type have been grouped together under common headings chosen for purposes of convenience only.

CHAPTER I. TREATIES

PART I. PROHIBITIONS OR RESTRICTIONS OF A GENERAL NATURE 1/

SECTION 1. THE PRINCIPLE THAT THE CHOICE OF MEANS AND METHODS OF COMBAT IS NOT UNLIMITED

1. The first international instrument to state the principle that the choice of means and methods of combat is not unlimited was the St. Petersburg Declaration of 29 November/11 December 1868. That Declaration states, inter alia,

"That the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy;

"That for this purpose, it is sufficient to disable the greatest possible number of men;"

2. The principle was also explicitly recognized by the Hague Peace Conferences of 1899 and 1907, as reflected in the "Regulations respecting the laws and customs of war on land" annexed to the 1899 Convention (II) and to the 1907 Convention (IV). Article 22 of the Regulations states that

"The right of belligerents to adopt means of injuring the enemy is not unlimited."

SECTION 2. RULES SPECIFYING THE PRINCIPLE THAT THE CHOICE OF MEANS AND METHODS OF COMBAT IS NOT UNLIMITED

A. Unnecessary suffering/superfluous injury

3. Besides declaring that the only legitimate object which States should endeavour to accomplish during war is to weaken the enemy's military force, the 1868 St. Petersburg Declaration also declares that that object "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable". The Declaration goes on to state that "the employment of such arms would, therefore, be contrary to the laws of humanity".

4. The authentic French text of article 23 (e) of the Regulations annexed to the 1899 Hague Convention (II) and the 1907 Hague Convention (IV) states that: "Outre les prohibitions établies par des conventions spéciales, il est notamment interdit: ... d'employer des armes, des projectiles ou des matières propre à causer des maux superflus;". The authentic French text has been rendered differently in

1/ The instruments to which references are made in part I are reproduced infra, in whole or in part, as an appendix to part I.

the English translations of the two Conventions provided by the United States Department of State. The English translation of the 1899 Convention reads "Besides the prohibitions provided by special Conventions, it is especially prohibited: - ... To employ arms, projectiles, or material of a nature to cause superfluous injury";", while the English translation of the 1907 Convention reads "In addition to the prohibitions provided by special Conventions, it is especially forbidden - ... To employ arms, projectiles, or material calculated to cause unnecessary suffering;" (emphasis supplied). 2/

B. Indiscriminate effects

5. The rule that the parties to an armed conflict shall confine their operations to defeating the military objectives of the adversary, and shall ensure that civilians and civilian objects are respected and protected is also a firmly established rule in international law embodied likewise in the 1868 St. Petersburg Declaration and the Hague Regulations. 3/ As indicated above, the St. Petersburg

2/ Carnegie Endowment for International Peace, the Hague Conventions and Declarations of 1899 and 1907, J. B. Scott, ed. (New York, Oxford, 1915). The United States Department of State's English version of the two Conventions may also be found in Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, compiled by W. M. Malloy, U.S. Senate, 61st Congress, 2d Session, document No. 357 (Washington, U.S. Government Printing Office, 1910), vol. II, p. 2042 and p. 2269. It may be noted that the English version of the French phrase "ou des matières propres à causer des maux superflus;" contained in the British Treaty Series corresponds to the English version provided by the United States Department of State. See Great Britain, Treaty Series, 1901 (No. 11) and ibid., 1910 (No. 9). With regard to what suffering must be considered "unnecessary or what injury must be deemed "superfluous" a report published recently said that such concepts "must be taken to cover at any rate all weapons that do not offer greater military advantages than other available weapons while causing greater suffering/injury. This interpretation is in line with the philosophy that if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided. In addition the concepts "unnecessary suffering" and "superfluous injury" would seem to call for weighing the military advantages of any given weapon against humanitarian considerations. (International Committee of the Red Cross, Weapons that may cause unnecessary suffering or have indiscriminate effects, op. cit., para. 23).

3/ This principle was recognized by the General Assembly in resolution 2444 (XXIII) of 19 December 1968 which affirmed resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965 which laid down, inter alia, the principle "that 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".

Declaration explicitly states "that the only legitimate object which States should endeavour to accomplish during war is to weaken the military force of the enemy" (emphasis supplied). 4/

C. Treachery

6. The 1899 Hague Convention (II) and the 1907 Hague Convention (IV) provide in article 23 (b) of the Regulations annexed to each Convention that besides, or in addition to, the prohibitions provided in special conventions, "it is especially prohibited /"forbidden" in the English version of the 1907 text/ ... to kill or wound treacherously individuals belonging to the hostile nation or army".

SECTION 3. THE MARTENS CLAUSE

7. The drafters of both the 1899 Hague Convention (II) and the 1907 Hague Convention (IV) inserted in a preambular paragraph of those Conventions a general maxim, known as "The Martens clause", in order to underline the applicability of international law even in cases where prohibitions of specific weapons do not appear in existing international conventions. The "clause" provides that in such cases civilians and combatants remain under the protection and the authority of the principles of international law, as they result from the usages established between civilized nations, from the principles of humanity and the dictates of public conscience. The authentic French text of the "clause" reads:

"En attendant qu'un Code plus complet des lois de la guerre puisse être édicté, les Hautes Parties contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique." 5/

4/ "The prohibition of indiscriminate warfare relates more often to methods of warfare and methods of using weapons than to specific weapons per se. All weapons are capable of being used indiscriminately. This is not, of course, sufficient ground for prohibiting their use in armed conflicts, but a ground for prohibiting such types of use. However, in some cases weapons may be indiscriminate by their very nature. Moreover, in some other cases the normal or typical use of the weapons may be one which has indiscriminate effects." (International Committee of the Red Cross, Weapons that may cause unnecessary suffering or have indiscriminate effects, op. cit., para. 27).

5/ See foot-notes 7 and 9 infra.

APPENDIX TO PART I

(a) Declaration signed at St. Petersburg on 29 November/11 December 1868 6/

"Upon the invitation of the Imperial Cabinet of Russia, an international military commission having been assembled at St. Petersburg in order to consider the desirability of forbidding the use of certain projectiles in time of war among civilized nations, and this commission having fixed by a common accord the technical limits within which the necessities of war ought to yield to the demands of humanity, the undersigned have been authorized by the orders of their Governments to declare as follows:

Considering that the progress of civilization should have the effect of alleviating, as much as possible the calamities of war:

That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;

That for this purpose, it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances.

They agree to invite all the states which have not taken part in the deliberations of the International Military Commission, assembled at St. Petersburg, by sending delegates thereto, to accede to the present engagement.

This engagement is obligatory only upon the contracting or acceding parties thereto, in case of war between two or more of themselves; it is not applicable with regard to non-contracting powers, or powers that shall not have acceded to it.

6/ De Martens, Nouveau Recueil général de Traités, t. 18, p. 474 /authentic French text/. English translation: American Journal of International Law, vol. I (1907), Supp., p. 95.

It will also cease to be obligatory from the moment when, in a war between contracting or acceding parties, a non-contracting party, or a non-acceding party, shall join one of the belligerents.

The contracting or acceding parties reserve to themselves the right to come to an understanding, hereafter, whenever a precise proposition shall be drawn up, in view of future improvements which may be effected in the armament of troops, in order to maintain the principles which they have established, and to reconcile the necessities of war with the laws of humanity."

(b) Convention (II) with respect to the laws and customs of war on land. Signed at The Hague on 29 July 1899. 7/

"... /the High Contracting Parties/

Considering that, while seeking means to preserve peace and prevent armed conflicts among nations, it is likewise necessary to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert;

Animated by the desire to serve, even in this extreme hypothesis, the interests of humanity and the ever increasing requirements of civilization;

Thinking it important, with this object, to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible;

Inspired by these views which are enjoined at the present day, as they were twenty-five years ago at the time of the Brussels Conference in 1874, 8/ by a wise and generous foresight;

Have, in this spirit, adopted a great number of provisions, the object of which is to define and govern the usages of war on land.

In view of the high contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war so

7/ De Martens, Nouveau Recueil général de Traités, 2ème série, t. 26, p. 949 /authentic French text/. English translation: Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907, J. B. Scott, ed. (New York, Oxford, 1915), p. 100.

8/ A draft international declaration concerning the laws and customs of war was adopted by the Conference of Brussels of 1874 but never entered into force. (See De Martens, Nouveau Recueil général de Traités, 2ème série, t. 4, p. 219. English translation: American Journal of International Law, vol. I (1907), Supp., p. 96).

far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations.

It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.

On the other hand, it could not be intended by the high contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders.

Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience;

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood;

The high contracting Parties, desiring to conclude a Convention to this effect, have appointed as their plenipotentiaries, to wit:

...

Who, after communication of their full powers, found in good and due form, have agreed on the following:

Article 1

The high contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the 'Regulations respecting the laws and customs of war on land' annexed to the present Convention.

Article 2

The provisions contained in the Regulations mentioned in Article 1 are only binding on the contracting Powers, in case of war between two or more of them.

These provisions shall cease to be binding from the time when, in a war between contracting Powers, a non-contracting Power joins one of the belligerents.

...

/...

Annex to the Convention

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

...

SECTION II - ON HOSTILITIES

CHAPTER I - On Means of Injuring the Enemy, Sieges, and Bombardments

Article 22

The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23

Besides the prohibitions provided by special Conventions, it is especially prohibited -

(a.) To employ poison or poisoned arms;

(b.) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c.) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

(d.) To declare that no quarter will be given;

(e.) To employ arms, projectiles, or material of a nature to cause superfluous injury /propres à causer des maux superflus in the authentic French text/;

(f.) To make improper use of a flag of truce, the national flag or military ensigns and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Article 24

Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable.

Article 25

The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited.

/...

Article 26

The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.

Article 27

In sieges and bombardments all necessary steps should be taken to spare as far as possible, edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

Article 28

The pillage of a town or place, even when taken by assault, is prohibited."

...

- (c) Convention (IV) respecting the laws and customs of war on land. Signed at The Hague on 18 October 1907 9/

/This Convention in many instances contains provisions identical to provisions included in the 1899 Hague Convention (II) reproduced in part above. For purposes of comparison, provisions which are included in the 1907 Convention but not found in the 1899 Convention are underlined in the texts reproduced below./

"... the High Contracting Parties

Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision

9/ De Martens, Nouveau Recueil général de Traités, 3ème série, t. 3, p. 461 /authentic French text/. English translation: Carnegie Endowment for International Peace, op. cit., p. 100.

/...

or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, 10/ and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the high contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and 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.

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.

The high contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their plenipotentiaries:

...

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

Article 1

The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

10/ See foot-note 8 of this chapter.

Article 2

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

Article 3

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 4

The present Convention, duly ratified, shall as between the contracting Powers, be substituted for the Convention of the 29th July, 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

...

Annex to the Convention

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

...

SECTION II - HOSTILITIES

CHAPTER I - Means of Injuring the Enemy, Sieges, and Bombardments

Article 22

The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23

In addition to the prohibitions provided by special Conventions, it is especially forbidden -

(a.) To employ poison or poisoned weapons;

(b.) To kill or wound treacherously individuals belonging to the hostile nation or army;

/...

(c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

(d.) To declare that no quarter will be given;

(e.) To employ arms, projectiles, or material calculated to cause unnecessary suffering /propres à causer des maux superflus in the authentic French text/;

(f.) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h.) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Article 24

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Article 25

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Article 26

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Article 27

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

/...

Article 28

The pillage of a town or place, even when taken by assault, is prohibited."

...

PART II. PROHIBITIONS OR RESTRICTIONS CONCERNING SPECIFIC WEAPONS

SECTION 1. POISON AND POISONED WEAPONS 11/

8. The regulations annexed to the 1899 Hague Convention (II) and to the 1907 Hague Convention (IV) state in article 23 (a) that besides the prohibitions provided by special conventions it is especially prohibited or forbidden ... "to employ poison or poisoned arms,". 12/

9. On 7 February 1923, the Convention on the Limitation of Armaments of Central American States was signed at Washington. Article 5 of that Convention states that: "The Contracting Parties consider that the use in warfare of asphyxiating gases, poisons, or similar substances as well as analogous liquids, materials or devices, is contrary to humanitarian principles and to international law, and obligate themselves by the present Convention not to use said substances in time of war." 13/

SECTION 2. CHEMICAL AND BACTERIOLOGICAL WEAPONS

10. At the 1899 Hague International Peace Conference the following Declaration (IV,2) concerning asphyxiating gases was signed on 29 July 1899:

"The undersigned, plenipotentiaries of the Powers represented at the International Peace Conference at The Hague, duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29th November (11th December), 1868,

Declare as follows:

The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.

11/ This section may be considered related to the following one concerning chemical and bacteriological weapons. Treaty provisions concerning chemical agents of warfare - chemical substances, whether gaseous, liquid or solid - which might be used because of their toxic effects are included in that section.

12/ See appendix to part I, supra.

13/ Conference on Central American Affairs (Washington, U.S. Government Printing Office, 1923), p. 339 /authentic Spanish text and English translation/.

The present Declaration is only binding on the contracting Powers in the case of a war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power.

..." 14/

11. At the Washington Conference on the Limitation of Armaments held in 1922, a treaty relating to the use of submarines and noxious gases in warfare was signed on 6 February 1922 but never entered into force. Article 5 of that treaty states the following:

"The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto." 15/

12. On 7 February 1923, the Convention on the Limitation of Armaments of Central American States was signed at Washington. Article 5 of that Convention states that: "The Contracting Parties consider that the use in warfare of asphyxiating gases, poisons, or similar substances as well as analogous liquids, materials or devices, is contrary to humanitarian principles and to international law, and obligate themselves by the present Convention not to use said substances in time of war." 16/

13. The Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare was signed at Geneva on 17 June 1925 and entered into force on 8 February 1928. It reads as follows:

14/ De Martens, Nouveau Recueil général de Traités, 2ème série, t. 26, p. 998 /authentic French text/. English translation: Carnegie Endowment for International Peace, op. cit., p. 225.

15/ Conference on the Limitation of Armaments (Washington, U.S. Government Printing Office, 1922), p. 1605.

16/ Conference on Central American Affairs (Washington, U.S. Government Printing Office, 1923), p. 339 /authentic Spanish text and English translation/.

"The undersigned Plenipotentiaries, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all signatory and acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.

The present Protocol, of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear to-day's date.

The ratifications of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the signatory and acceding Powers.

The instruments of ratification of and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.

The present Protocol will come into force for each signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications.

In witness whereof the Plenipotentiaries have signed the present Protocol.

Done at Geneva in a single copy, the seventeenth day of June,
One Thousand Nine Hundred and Twenty-Five." 17/

17/ League of Nations, Treaty Series, vol. 94, p. 65.

14. A treaty entitled "Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxic weapons and on their destruction" was signed at London, Moscow and Washington on 10 April 1972. The treaty, which is not yet in force, reads as follows:

"The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control,

Recognizing the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925;

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognizing that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk,

Have agreed as follows:

Article I

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Article II

Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

Article III

Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention.

Article IV

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

Article V

The States Parties to this Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and co-operation pursuant to this article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

Article VI

1. Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

2. Each State Party to this Convention undertakes to co-operate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

Article VII

Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

Article VIII

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

Article IX

Each State Party to this Convention affirms the recognized objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.

Article X

1. The States Parties to this Convention undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also co-operate in contributing individually or together with other States or international organizations to the further development and application of scientific discoveries in the field of bacteriology (biology) for the prevention of disease, or for other peaceful purposes.

2. This Convention shall be implemented in a manner designed to avoid hampering the economic or technological development of States Parties to the Convention or international co-operation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) agents and toxins and equipment for the processing, use or production of bacteriological (biological) agents and toxins for peaceful purposes in accordance with the provisions of the Convention.

Article XI

Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

Article XII

Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention.

Article XIII

1. This Convention shall be of unlimited duration.

2. Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject-matter of the Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

Article XIV

1. This Convention shall be open to all States for signature. Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force after the deposit of instruments of ratification by twenty-two Governments, including the Governments designated as Depositaries of the Convention.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of the entry into force of this Convention, and of the receipt of other notices.

6. This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article XV

This Convention, the Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of the Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

In witness whereof the undersigned, duly authorized, have signed this Convention.

Done in triplicate, at London, Moscow and Washington, this tenth day of April, one thousand nine hundred and seventy-two." 18/

15. Article 171 of the Treaty of Versailles, signed on 28 June 1919, states, inter alia, that "The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany. ..." 19/

16. Similar language may be found in the Treaty of Saint-Germain-en-Laye, 20/ signed on 10 September 1919, the Treaty of Neuilly-sur-Seine, 21/ signed on 27 November 1919 and the Treaty of Trianon, 22/ signed on 4 June 1920, with respect to Austria, Bulgaria and Hungary, respectively. In the latter three treaties, however, "flame throwers" are added to the list of those items whose use "being prohibited, their manufacture and importation are strictly forbidden ...".

18/ See General Assembly resolution 2826 (XXVI) of 16 December 1971 and United Nations Juridical Yearbook, 1971, p. 118.

19/ De Martens, Nouveau Recueil général de Traités, 3ème série, t. 11, p. 450.

20/ British and Foreign State Papers, vol. 112, p. 371 (article 135).

21/ Ibid., vol. 112, p. 801 (article 82).

22/ Ibid., vol. 113, p. 527 (article 119).

17. Protocol III (with annexes) on the control of armaments, which is an integral part of the Protocol modifying and completing the 1948 Brussels Treaty for collaboration in economic, social and cultural matters and for collective self-defence, was signed at Paris on 23 October 1954. It reads, inter alia:

"His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol 23/ Modifying and completing the Brussels Treaty. /Treaty for collaboration in economic, social and cultural matters and for collective self-defence, signed at Brussels on 17 March 1948. 24/ 7

...

Have agreed as follows:

Part I - Armaments not to be manufactured

Article 1

The High Contracting Parties, members of Western European Union, take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory atomic, biological and chemical weapons. The types of armaments referred to in this Article are defined in Annex II. These armaments shall be more closely defined and the definitions brought up to date by the Council of Western European Union.

...

Annex I

The Federal Chancellor declares:

that the Federal Republic undertakes not to manufacture in its territory any atomic weapons, chemical weapons or biological weapons, as detailed in paragraphs I, II and III of the attached list. /See Annex II below/,

...

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organization to ensure that these undertakings are observed.

23/ United Nations, Treaty Series, vol. 211, p. 342.

24/ Ibid., vol. 19, p. 51.

Annex II

This list comprises the weapons defined in paragraphs I to III and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

...

II. Chemical Weapons

(a) A chemical weapon is defined as any equipment or apparatus expressly designed to use, for military purposes, the asphyxiating, toxic, irritant, paralytant, growth-regulating, anti-lubricating or catalysing properties of any chemical substance.

(b) Subject to the provisions of paragraph (c), chemical substances, having such properties and capable of being used in the equipment or apparatus referred to in paragraph (a), shall be deemed to be included in this definition.

(c) Such apparatus and such quantities of the chemical substances as are referred to in paragraphs (a) and (b) which do not exceed peaceful civilian requirements shall be deemed to be excluded from this definition.

III. Biological Weapons

(a) A biological weapon is defined as any equipment or apparatus expressly designed to use, for military purposes, harmful insects or other living or dead organisms, or their toxic products.

(b) Subject to the provisions of paragraph (c), insects, organisms and their toxic products of such nature and in such amounts as to make them capable of being used in the equipment or apparatus referred to in (a) shall be deemed to be included in this definition.

(c) Such equipment or apparatus and such quantities of the insects, organisms and their toxic products as are referred to in paragraphs (a) and (b) which do not exceed peaceful civilian requirements shall be deemed to be excluded from the definition of biological weapons.

..." 25/

25/ Ibid., vol. 211, p. 364.

18. Article 13 of the State Treaty for the re-establishment of an independent and democratic Austria, signed at Vienna on 15 May 1955 states, inter alia, "Austria shall not possess, construct or experiment with - ... j) asphyxiating, vesicant or poisonous materials or biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.". 26/

SECTION 3. PROJECTILES OF VARIOUS KINDS 27/

19. The Hague Declaration (IV,3) concerning expanding bullets ("Dum-Dum" bullets) was signed on 29 July 1899 at The Hague and includes, inter alia, the following:

"The undersigned, plenipotentiaries of the Powers represented at the International Peace Conference at The Hague, duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29th November (11th December), 1868,

Declare as follows:

The contracting Parties agree to abstain from the use 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.

The present Declaration is only binding for the contracting Powers in the case of a war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power.

..." 28/

26/ Ibid., vol. 217, p. 223.

27/ The 1868 St. Petersburg Declaration concerning projectiles of less than 400 grammes which are explosive or charged with fulminating or inflammable substances is included in section 4 of this part entitled "Incendiary weapons", infra. The 1899 Hague Declaration (IV,2) concerning projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases is included in section 2, entitled "Chemical and bacteriological weapons", supra. The Hague Declarations of 1899 (IV,1) and 1907 (XIV) concerning the discharge of projectiles and explosives from balloons is included in section 6, entitled "Balloons", infra. Concern has been expressed recently as to the need for regulation of small-calibre high-velocity weapons and fragmentation warheads. See International Committee of the Red Cross, "Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effects", op. cit., chapters III and IV.

28/ De Martens, Nouveau Recueil général de Traités, 2ème série, t. 26, p. 1002.

SECTION 4. INCENDIARY WEAPONS 29/

20. The St. Petersburg Declaration of 1868 includes, inter alia, the following:

"The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes which is explosive, or is charged with fulminating or inflammable substances.

They agree to invite all the states which have not taken part in the deliberations of the International Military Commission, assembled at St. Petersburg, by sending delegates thereto, to accede to the present engagement.

This engagement is obligatory only upon the contracting or acceding parties thereto, in case of war between two or more of themselves; it is not applicable with regard to non-contracting powers, or powers that shall not have acceded to it.

It will also cease to be obligatory from the moment when, in a war between contracting or acceding parties, a non-contracting party, or a non-acceding party, shall join one of the belligerents.

..." 30/

21. The Treaty of Saint-Germain-en-Laye, signed on 10 September 1919, states in article 135 that "The use of flame throwers, asphyxiating, poisonous or other gases, and all similar liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Austria ...". 31/ Similar provisions appear in the Treaty of Neuilly-sur-Seine 32/ of 27 November 1919 and the Treaty of Trianon 33/ of 4 June 1920 with respect to Bulgaria and Hungary, respectively.

29/ The 1899 Hague Declaration (IV,1) and the 1907 Hague Declaration (XIV), both concerning the discharge of projectiles and explosives from balloons, are included in section 6 of this part, entitled "Balloons", infra.

30/ See appendix to part I of this chapter, supra.

31/ British and Foreign State Papers, vol. 112, pp. 317, 371.

32/ Ibid., vol. 112, p. 801 (article 82).

33/ Ibid., vol. 113, p. 527 (article 119).

SECTION 5. NUCLEAR WEAPONS

22. On 5 August 1963, the "Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water" was signed at Moscow. That treaty includes the following:

"The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, hereinafter referred to as the "Original Parties",

Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons,

Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances,

Have agreed as follows:

Article I

1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this Article.

...

/...

Article IV

This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.

..." 34/

23. On 27 January 1967, the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies was opened for signature at Moscow, London and Washington. That Treaty includes the following:

"The States Parties to this Treaty,

Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,

Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples,

Recalling resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", which was adopted unanimously by the United Nations General Assembly on 13 December 1963,

Recalling resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,

34/ United Nations, Treaty Series, vol. 480, p. 43.

Taking account of United Nations General Assembly resolution 110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Convinced that a Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, will further the Purposes and Principles of the Charter of the United Nations,

Have agreed on the following:

Article I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article II

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of

military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

...

Article IX

In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.

Article X

In order to promote international co-operation in the exploration and use of outer space, including the moon and other celestial bodies, in conformity with the purposes of this Treaty, the States Parties to the Treaty shall consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States.

The nature of such an opportunity for observation and the conditions under which it could be afforded shall be determined by agreement between the States concerned.

Article XI

In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform

the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Article XII

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Article XIII

The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organizations.

Any practical questions arising in connexion with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.

..." 35/

24. A treaty entitled "Treaty for the Prohibition of Nuclear Weapons in Latin America" was signed at Mexico, Federal District, on 14 February 1967. Relevant portions of that treaty appear below:

"Preamble

In the name of their peoples and faithfully interpreting their desires and aspirations, the Governments of the States which sign the Treaty for the Prohibition of Nuclear Weapons in Latin America,

Desiring to contribute, so far as lies in their power, towards ending the armaments race, especially in the field of nuclear weapons, and towards strengthening a world at peace, based on the sovereign equality of States, mutual respect and good neighbourliness,

35/ Ibid., vol. 610, p. 205.

Recalling that the United Nations General Assembly, in its Resolution 808 (IX), adopted unanimously as one of the three points of a coordinated programme of disarmament 'the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type',

Recalling that militarily denuclearized zones are not an end in themselves but rather a means for achieving general and complete disarmament at a later stage,

Recalling United Nations General Assembly Resolution 1911 (XVIII), which established that the measures that should be agreed upon for the denuclearization of Latin America should be taken 'in the light of the principles of the Charter of the United Nations and of regional agreements',

Recalling United Nations General Assembly Resolution 2028 (XX), which established the principle of an acceptable balance of mutual responsibilities and duties for the nuclear and non-nuclear powers, and

Recalling that the Charter of the Organization of American States proclaims that it is an essential purpose of the Organization to strengthen the peace and security of the hemisphere,

Convinced:

That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured,

That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable,

That general and complete disarmament under effective international control is a vital matter which all the peoples of the world equally demand,

That the proliferation of nuclear weapons, which seems inevitable unless States, in the exercise of their sovereign rights, impose restrictions on themselves in order to prevent it, would make any agreement on disarmament enormously difficult and would increase the danger of the outbreak of a nuclear conflagration,

That the establishment of militarily denuclearized zones is closely linked with the maintenance of peace and security in the respective regions,

That the military denuclearization of vast geographical zones, adopted by the sovereign decision of the States comprised therein, will exercise a beneficial influence on other regions where similar conditions exist,

That the privileged situation of the signatory States, whose territories are wholly free from nuclear weapons, imposes upon them the inescapable duty of preserving that situation both in their own interests and for the good of mankind,

That the existence of nuclear weapons in any country of Latin America would make it a target for possible nuclear attacks and would inevitably set off, throughout the region, a ruinous race in nuclear weapons which would involve the unjustifiable diversion, for warlike purposes, of the limited resources required for economic and social development,

That the foregoing reasons, together with the traditional peace-loving outlook of Latin America, give rise to an inescapable necessity that nuclear energy should be used in that region exclusively for peaceful purposes, and that the Latin American countries should use their right to the greatest and most equitable possible access to this new source of energy in order to expedite the economic and social development of their peoples,

Convinced finally:

That the military denuclearization of Latin America - being understood to mean the undertaking entered into internationally in this Treaty to keep their territories forever free from nuclear weapons - will constitute a measure which will spare their peoples from the squandering of their limited resources on nuclear armaments and will protect them against possible nuclear attacks on their territories, and will also constitute a significant contribution towards preventing the proliferation of nuclear weapons and a powerful factor for general and complete disarmament, and

That Latin America, faithful to its tradition of universality, must not only endeavour to banish from its homelands the scourge of a nuclear war, but must also strive to promote the well-being and advancement of its peoples, at the same time co-operating in the fulfilment of the ideals of mankind, that is to say, in the consolidation of a permanent peace based on equal rights, economic fairness and social justice for all, in accordance with the principles and purposes set forth in the Charter of the United Nations and in the Charter of the Organization of American States,

Have agreed as follows:

Obligations

Article 1

1. The Contracting Parties hereby undertake to use exclusively for peaceful purposes the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories:

(a) The testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way, and

/...

(b) The receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way.

2. The Contracting Parties also undertake to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.

...

Definition of nuclear weapons

Article 5

For the purposes of this Treaty, a nuclear weapon is 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. An instrument that may be used for the transport or propulsion of the device is not included in this definition if it is separable from the device and not an indivisible part thereof.

...

Control system

Article 12

1. For the purpose of verifying compliance with the obligations entered into by the Contracting Parties in accordance with article 1, a control system shall be established which shall be put into effect in accordance with the provisions of articles 13-18 of this Treaty.

2. The control system shall be used in particular for the purpose of verifying:

(a) That devices, services and facilities intended for peaceful uses of nuclear energy are not used in the testing or manufacture of nuclear weapons;

(b) That none of the activities prohibited in article 1 of this Treaty are carried out in the territory of the Contracting Parties with nuclear materials or weapons introduced from abroad, and

(c) That explosions for peaceful purposes are compatible with article 18 of this Treaty.

...

/...

Use of nuclear energy for peaceful purposes

Article 17

Nothing in the provisions of this Treaty shall prejudice the rights of the Contracting Parties, in conformity with this Treaty, to use nuclear energy for peaceful purposes, in particular for their economic development and social progress.

Explosions for peaceful purposes

Article 18

1. The Contracting Parties may carry out explosions of nuclear devices for peaceful purposes - including explosions which involve devices similar to those used in nuclear weapons - or collaborate with third parties for the same purpose, provided that they do so in accordance with the provisions of this article and the other articles of the Treaty, particularly articles 1 and 5.

2. Contracting Parties intending to carry out, or to co-operate in carrying out, such an explosion shall notify the Agency and the International Atomic Energy Agency, as far in advance as the circumstances require, of the date of the explosion and shall at the same time provide the following information:

(a) The nature of the nuclear device and the source from which it was obtained;

(b) The place and purpose of the planned explosion;

(c) The procedures which will be followed in order to comply with paragraph 3 of this article;

(d) The expected force of the device, and

(e) The fullest possible information on any possible radioactive fall-out that may result from the explosion or explosions, and measures which will be taken to avoid danger to the population, flora, fauna and territories of any other Party or Parties.

3. The General Secretary and the technical personnel designated by the Council and the International Atomic Energy Agency may observe all the preparations, including the explosion of the device, and shall have unrestricted access to any area in the vicinity of the site of the explosion in order to ascertain whether the device and the procedures followed during the explosion are in conformity with the information supplied under paragraph 2 of this article and the other provisions of this Treaty.

4. The Contracting Parties may accept the collaboration of third parties for the purpose set forth in paragraph 1 of the present article, in accordance with paragraphs 2 and 3 thereof.

Relations with other international organizations

Article 19

1. The Agency may conclude such agreements with the International Atomic Energy Agency as are authorized by the General Conference and as it considers likely to facilitate the efficient operation of the control system established by this Treaty.

2. The Agency may also enter into relations with any international organization or body, especially any which may be established in the future to supervise disarmament or measures for the control of armaments in any part of the world.

3. The Contracting Parties may, if they see fit, request the advice of the Inter-American Nuclear Energy Commission on all technical matters connected with the application of this Treaty with which the Commission is competent to deal under its Statute.

Measures in the event of violation of the Treaty

Article 20

1. The General Conference shall take note of all cases in which, in its opinion, any Contracting Party is not complying fully with its obligations under this Treaty and shall draw the matter to the attention of the Party concerned, making such recommendations as it deems appropriate.

2. If, in its opinion, such non-compliance constitutes a violation of this Treaty which might endanger peace and security, the General Conference shall report thereon simultaneously to the United Nations Security Council and the General Assembly through the Secretary-General of the United Nations, and to the Council of the Organization of American States. The General Conference shall likewise report to the International Atomic Energy Agency for such purposes as are relevant in accordance with its Statute.

United Nations and Organization of American States

Article 21

None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the Parties under the Charter of the United Nations or, in the case of States Members of the Organization of American States, under existing regional treaties.

...

/...

Reservations

Article 27

This Treaty shall not be subject to reservations.

Entry into force

Article 28

1. Subject to the provisions of paragraph 2 of this article, this Treaty shall enter into force among the States that have ratified it as soon as the following requirements have been met:

(a) Deposit of the instruments of ratification of this Treaty with the Depositary Government by the Governments of the States mentioned in article 25 which are in existence on the date when this Treaty is opened for signature and which are not affected by the provisions of article 25, paragraph 2;

(b) Signature and ratification of Additional Protocol I annexed to this Treaty by all extra-continental or continental States having de jure or de facto international responsibility for territories situated in the zone of application of the Treaty;

(c) Signature and ratification of the Additional Protocol II annexed to this Treaty by all powers possessing nuclear weapons;

(d) Conclusion of bilateral or multilateral agreements on the application of the Safeguards System of the International Atomic Energy Agency in accordance with article 13 of this Treaty.

2. All signatory States shall have the imprescriptible right to waive, wholly or in part, the requirements laid down in the preceding paragraph. They may do so by means of a declaration which shall be annexed to their respective instrument of ratification and which may be formulated at the time of deposit of the instrument or subsequently. For those States which exercise this right, this Treaty shall enter into force upon deposit of the declaration, or as soon as those requirements have been met which have not been expressly waived.

3. As soon as this Treaty has entered into force in accordance with the provisions of paragraph 2 for eleven States, the Depositary Government shall convene a preliminary meeting of those States in order that the Agency may be set up and commence its work.

4. After the entry into force of this Treaty for all the countries of the zone, the rise of a new power possessing nuclear weapons shall have the effect of suspending the execution of this Treaty for those countries which

/...

have ratified it without waiving requirements of paragraph 1, sub-paragraph (c) of this article, and which request such suspension; the Treaty shall remain suspended until the new power, on its own initiative or upon request by the General Conference, ratifies the annexed Additional Protocol II.

...

Duration and denunciation

Article 30

1. This Treaty shall be of a permanent nature and shall remain in force indefinitely, but any Party may denounce it by notifying the General Secretary of the Agency if, in the opinion of the denouncing State, there have arisen or may arise circumstances connected with the content of this Treaty or of the annexed Additional Protocols I and II which affect its supreme interests or the peace and security of one or more Contracting Parties.

2. The denunciation shall take effect three months after the delivery to the General Secretary of the Agency of the notification by the Government of the signatory State concerned. The General Secretary shall immediately communicate such notification to the other Contracting Parties and to the Secretary-General of the United Nations for the information of the United Nations Security Council and the General Assembly. He shall also communicate it to the Secretary-General of the Organization of American States.

...

ADDITIONAL PROTOCOL I

The undersigned Plenipotentiaries, furnished with full powers by their respective Governments,

Convinced that the Treaty for the Prohibition of Nuclear Weapons in Latin America, negotiated and signed in accordance with the recommendations of the General Assembly of the United Nations in Resolution 1911 (XVIII) of 27 November 1963, represents an important step towards ensuring the non-proliferation of nuclear weapons,

Aware that the non-proliferation of nuclear weapons is not an end in itself but, rather, a means of achieving general and complete disarmament at a later stage, and

Desiring to contribute, so far as lies in their power, towards ending the armaments race, especially in the field of nuclear weapons, and towards strengthening a world at peace, based on mutual respect and sovereign equality of States,

/...

Have agreed as follows:

Article 1

To undertake to apply the statute of denuclearization in respect of warlike purposes as defined in articles 1, 3, 5 and 13 of the Treaty for the Prohibition of Nuclear Weapons in Latin America in territories for which, de jure or de facto, they are internationally responsible and which lie within the limits of the geographical zone established in that Treaty.

Article 2

The duration of this Protocol shall be the same as that of the Treaty for the Prohibition of Nuclear Weapons in Latin America of which this Protocol is an annex, and the provisions regarding ratification and denunciation contained in the Treaty shall be applicable to it.

Article 3

This Protocol shall enter into force, for the States which have ratified it, on the date of the deposit of their respective instruments of ratification.

...

ADDITIONAL PROTOCOL II

The undersigned Plenipotentiaries, furnished with full powers by their respective Governments,

Convinced that the Treaty for the Prohibition of Nuclear Weapons in Latin America, negotiated and signed in accordance with the recommendations of the General Assembly of the United Nations in Resolution 1911 (XVIII) of 27 November 1963, represents an important step towards ensuring the non-proliferation of nuclear weapons,

Aware that the non-proliferation of nuclear weapons is not an end in itself but, rather, a means of achieving general and complete disarmament at a later stage, and

Desiring to contribute, so far as lies in their power, towards ending the armaments race, especially in the field of nuclear weapons, and towards promoting and strengthening a world at peace, based on mutual respect and sovereign equality of States,

/...

Have agreed as follows:

Article 1

The statute of denuclearization of Latin America in respect of warlike purposes, as defined, delimited and set forth in the Treaty for the Prohibition of Nuclear Weapons in Latin America of which this instrument is an annex, shall be fully respected by the Parties to this Protocol in all its express aims and provisions.

Article 2

The Governments represented by the undersigned Plenipotentiaries undertake, therefore, not to contribute in any way to the performance of acts involving a violation of the obligations of article 1 of the Treaty in the territories to which the Treaty applies in accordance with article 4 thereof.

Article 3

The Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America.

Article 4

The duration of this Protocol shall be the same as that of the Treaty for the Prohibition of Nuclear Weapons in Latin America of which this Protocol is an annex, and the definitions of territory and nuclear weapons set forth in articles 3 and 5 of the Treaty shall be applicable to this Protocol, as well as the provisions regarding ratification, reservations, denunciation, authentic texts and registration contained in articles 26, 27, 30 and 31 of the Treaty.

Article 5

This Protocol shall enter into force, for the States which have ratified it, on the date of the deposit of their respective instruments of ratification.

..." 36/

25. The "Treaty on the Non-Proliferation of Nuclear Weapons" signed at Washington, London and Moscow on 1 July 1968 reads, inter alia:

"The States concluding this Treaty, hereinafter referred to as the 'Parties to the Treaty',

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,

In conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons,

Undertaking to cooperate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,

Expressing their support for research, development and other efforts to further the application, within the framework of the International Atomic Energy Agency safeguards system, of the principle of safeguarding effectively the flow of source and special fissionable materials by use of instruments and other techniques at certain strategic points,

Affirming the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States,

Convinced that, in furtherance of this principle, all Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in cooperation with other States to, the further development of the applications of atomic energy for peaceful purposes,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

Urging the cooperation of all States in the attainment of this objective,

Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end,

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control,

Recalling that, in accordance with the Charter of the United Nations, States must refrain in their international relations from 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, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources,

Have agreed as follows:

ARTICLE I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

ARTICLE II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

ARTICLE III

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

2. Each State Party to the Treaty undertakes not to provide:
(a) source or special fissionable material, or (b) equipment or material

/...

especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article.

3. The safeguards required by this article shall be implemented in a manner designed to comply with article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international cooperation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this article and the principle of safeguarding set forth in the Preamble of the Treaty.

4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.

ARTICLE IV

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

ARTICLE V

Each Party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a

non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.

ARTICLE VI

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

ARTICLE VII

Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.

...

ARTICLE X

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

..." 37/

26. The agreement entitled "Measures to Reduce the Risk of Outbreak of Nuclear War" was signed at Washington on 30 September 1971 and reads, inter alia:

37/ United States Treaties and other International Agreements, vol. 21, p. 483.

"The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties:

Taking into account the devastating consequences that nuclear war would have for all mankind, and recognizing the need to exert every effort to avert the risk of outbreak of such a war, including measures to guard against accidental or unauthorized use of nuclear weapons,

Believing that agreement on measures for reducing the risk of outbreak of nuclear war serves the interests of strengthening international peace and security, and is in no way contrary to the interests of any other country,

Bearing in mind that continued efforts are also needed in the future to seek ways of reducing the risk of outbreak of nuclear war,

Have agreed as follows:

Article 1

Each Party undertakes to maintain and to improve, as it deems necessary, its existing organizational and technical arrangements to guard against the accidental or unauthorized use of nuclear weapons under its control.

Article 2

The Parties undertake to notify each other immediately in the event of an accidental, unauthorized or any other unexplained incident involving a possible detonation of a nuclear weapon which could create a risk of outbreak of nuclear war. In the event of such an incident, the Party whose nuclear weapon is involved will immediately make every effort to take necessary measures to render harmless or destroy such weapon without its causing damage.

Article 3

The Parties undertake to notify each other immediately in the event of detection by missile warning systems of unidentified objects, or in the event of signs of interference with these systems or with related communications facilities, if such occurrences could create a risk of outbreak of nuclear war between the two countries.

Article 4

Each Party undertakes to notify the other Party in advance of any planned missile launches if such launches will extend beyond its national territory in the direction of the other Party.

Article 5

Each Party, in other situations involving unexplained nuclear incidents, undertakes to act in such a manner as to reduce the possibility of its actions being misinterpreted by the other Party. In any such situation, each Party may inform the other Party or request information when, in its view, this is warranted by the interests of averting the risk of outbreak of nuclear war.

Article 6

For transmission of urgent information, notifications and requests for information in situations requiring prompt clarification, the Parties shall make primary use of the Direct Communications Link between the Governments of the United States of America and the Union of Soviet Socialist Republics.

For transmission of other information, notifications and requests for information, the Parties, at their own discretion, may use any communications facilities, including diplomatic channels, depending on the degree of urgency.

Article 7

The Parties undertake to hold consultations, as mutually agreed, to consider questions relating to implementation of the provisions of this Agreement, as well as to discuss possible amendments thereto aimed at further implementation of the purposes of this Agreement.

Article 8

This Agreement shall be of unlimited duration.

Article 9

This Agreement shall enter into force upon signature.

..." 38/

27. On 11 February 1971, the "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof" was signed at Washington, London and Moscow. Relevant portions of that Treaty include the following:

38/ United States Treaties and Other International Agreements, vol. 22, p. 1590.

"The States Parties to this Treaty,

Recognizing the common interest of mankind in the progress of the exploration and use of the sea-bed and the ocean floor for peaceful purposes,

Considering that the prevention of a nuclear arms race on the sea-bed and the ocean floor serves the interests of maintaining world peace, reduces international tensions and strengthens friendly relations among States,

Convinced that this Treaty constitutes a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race,

Convinced that this Treaty constitutes a step towards a treaty on general and complete disarmament under strict and effective international control, and determined to continue negotiations to this end,

Convinced that this Treaty will further the purposes and principles of the Charter of the United Nations, in a manner consistent with the principles of international law and without infringing the freedoms of the high seas,

Have agreed as follows:

ARTICLE I

1. The States Parties to this Treaty undertake not to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of a sea-bed zone, as defined in article II, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.

2. The undertakings of paragraph 1 of this article shall also apply to the sea-bed zone referred to in the same paragraph, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters.

3. The States Parties to this Treaty undertake not to assist, encourage or induce any State to carry out activities referred to in paragraph 1 of this article and not to participate in any other way in such actions.

...

ARTICLE III

1. In order to promote the objectives of and ensure compliance with the provisions of this Treaty, each State Party to the Treaty shall have the right to verify through observation the activities of other States Parties to the Treaty on the sea-bed and the ocean floor and in the subsoil thereof beyond the zone referred to in article I, provided that observation does not interfere with such activities.

/...

2. If after such observation reasonable doubts remain concerning the fulfilment of the obligations assumed under the Treaty, the State Party having such doubts and the State Party that is responsible for the activities giving rise to the doubts shall consult with a view to removing the doubts. If the doubts persist, the State Party having such doubts shall notify the other States Parties, and the Parties concerned shall co-operate on such further procedures for verification as may be agreed, including appropriate inspection of objects, structures, installations or other facilities that reasonably may be expected to be of a kind described in article I. The Parties in the region of the activities, including any coastal State, and any other Party so requesting, shall be entitled to participate in such consultation and co-operation. After completion of the further procedures for verification, an appropriate report shall be circulated to other Parties by the Party that initiated such procedures.

3. If the State responsible for the activities giving rise to the reasonable doubts is not identifiable by observation of the object, structure, installation or other facility, the State Party having such doubts shall notify and make appropriate inquiries of States Parties in the region of the activities and of any other State Party. If it is ascertained through these inquiries that a particular State Party is responsible for the activities, that State Party shall consult and co-operate with other Parties as provided in paragraph 2 of this article. If the identity of the State responsible for the activities cannot be ascertained through these inquiries, then further verification procedures, including inspection, may be undertaken by the inquiring State Party, which shall invite the participation of the Parties in the region of the activities, including any coastal State, and of any other Party desiring to co-operate.

4. If consultation and co-operation pursuant to paragraphs 2 and 3 of this article have not removed the doubts concerning the activities and there remains a serious question concerning fulfilment of the obligations assumed under this Treaty, a State Party may, in accordance with the provisions of the Charter of the United Nations, refer the matter to the Security Council, which may take action in accordance with the Charter.

5. Verification pursuant to this article may be undertaken by any State Party using its own means, or with the full or partial assistance of any other State Party, or through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

6. Verification activities pursuant to this Treaty shall not interfere with activities of other States Parties and shall be conducted with due regard for rights recognized under international law, including the freedoms of the high seas and the rights of coastal States with respect to the exploration and exploitation of their continental shelves.

...

/...

ARTICLE V

The Parties to this Treaty undertake to continue negotiations in good faith concerning further measures in the field of disarmament for the prevention of an arms race on the sea-bed, the ocean floor and the subsoil thereof.

...

ARTICLE VII

Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held at Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized. Such review shall take into account any relevant technological developments. The review conference shall determine, in accordance with the views of a majority of those Parties attending, whether and when an additional review conference shall be convened.

ARTICLE VIII

Each State Party to this Treaty shall in exercising its national sovereignty have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject-matter of this Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it considers to have jeopardized its supreme interests.

ARTICLE IX

The provisions of this Treaty shall in no way affect the obligations assumed by States Parties to the Treaty under international instruments establishing zones free from nuclear weapons.

... " 39/

28. On 22 June 1973, the "Agreement between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War" was signed in Washington. It reads, inter alia:

"The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

39/ United States Treaties and Other International Acts Series, No. 7337.
See annex to United Nations General Assembly resolution 2660 (XXV) of 7 December 1970.

Guided by the objectives of strengthening world peace and international security,

Conscious that nuclear war would have devastating consequences for mankind,

Proceeding from the desire to bring about conditions in which the danger of an outbreak of nuclear war anywhere in the world would be reduced and ultimately eliminated,

Proceeding from their obligations under the Charter of the United Nations regarding the maintenance of peace, refraining from the threat or use of force, and the avoidance of war, and in conformity with the agreements to which either Party has subscribed,

Proceeding from the Basic Principles of Relations between the United States of America and the Union of Soviet Socialist Republics signed in Moscow on May 29, 1972,

Reaffirming that the development of relations between the United States of America and the Union of Soviet Socialist Republics is not directed against other countries and their interests,

Have agreed as follows:

ARTICLE I

The United States and the Soviet Union agree that an objective of their policies is to remove the danger of nuclear war and of the use of nuclear weapons.

Accordingly, the Parties agree that they will act in such a manner as to prevent the development of situations capable of causing a dangerous exacerbation of their relations, as to avoid military confrontations, and as to exclude the outbreak of nuclear war between them and between either of the Parties and other countries.

ARTICLE II

The Parties agree, in accordance with Article I and to realize the objective stated in that Article, to proceed from the premise that each Party will refrain from the threat or use of force against the other Party, against the allies of the other Party and against other countries, in circumstances which may endanger international peace and security. The Parties agree that they will be guided by these considerations in the formulation of their foreign policies and in their actions in the field of international relations.

ARTICLE III

The Parties undertake to develop their relations with each other and with other countries in a way consistent with the purposes of this Agreement.

ARTICLE IV

If at any time relations between the Parties or between either Party and other countries appear to involve the risk of a nuclear conflict, or if relations between countries not parties to this Agreement appear to involve the risk of nuclear war between the United States of America and the Union of Soviet Socialist Republics or between either Party and other countries, the United States and the Soviet Union, acting in accordance with the provisions of this Agreement, shall immediately enter into urgent consultations with each other and make every effort to avert this risk.

ARTICLE V

Each Party shall be free to inform the Security Council of the United Nations, the Secretary General of the United Nations and the Governments of allied or other countries of the progress and outcome of consultations initiated in accordance with Article IV of this Agreement.

ARTICLE VI

Nothing in this Agreement shall affect or impair:

(a) the inherent right of individual or collective self-defense as envisaged by Article 51 of the Charter of the United Nations,

(b) the provisions of the Charter of the United Nations, including those relating to the maintenance or restoration of international peace and security, and

(c) the obligations undertaken by either Party towards its allies or other countries in treaties, agreements, and other appropriate documents.

ARTICLE VII

This Agreement shall be of unlimited duration.

ARTICLE VIII

This Agreement shall enter into force upon signature.

..." 40/

40/ United States Treaties and Other International Acts Series, No. 7654.
See also United States Department of State Bulletin, vol. 69, 23 July 1973, p. 160.

29. Article 2 of the Treaty of Friendship, Co-operation and Mutual Assistance, signed at Warsaw on 14 May 1955, states, inter alia, that "... the Contracting Parties shall endeavour to secure, in agreement with other States desiring to co-operate in this matter, the adoption of effective measures for the general reduction of armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction". 41/

30. Article 13 of the Treaty of Peace with Bulgaria, signed at Paris on 10 February 1947, states, inter alia, "Bulgaria shall not possess, construct or experiment with any atomic weapon ...". 42/ Similar language with regard to Finland, Hungary and Romania is found in their respective peace treaties, each signed at Paris on 10 February 1947. 43/ Article 51 of the Treaty of Peace with Italy, signed at Paris on 10 February 1947, states, inter alia, "Italy shall not possess, construct or experiment with (i) any atomic weapon ...". 44/

31. Protocol III (with annexes) on the control of armaments, which is an integral part of the Protocol modifying and completing the 1948 Brussels Treaty for collaboration in economic, social and cultural matters and for collective self-defence, was signed at Paris on 23 October 1954. It reads, inter alia:

"His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol 45/ Modifying and Completing the Brussels Treaty. /Treaty for collaboration in economic, social and cultural matters and for collective self-defence, signed at Brussels on 17 March 1948 46//

...

41/ United Nations, Treaty Series, vol. 219, pp. 3 and 28.

42/ Ibid., vol. 41, p. 21.

43/ Treaty of Peace with Finland, ibid., vol. 48, p. 203 (article 17); Treaty of Peace with Hungary, ibid., vol. 41, p. 135 (article 15); and Treaty of Peace with Romania, ibid., vol. 42, p. 3 (article 14).

44/ Ibid., vols. 49 and 50.

45/ United Nations, Treaty Series, vol. 211, p. 342.

46/ Ibid., vol. 19, p. 51.

Have agreed as follows:

Part I - Armaments not to be manufactured

Article I

The High Contracting Parties, members of Western European Union, take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory atomic, biological and chemical weapons. The types of armaments referred to in this Article are defined in Annex II. These armaments shall be more closely defined and the definitions brought up to date by the Council of Western European Union.

...

Annex I

The Federal Chancellor declares:

that the Federal Republic undertakes not to manufacture in its territory any atomic weapons, chemical weapons or biological weapons, as detailed in paragraphs I, II and III of the attached list /see Annex II below/.

...

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organization to ensure that these undertakings are observed.

Annex II

This list comprises the weapons defined in paragraphs I to III and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

I. Atomic Weapons

(a) An atomic weapon is defined as any weapon which contains, or is designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass poisoning.

(b) Furthermore, any part, device, assembly or material especially designed for, or primarily useful in, any weapon as set forth under paragraph (a), shall be deemed to be an atomic weapon.

/...

(c) Nuclear fuel as used in the preceding definition includes plutonium, Uranium 223, Uranium 235 (including Uranium 235 contained in Uranium enriched to over 2.1 per cent by weight of Uranium 235) and any other material capable of releasing substantial quantities of atomic energy through nuclear fission or fusion or other nuclear reaction of the material. The foregoing materials shall be considered to be nuclear fuel regardless of the chemical or physical form in which they exist.

..." 47/

32. The State Treaty for the re-establishment of an independent and democratic Austria, signed at Vienna on 15 May 1955, includes the following in article 13: "Austria shall not possess, construct or experiment with - a) Any atomic weapon, b) Any other weapon adaptable now or in the future to mass destruction and defined as such by the appropriate organ of the United Nations ..." 48/

SECTION 6. BALLOONS

33. The Declaration (IV,1) to prohibit for the term of five years the launching of projectiles and explosives from balloons, and other new methods of a similar nature, was signed at The Hague on 29 July 1899 and states, inter alia:

"The undersigned, plenipotentiaries of the Powers represented at the International Peace Conference at The Hague, duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29th November (11 December), 1868.

Declare that:

The contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of similar nature.

The present Declaration is only binding on the contracting Powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power.

..." 49/

47/ Ibid., vol. 211, p. 364.

48/ Ibid., vol. 217, p. 223.

49/ De Martens, Nouveau Recueil général de Traités, 2ème série, t. 26, p. 994 /authentic French text/. English translation: Carnegie Endowment for International Peace, op. cit., p. 220.

34. At the Second International Peace Conference held at The Hague, the Declaration (XIV) prohibiting the discharge of projectiles and explosives from balloons was signed on 18 October 1907 with a view towards renewing the 1899 Declaration concerning the same subject-matter. That Declaration reads, inter alia:

"The undersigned, plenipotentiaries of the Powers invited to the Second International Peace Conference at The Hague, duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29th November (11th December), 1868, and being desirous of renewing the declaration of The Hague of the 29th July, 1899, which has now expired,

Declare:

The contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, 50/ the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The present Declaration is only binding on the contracting Powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power.

..." 51/

SECTION 7. MISSILES

35. On 26 May 1972, the Treaty between the United States of America and the Union of Soviet Socialist Republics on the limitation of anti-ballistic missile systems was signed at Moscow. That Treaty reads, inter alia:

"The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Proceeding from the premise that nuclear war would have devastating consequences for all mankind,

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic

50/ A "Third Peace Conference" was never held.

51/ De Martens, Nouveau Recueil général de Traités, 3ème série, t. 3, p. 745 /authentic French text/. English translation: Carnegie Endowment for International Peace, op. cit., p. 220.

offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons,

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament,

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States,

Have agreed as follows:

Article I

1. Each Party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.
2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

Article II

1. For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
 - (a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
 - (b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
 - (c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.
2. The ABM system components listed in paragraph 1 of this Article include those which are:

/...

- (a) operational;
- (b) under construction;
- (c) undergoing testing;
- (d) undergoing overhaul, repair or conversion; or
- (e) mothballed.

Article III

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Article IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

Article V

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, nor to modify deployed launchers to provide them with such a capability, nor to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

/...

Article VI

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by this Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

Article VII

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

Article VIII

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

Article IX

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

Article X

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

Article XI

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

Article XII

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

Article XIII

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;

(c) consider questions involving unintended interference with national technical means of verification;

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;

(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty;

(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty, including proposals for amendments in accordance with the provisions of this Treaty;

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

Article XIV

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five year intervals thereafter, the Parties shall together conduct a review of this Treaty.

Article XV

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

Article XVI

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

..." 52/

36. On the same date, 26 May 1972, at Moscow, the Interim Agreement and Protocol between the United States of America and the Union of Soviet Socialist Republics on certain measures with respect to the limitation of strategic offensive arms and the Protocol thereto were signed. That Interim Agreement reads, inter alia:

"The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Convinced that the Treaty on the Limitation of Anti-Ballistic Missile Systems and this Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms will contribute to the creation of more favorable conditions for active negotiations on limiting strategic arms as well as to the relaxation of international tension and the strengthening of trust between States,

Taking into account the relationship between strategic offensive and defensive arms,

52/ United States Treaties and Other International Acts Series, No. 7503.
See also United States Department of State Bulletin, vol. 66, p. 918.

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Have agreed as follows:

Article I

The Parties undertake not to start construction of additional fixed land-based intercontinental ballistic missile (ICBM) launchers after July 1, 1972.

Article II

The Parties undertake not to convert land-based launchers for light ICBMs, or for ICBMs of older types deployed prior to 1964, into land-based launchers for heavy ICBMs of types deployed after that time.

Article III

The Parties undertake to limit submarine-launched ballistic missile (SLBM) launchers and modern ballistic missile submarines to the numbers operational and under construction on the date of signature of this Interim Agreement, and in addition to launchers and submarines constructed under procedures established by the Parties as replacements for an equal number of ICBM launchers of older types deployed prior to 1964 or for launchers on older submarines.

Article IV

Subject to the provisions of this Interim Agreement, modernization and replacement of strategic offensive ballistic missiles and launchers covered by this Interim Agreement may be undertaken.

Article V

1. For the purpose of providing assurance of compliance with the provisions of this Interim Agreement, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Interim Agreement. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

/...

Article VI

To promote the objectives and implementation of the provisions of this Interim Agreement, the Parties shall use the Standing Consultative Commission established under Article XIII of the Treaty on the Limitation of Anti-Ballistic Missile Systems in accordance with the provisions of that Article.

Article VII

The Parties undertake to continue active negotiations for limitations on strategic offensive arms. The obligations provided for in this Interim Agreement shall not prejudice the scope or terms of the limitations on strategic offensive arms which may be worked out in the course of further negotiations.

Article VIII

1. This Interim Agreement shall enter into force upon exchange of written notices of acceptance by each Party, which exchange shall take place simultaneously with the exchange of instruments of ratification of the Treaty on the Limitation of Anti-Ballistic Missile Systems.

2. This Interim Agreement shall remain in force for a period of five years unless replaced earlier by an agreement on more complete measures limiting strategic offensive arms. It is the objective of the Parties to conduct active follow-on negotiations with the aim of concluding such an agreement as soon as possible.

3. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Interim Agreement if it decides that extraordinary events related to the subject matter of this Interim Agreement have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from this Interim Agreement. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests." 53/

...

37. Article 13 of the Treaty of Peace with Bulgaria, signed at Paris on 10 February 1947, includes the following:

"Bulgaria shall not possess, construct or experiment with any atomic weapon, any self-propelled or guided missiles or apparatus connected with

53/ United States Treaties and Other International Acts Series, No. 7504.
See also United States Department of State Bulletin, vol. 66, p. 920.

their discharge (other than torpedoes and torpedo-launching gear comprising the normal armament of naval vessels permitted by the present Treaty)..." 54/

Similar provisions with regard to Finland, Hungary and Romania are found in their respective peace treaties, each signed at Paris on 10 February 1947. 55/ Included in article 51 of the Treaty of Peace with Italy, signed at Paris on 10 February 1947, is the following: "Italy shall not possess, construct or experiment with ... (ii) any self-propelled or guided missiles or apparatus connected with their discharge (other than torpedoes and torpedo-launching gear comprising the normal armament of naval vessels permitted by the present Treaty)..." 56/

38. Protocol III (with annexes) on the control of armaments, which is an integral part of the Protocol modifying and completing the 1948 Brussels Treaty for collaboration in economic, social and cultural matters and for collective self-defence, was signed at Paris on 23 October 1954. It reads, inter alia:

"His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol 57/ Modifying and Completing the Brussels Treaty /Treaty for collaboration in economic, social and cultural defence, signed at Brussels on 17 March 1948 58/ /.

...

Have agreed as follows:

Part I - Armaments not to be manufactured

Article 1

The High Contracting Parties, members of Western European Union, take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook

54/ United Nations, Treaty Series, vol. 41, p. 21.

55/ Treaty of Peace with Finland, ibid., vol. 48, p. 203 (article 17); Treaty of Peace with Hungary, ibid., vol. 41, p. 135 (article 15); and Treaty of Peace with Romania, ibid., vol. 42, p. 3 (article 14).

56/ Ibid., vols. 49 and 50.

57/ Ibid., vol. 211, p. 341.

58/ Ibid., vol. 19, p. 51.

/...

not to manufacture in its territory atomic, biological and chemical weapons. The types of armaments referred to in this Article are defined in Annex II. These armaments shall be more closely defined and the definitions brought up to date by the Council of Western European Union.

Article 2

The High Contracting Parties, members of Western European Union, also take note of and record their agreement with the undertaking given by the Chancellor of the Federal Republic of Germany in the same Declaration that certain further types of armaments will not be manufactured in the territory of the Federal Republic of Germany, except that if in accordance with the needs of the armed forces a recommendation for an amendment to, or cancellation of, the content of the list of these armaments is made by the competent Supreme Commander of the North Atlantic Treaty Organization, and if the Government of the Federal Republic of Germany submits a request accordingly such an amendment or cancellation may be made by a resolution of the Council of Western European Union passed by a two-thirds majority. The types of armaments referred to in this Article are listed in Annex III.

...

Annex I

The Federal Chancellor declares:

that it /The Federal Republic of Germany/ undertakes further not to manufacture in its territory such weapons as those detailed in paragraphs IV, V and VI of the attached list /see Annex III below/. Any amendment to or cancellation of the substance of paragraphs IV, V and VI can, on the request of the Federal Republic, be carried out by a resolution of the Brussels Council of Ministers by a two-thirds majority, if in accordance with the needs of the armed forces a request is made by the competent Supreme Commander of the North Atlantic Treaty Organization;

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organization to ensure that these undertakings are observed.

...

Annex III

This list comprises the weapons defined in paragraphs IV to VI and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

/...

IV. Long-range Missiles, Guided Missiles and Influence Mines

(a) Subject to the provisions of paragraph (d), long-range missiles and guided missiles are defined as missiles such that the speed or direction of motion can be influenced after the instant of launching by a device or mechanism inside or outside the missile, including V-type weapons developed in the recent war and subsequent modifications thereof. Combustion is considered as a mechanism which may influence the speed.

(b) Subject to the provisions of paragraph (d), influence mines are defined as naval mines which can be exploded automatically by influences which emanate solely from external sources, including influence mines developed in the recent war and subsequent modifications thereof.

(c) Parts, devices or assemblies specially designed for use in or with the weapons referred to in paragraphs (a) and (b) shall be deemed to be included in this definition.

(d) Proximity fuses, and short-range guided missiles for anti-aircraft defence with the following maximum characteristics are regarded as excluded from this definition:

Length, 2 metres;

Diameter, 30 centimetres;

Speed, 660 metres per second;

Ground range, 32 kilometres;

Weight of war-head, 22.5 kilogrammes.

..." 59/

39. The State Treaty for the re-establishment of an independent and democratic Austria, signed at Vienna on 15 May 1955, included in article 13 the provision that "Austria shall not possess, construct or experiment with - ... c) any self-propelled or guided missile or torpedoes, or apparatus connected with their discharge or control ..." 60/

59/ Ibid., vol. 211, p. 364.

60/ Ibid., vol. 217, p. 223.

SECTION 8. NAVAL WEAPONS 61/

40. The Convention (VIII) relative to the laying of automatic submarine contact mines, signed at The Hague on 18 October 1907, contains, inter alia, the following:

"... The contracting Powers

"Inspired by the principle of the freedom of sea routes, the common highway of all nations;

Seeing that, although the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, it is nevertheless desirable to restrict and regulate their employment in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war;

Until such time as it is found possible to formulate rules on the subject which shall ensure to the interests involved all the guarantees desirable;

Have resolved to conclude a Convention for this purpose, and have appointed the following as their plenipotentiaries:

...

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

It is forbidden -

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

61/ The 1907 Hague Convention (IX) concerning bombardment by naval forces in time of war is included in part III, section 2, of this chapter, entitled "Prohibitions or restrictions of the use of weapons resulting from the protection granted to certain persons, areas, places or objects: undefended towns, villages, ports, dwellings and buildings", infra. The 1972 Interim Agreement between the United States and the USSR with respect to the limitations of strategic offensive arms and the Protocol thereto refer to "ballistic missile submarines". The Interim Agreement is included in section 7 of this part, entitled "Missiles", supra.

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

Article 2

It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Article 3

When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.

Article 4

Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

Article 5

At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

Article 6

The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

Article 7

The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

...

Article 11

The present Convention shall remain in force for seven years, dating from the sixtieth day after the date of the first deposit of ratifications.

Unless denounced, it shall continue in force after the expiration of this period.

The denunciation shall be notified in writing to the Netherland Government, which shall at once communicate a duly certified copy of the notification to all the Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and six months after the notification has reached the Netherland Government.

Article 12

The contracting Powers undertake to reopen the question of the employment of automatic contact mines six months before the expiration of the period contemplated in the first paragraph of the preceding article, in the event of the question not having been already reopened and settled by the Third Peace Conference.

If the contracting Powers conclude a fresh Convention relative to the employment of mines, the present Convention shall cease to be applicable from the moment it comes into force.

..." 62/

41. At the Conference on Limitation of Armaments, held at Washington in 1922, a draft relating to the use of submarines and noxious gases in warfare was signed on 6 February 1922. The treaty never entered into force. It included the following:

62/ De Martens, Nouveau Recueil général de Traités, 3ème série, t. 3, p. 580 /authentic French text/. English translation: Carnegie Endowment for International Peace, op. cit., p. 151.

"Article 1

The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, the following are to be deemed an established part of international law;

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

Article 2

The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

Article 3

The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Article 4

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines

as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

..." 63/

42. On 22 April 1930, the International Treaty for the limitation and reduction of naval armament was signed at London. Relevant portions of that Treaty are reproduced below:

"Desiring to prevent the dangers and reduce the burdens inherent in competitive armaments, and

Desiring to carry forward the work begun by the Washington Naval Conference and to facilitate the progressive realization of general limitation and reduction of armaments,

Have resolved to conclude a Treaty for the limitation and reduction of naval armament, and have accordingly appointed as their Plenipotentiaries:

...

Who, having communicated to one another their full powers, found in good and due form, have agreed as follows:

...

63/ Conference on the Limitation of Armaments (Washington, U.S. Government Printing Office, 1922), p. 1605.

PART IV.

Article 22

The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The High Contracting Parties invite all other Powers to express their assent to the above rules.

PART V.

Article 23

The present Treaty shall remain in force until the 31st December, 1936, subject to the following exceptions:

(1) Part IV shall remain in force without limit of time;

(2) The provisions of Articles 3, 4 and 5, and of Article II and Annex II to Part II so far as they relate to aircraft carriers, shall remain in force for the same period as the Washington Treaty.

Unless the High Contracting Parties should agree otherwise by reason of a more general agreement limiting naval armaments, to which they all become parties, they shall meet in conference in 1935 to frame a new treaty to replace and to carry out the purposes of the present Treaty, it being understood that none of the provisions of the present Treaty shall prejudice the attitude of any of the High Contracting Parties at the conference agreed to.

..." 64/

43. The rules of submarine warfare set forth in Part IV of the above Treaty were the subject of a procès-verbal signed at London on 6 November 1936 which states:

"Whereas the Treaty for the Limitation and Reduction of Naval Armaments signed in London on the 22nd April, 1930, has not been ratified by all the signatories;

And whereas the said Treaty will cease to be in force after the 31st December, 1936, with the exception of Part IV thereof, which sets forth rules as to the action of submarines with regard to merchant ships as being established rules of international law, and remains in force without limit of time;

And whereas the last paragraph of Article 22 in the said Part IV states that the High Contracting Parties invite all other Powers to express their assent to the said rules;

And whereas the Governments of the French Republic and the Kingdom of Italy have confirmed their acceptance of the said rules resulting from the signature of the said Treaty;

And whereas all the signatories of the said Treaty desire that as great a number of Powers as possible should accept the rules contained in the said Part IV as established rules of international law;

64/ League of Nations, Treaty Series, vol. 112, p. 65.

The undersigned, representatives of their respective Governments, bearing in mind the said Article 22 of the Treaty, hereby request the Government of the United Kingdom of Great Britain and Northern Ireland forthwith to communicate the said rules, as annexed hereto, to the Governments of all Powers which are not signatories of the said Treaty, with an invitation to accede thereto definitely and without limit of time.

RULES

'(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

'(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.'

..." 65/

44. The Nyon Arrangement, signed at Nyon on 14 September 1937, reads, inter alia:

"Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22nd, 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and

Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any Participating Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines:

65/ Ibid., vol. 173, p. 353.

In view thereof the undersigned, being authorised to this effect by their respective Governments, have met in conference at Nyon between the 9th and the 14th September 1937, and have agreed upon the following provisions which shall enter immediately into force:

I. The Participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.

II. Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22nd, 1930, and confirmed in the Protocol signed in London on November 6th, 1936, shall be counter-attacked and, if possible, destroyed.

III. The instruction mentioned in the preceding paragraph shall extend to any submarine encountered in the vicinity of a position where a ship not belonging to either of the conflicting Spanish parties has recently been attacked in violation of the rules referred to in the preceding paragraph in circumstances which give valid grounds for the belief that the submarine was guilty of the attack.

IV. In order to facilitate the putting into force of the above arrangements in a practical manner, the Participating Powers have agreed upon the following arrangements:

1. In the western Mediterranean and in the Malta Channel, with the exception of the Tyrrhenean Sea, which may form the subject of special arrangements, the British and French fleets will operate both on the high seas and in the territorial waters of the Participating Powers, in accordance with the division of the area agreed upon between the two Governments.

2. In the eastern Meditteranean,

(a) Each of the Participating Powers will operate in its own territorial waters;

(b) On the high seas, with the exception of the Adriatic Sea, the British and French fleets will operate up to the entrance to the Dardanelles, in those areas where there is reason to apprehend danger to shipping in accordance with the division of the area agreed upon between the two Governments. The other Participating Governments possessing a sea border on the Mediterranean undertake, within the limit of their resources, to furnish these fleets any assistance that may be asked for; in particular, they will permit them to take action in their territorial waters and to use such of their ports as they shall indicate.

3. It is further understood that the limits of the zones referred to in subparagraphs 1 and 2 above, and their allocation shall be subject at any time to revision by the Participating Powers in order to take account of any change in the situation.

/...

V. The Participating Powers agree that, in order to simplify the operation of the above-mentioned measures, they will for their part restrict the use of their submarines in the Mediterranean in the following manner:

(a) Except as stated in (b) and (c) below, no submarine will be sent to sea within the Mediterranean.

(b) Submarines may proceed on passage after notification to the other Participating Powers, provided that they proceed on the surface and are accompanied by a surface ship.

(c) Each Participating Power reserves for purposes of exercises certain areas defined in Annex I hereto in which its submarines are exempt from the restrictions mentioned in (a) or (b).

The Participating Powers further undertake not to allow the presence in their respective territorial waters of any foreign submarines except in case of urgent distress, or where the conditions prescribed in sub-paragraph (b) above are fulfilled.

VI. The Participating Powers also agree that, in order to simplify the problem involved in carrying out the measures above described, they may severally advise their merchant shipping to follow certain main routes in the Mediterranean agreed upon between them and defined in Annex II hereto.

VII. Nothing in the present agreement restricts the right of any Participating Power to send its surface vessels to any part of the Mediterranean.

VIII. Nothing in the present agreement in any way prejudices existing international engagements which have been registered with the Secretariat of the League of Nations.

..." 66/

45. An Agreement Supplementary to the Nyon Arrangement was signed at Geneva on 17 September 1937. That Agreement reads as follows:

"Whereas under the Arrangement signed at Nyon on the 14th September, 1937, whereby certain collective measures were agreed upon relating to piratical acts by submarines in the Mediterranean, the Participating Powers reserved the possibility of taking further collective measures; and

Whereas it is now considered expedient that such measures should be taken against similar acts by surface vessels and aircraft;

66/ Ibid., vol. 181, p. 135.

In view thereof, the undersigned, being authorised to this effect by their respective Governments, have met in conference at Geneva on the seventeenth day of September and have agreed upon the following provisions which shall enter immediately into force:

I. The present Agreement is supplementary to the Nyon Arrangement and shall be regarded as an integral part thereof.

II. The present Agreement applies to any attack by a surface vessel or an aircraft upon any merchant vessel in the Mediterranean not belonging to either of the conflicting Spanish parties, when such attack is accompanied by a violation of the humanitarian principles embodied in the rules of international law with regard to warfare at sea, which are referred to in Part IV of the Treaty of London of April 22nd, 1930, and confirmed in the Protocol signed in London on November 6th, 1936.

III. Any surface war vessel, engaged in the protection of merchant shipping in conformity with the Nyon Arrangement, which witnesses an attack of the kind referred to in the preceding paragraph shall:

(a) If the attack is committed by an aircraft, open fire on the aircraft;

(b) If the attack is committed by a surface vessel, intervene to resist it within the limits of its powers, summoning assistance if such is available and necessary.

In territorial waters each of the Participating Powers concerned will give instructions as to the action to be taken by its own war vessels in the spirit of the present Agreement.

..." 67/

46. The Treaty of Peace with Bulgaria, signed on 10 February 1947, included the following in article 13:

"Bulgaria shall not possess, construct or experiment with ... any self-propelled or guided missiles or apparatus connected with their discharge (other than torpedoes and torpedo launching gear comprising the normal armament of naval vessels permitted by the present Treaty), sea mines or torpedoes of non-contact types actuated by influence mechanisms, torpedoes capable of being manned, submarines or other submersible craft, motor torpedo boats, or specialised types of assault craft." 68/

67/ Ibid., vol. 181, p. 149.

68/ United Nations, Treaty Series, vol. 41, p. 21.

Similar provisions with regard to Finland, Hungary and Romania are found in their respective peace treaties, 69/ each signed at Paris on 10 February 1947. The Treaty of Peace with Italy, signed at Paris on 10 February 1947, includes the following in article 51:

"Italy shall not possess, construct or experiment with ... (ii) any self-propelled or guided missiles or apparatus connected with their discharge (other than torpedoes and torpedo-launching gear comprising the normal armament of naval vessels permitted by the present Treaty), ... (iv) sea mines or torpedoes of non-contact types actuated by influence mechanisms, (v) any torpedoes capable of being manned." 70/

47. Protocol III (with annexes) on the control of armaments, which is an integral part of the Protocol modifying and completing the 1948 Brussels Treaty for collaboration in economic, social and cultural matters and for collective self-defence, was signed at Paris on 23 October 1954. It reads, inter alia:

"His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol 71/ Modifying and Completing the Brussels Treaty. /Treaty for collaboration in economic, social and cultural matters and for collective self-defence, signed at Brussels on 17 March 1948 72/

...

Have agreed as follows:

Part I - Armaments not to be manufactured

Article 1

The High Contracting Parties, members of Western European Union, take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook

69/ Treaty of Peace with Finland, ibid., vol. 48, p. 203 (article 17); Treaty of Peace with Hungary, ibid., vol. 41, p. 135 (article 15); and Treaty of Peace with Romania, ibid., vol. 42, p. 3 (article 14).

70/ Ibid., vols. 49 and 50.

71/ Ibid., vol. 211, p. 341.

72/ Ibid., vol. 19, p. 51.

not to manufacture in its territory atomic, biological and chemical weapons. The types of armaments referred to in this Article are defined in Annex II. These armaments shall be more closely defined and the definitions brought up to date by the Council of Western European Union.

Article 2

The High Contracting Parties, members of Western European Union, also take note of and record their agreement with the undertaking given by the Chancellor of the Federal Republic of Germany in the same Declaration that certain further types of armaments will not be manufactured in the territory of the Federal Republic of Germany, except that if in accordance with the needs of the armed forces a recommendation for an amendment to, or cancellation of, the content of the list of these armaments is made by the competent Supreme Commander of the North Atlantic Treaty Organization, and if the Government of the Federal Republic of Germany submits a request accordingly, such an amendment or cancellation may be made by a resolution of the Council of Western European Union passed by a two-thirds majority. The types of armaments referred to in this Article are listed in Annex III.

...

Annex I

The Federal Chancellor declares:

that it /The Federal Republic of Germany/ undertakes further not to manufacture in its territory such weapons as those detailed in paragraphs IV, V and VI of the attached list /See annex III below/. Any amendment to or cancellation of the substance of paragraphs IV, V and VI can, on the request of the Federal Republic, be carried out by a resolution of the Brussels Council of Ministers by a two-thirds majority, if in accordance with the needs of the armed forces a request is made by the competent Supreme Commander of the North Atlantic Treaty Organization;

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organization to ensure that these undertakings are observed.

...

Annex III

This list comprises the weapons defined in paragraphs IV to VI and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

/...

IV. Long-range Missiles, Guided Missiles and Influence Mines

...

(b) Subject to the provisions of paragraph (d), influence mines are defined as naval mines which can be exploded automatically by influences which emanate solely from external sources, including influence mines developed in the recent war and subsequent modifications thereof.

(c) Parts, devices or assemblies specially designed for use in or with the weapons referred to in paragraphs (a) and (b) shall be deemed to be included in this definition.

...

V. Warships, with the exception of smaller ships for defence purposes

'Warships, with the exception of smaller ships for defence purposes are:

(a) Warships of more than 3,000 tons displacement;

(b) Submarines of more than 350 tons displacement;

(c) All warships which are driven by means other than steam, Diesel or petrol engines or by gas turbines or by jet engines.'

..." 73/

48. Article 13 of the State Treaty for the re-establishment of an independent and democratic Austria, signed at Vienna on 15 May 1955, states inter alia: "Austria shall not possess, construct or experiment with ... (c) any self-propelled or guided missile or torpedoes, or apparatus connected with their discharge or control, (d) sea mines, (e) torpedoes capable of being manned, (f) submarines or other submersible craft, (g) motor torpedo boats, (h) specialized types of assault craft ..." 74/

73/ Ibid., vol. 211, p. 364.

74/ Ibid., vol. 217, p. 223.

PART III. PROHIBITIONS OR RESTRICTIONS OF THE USE OF WEAPONS
RESULTING FROM THE PROTECTION GRANTED TO CERTAIN
PERSONS, AREAS, PLACES OR OBJECTS

49. Not all treaties and treaty provisions recorded in the preceding part of the present chapter deal directly with questions concerning the prohibition or restriction of the use of specific weapons in armed conflicts. Some of them regulate with regard to a specific weapon or type of weapon activities other than use which might indirectly restrict uses in armed conflicts. However, all treaties and treaty provisions recorded in that part are what might be termed "weapon-oriented". The main object and purpose of any of those treaties or provisions is to regulate certain activities relating to a specific weapon or type of weapon, the eventual prohibition or restriction of its use in armed conflicts resulting directly or indirectly from such a regulation. The present part relates to another kind of restriction in the use of weapons, namely those originating in the protection accorded in a number of treaties to certain persons, areas, places or objects. The regulation of activities concerning specific weapons is not the main object and purpose of such treaties but the operation of their provisions certainly implies restrictions in the use of weapons against the protected persons, areas, places or objects. These kinds of restrictions are highly relevant for the purpose of assessing the lawfulness or unlawfulness of the use of a specific weapon or type of weapon by reason of the indiscriminate effects rule mentioned in part I of this chapter. Without trying in any manner to be exhaustive, a few selected provisions of the treaties referred to are given hereunder by way of illustration.

SECTION 1. CIVILIAN PERSONS

50. As indicated above, 75/ the rule that the parties to an armed conflict shall respect and protect civilian persons is well established in international law and has found expression in several international instruments, particularly in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. 76/

51. The Convention reads inter alia as follows:

...

"PART I

GENERAL PROVISIONS

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

75/ See paragraph 5 of the present chapter.

76/ United Nations, Treaty Series, vol. 75, p. 287.

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall, furthermore, be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, or by the Geneva Convention of August 12, 1949, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, or by the Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War, shall not be considered as protected persons within the meaning of the present Convention.

...

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

Article 13

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

/...

Article 14

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Article 15

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Article 16

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Article 17

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Article 18

Civilian hospitals organised to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention of August 12, 1949, 77/ for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, but only if so authorised by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Article 19

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

77/ Ibid., vol. 75, p. 31.

Article 20

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

...

Article 21

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Article 22

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

/...

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

...

PART III

STATUS AND TREATMENT OF PROTECTED PERSONS 78/

...

PART IV

EXECUTION OF THE CONVENTION

...

Article 1¹⁷

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

...

Article 15⁴

In the relations between the Powers who are bound by the Hague Conventions relative to the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

...

78/ As defined in article 4 of the Convention reproduced supra.

Article 158

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue 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."

...

52. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, 79/ states in its article I "That genocide, whether committed in time of peace or in time of war, is a crime under international law" that the Contracting Parties "undertake to prevent and to punish" [emphasis supplied]. It should be recalled that according to article II of the Convention "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

SECTION 2. UNDEFENDED TOWNS, VILLAGES, PORTS, DWELLINGS AND BUILDINGS

53. Several instruments contain provisions protecting undefended towns, villages, dwellings, buildings and ports against bombardment. Article 25 of the Regulations respecting the laws and customs of war on land annexed to the 1899 Hague Convention (II) provides that "The attack or bombardment of towns, villages, habitations or buildings which are not defended is prohibited". The Regulations annexed to the 1907 Hague Convention (IV) reproduce the same text with the addition of the words "by whatever means" after the words "the attack or bombardment". Article 26 of the Regulations annexed to both Conventions states that the commander of an attacking

79/ Ibid., vol. 78, p. 277.

/...

force before commencing a bombardment, except in case of assault, "devra faire tout ce qui dépend de lui pour en avertir les autorités."

54. Moreover, article 27 of the Regulations annexed to the 1899 Hague Convention (II) respecting the laws and customs of war on land provides that:

"In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants."

"Historic monuments" were added to the enumeration of buildings referred to in the article in the Regulations annexed to the 1907 Hague Convention (IV).

55. The 1907 Second International Peace Conference of The Hague adopted also a Convention (IX) concerning bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings. The Convention reads as follows: 80/

"The Contracting Powers"

Animated by the desire to realize the wish expressed by the first 1899 Peace Conference respecting the bombardment by naval forces of undefended ports, towns, and villages;

Whereas it is expedient that bombardments by naval forces should be subject to rules of general application which would safeguard the rights of the inhabitants and assure the preservation of the more important buildings, by applying as far as possible to this operation of war the principles of the Regulation of 1899 respecting the laws and customs of land war;

Actuated, accordingly, by the desire to serve the interests of humanity and to diminish the severity and disasters of war;

Have resolved to conclude a Convention to this effect, and have, for this purpose, appointed the following as their plenipotentiaries:

...

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

80/ English translation from the Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907, J. B. Scott, ed. (New York, Oxford, 1915), p. 157. For the French authentic text, see De Martens, Nouveau Recueil général de Traités, 3ème série, t. 3, p. 604.

Chapter I. - The Bombardment of undefended Ports, Towns,
Villages, Dwellings, or Buildings

Article 1

The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.

Article 2

Military works, military or naval establishments, depots of arms or war matériel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

Article 3

After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

Article 4

Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

Chapter II. - General Provisions

Article 5

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.

Article 6

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

Article 7

A town or place, even when taken by storm, may not be pillaged."

...

56. With regard to aerial bombardment reference has already been made in section 6 of part II supra to the 1899 Hague Declaration (IV, 1) and the 1907 Hague Declaration (XIV) prohibiting the discharge of projectiles and explosives from balloons. For the provisions on aerial bombardment contained in the Rules of Aerial Warfare prepared in 1922 and 1923 by an intergovernmental commission see infra, chapter II, section 6.

SECTION 3. CULTURAL PROPERTY

57. As indicated above, the 1899 and 1907 Hague Conventions contain already provisions aiming at protecting buildings devoted to religion, art, science as well as historic monuments. In 1954 an Intergovernmental Conference convened under the auspices of the United Nations Educational, Scientific and Cultural Organization adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict. 81/ The Convention, done at The Hague on 14 May 1954, reads, inter alia, as follows:

81/ United Nations, Treaty Series, vol. 249, p. 215.

"The High Contracting Parties,

Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April, 1935;

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;

Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions:

Chapter I

GENERAL PROVISIONS REGARDING PROTECTION

Article 1

DEFINITION OF CULTURAL PROPERTY

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.

Article 2

Protection of cultural property

For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

Article 3

Safeguarding of cultural property

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

Article 4

Respect for cultural property

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

...

/...

Article 6

Distinctive marking of cultural property

In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.

Article 7

Military measures

1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

2. The High Contracting Parties undertake to plan or establish in peace-time, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

Chapter II

SPECIAL PROTECTION

Article 8

Granting of special protection

1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order shall not be deemed to be use for military purposes.

5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the 'International Register of Cultural Property under Special Protection'. This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.

Article 9

Immunity of cultural property under special protection

The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

Article 10

Identification and control

During an armed conflict, cultural property under special protection shall be marked with the distinctive emblem described in Article 16, and shall be open to international control as provided for in the Regulations for the execution of the Convention.

Article 11

Withdrawal of immunity

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the

obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.

2. Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

Chapter III

TRANSPORT OF CULTURAL PROPERTY

Article 12

Transport under special protection

1. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of the High Contracting Party concerned, take place under special protection in accordance with the conditions specified in the Regulations for the execution of the Convention.

2. Transport under special protection shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16.

3. The High Contracting Parties shall refrain from any act of hostility directed against transport under special protection.

Article 13

Transport in urgent cases

1. If a High Contracting Party considers that the safety of certain cultural property requires its transfer and that the matter is of such urgency that the procedure laid down in Article 12 cannot be followed, especially at the beginning of an armed conflict, the transport may display the distinctive emblem described in Article 16, provided that an application for immunity referred to in Article 12 has not already been made and refused.

As far as possible, notification of transfer should be made to the opposing Parties. Nevertheless, transport conveying cultural property to the territory of another country may not display the distinctive emblem unless immunity has been expressly granted to it.

2. The High Contracting Parties shall take, so far as possible, the necessary precautions to avoid acts of hostility directed against the transport described in paragraph 1 of the present Article and displaying the distinctive emblem.

Article 14

Immunity from seizure, capture and prize

1. Immunity from seizure, placing in prize, or capture shall be granted to:

(a) cultural property enjoying the protection provided for in Article 12 or that provided for in Article 13;

(b) the means of transport exclusively engaged in the transfer of such cultural property.

2. Nothing in the present Article shall limit the right of visit and search.

Chapter IV

PERSONNEL

Article 15

Personnel

As far as is consistent with the interests of security, personnel engaged in the protection of cultural property shall, in the interests of such property, be respected and, if they fall into the hands of the opposing Party, shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.

Chapter V

THE DISTINCTIVE EMBLEM

...

/...

Chapter VI

SCOPE OF APPLICATION OF THE CONVENTION

Article 18

Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

Article 19

Conflicts not of an international character

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.

4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

Chapter VII

EXECUTION OF THE CONVENTION

...

/...

FINAL PROVISIONS

...

Article 36

Relation to previous conventions

1. In the relations between Powers which are bound by the Conventions of The Hague concerning the Laws and Customs of War on Land (IV) and concerning Naval Bombardment in Time of War (IX), whether those of 29 July, 1899 or those of 18 October, 1907, and which are Parties to the present Convention, this last Convention shall be supplementary to the aforementioned Convention (IX) and to the Regulations annexed to the aforementioned Convention (IV) and shall substitute for the emblem described in Article 5 of the aforementioned Convention (IX) the emblem described in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

2. In the relations between Powers which are bound by the Washington Pact of 15 April, 1935 for the Protection of Artistic and Scientific Institutions and of Historic Monuments (Roerich Pact) and which are Parties to the present Convention, the latter Convention shall be supplementary to the Roerich Pact and shall substitute for the distinguishing flag described in Article III of the Pact the emblem defined in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

...

REGULATIONS FOR THE EXECUTION OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

..."

SECTION 4. PROTECTED AREAS

58. Some "weapon-oriented" treaties recorded in Part II above, such as the Treaty for the prohibition of nuclear weapons in Latin America, the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water and the Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof concern, as their titles indicated, certain well specified areas. Prohibitions or restrictions affecting in one way or another the use of weapons in specified areas are sometimes also embodied in treaties falling under the present section. An important example is the Antarctic Treaty signed at Washington on 1 December 1959 82/ which states inter alia the following:

82/ United Nations, Treaty Series, vol. 402, p. 72.

/...

"The Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international co-operation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such co-operation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;

Have agreed as follows:

Article I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

...

Article V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica." 83/

83/ For instance, the safety zones referred to in article 14 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (see supra, paragraph 51).

59. Treaty provisions concerning neutralized, demilitarized or safety zones are examples which could also be mentioned in the present context. 83/ Canals of interest for international navigation are sometimes also protected by treaties against acts of war. 84/

84/ For instance, the 1888 Constantinople Convention concerning the free navigation of the Suez Maritime Canal states in its article 1 that "The high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers". (American Journal of International Law, vol. 3 (1909), Suppl., p. 123. French text: De Martens, Nouveau Recueil général de Traités, 2ème série, t. 15, p. 557).

CHAPTER II. STATE PRACTICE AND DOCTRINE

PART I. WEAPONS CLASSIFIED ACCORDING TO THEIR NATURE

SECTION 1. POISON AND POISONED WEAPONS

A. State practice

1. The military manuals of Austria, 1/ Ecuador, 2/ the Federal Republic of Germany, 3/ the Netherlands, 4/ Sweden, 5/ Switzerland, 6/ the United Kingdom, 7/ and the United States 8/ all contain a prohibition on the use of poison or poisoned weapons. These manuals do not specify whether the prohibition, deriving from article 23 (a) of the Regulations respecting the Laws and Customs of War on Land annexed to the Hague Conventions of 1899 and 1907, 9/ is a rule of customary or conventional international law, but the general terms in which the prohibition is couched may lead to thinking of the former. For its part, the guidebook "Rules of Warfare under International Law", which is issued to members of the armed forces of the German Democratic Republic, 10/ points out that the use of poison or poisoned weapons is prohibited under article 23 of the Hague Regulations.

2. Poison and poisoned weapons are likewise specified as unlawful under the

1/ Krivinyi, Kriegsvölkerrecht für die Truppe, 2d. ed. (1968), pp. 10 and 45. The manual makes clear that the prohibition extends to air warfare.

2/ Estado Mayor del Ejército, Manual de derecho de gentes y leyes de la guerra (1955), p. 39.

3/ ZDv 15-1, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung (1956, reprinting of 1960 with amendments 1-5), pp. 10 and 30. The manual makes clear that the prohibition extends to air warfare.

4/ Manual VS 2 - 1350, Manual for the Soldier, chap. 7, para. 10; Manual VR 2 - 1120-11. Rules of the Law of War, chap. III, para. 14.

5/ Jagerskiöld and Wulff, Handbok i folkrätt under neutralitet och krig (1971), p. 72.

6/ Armée Suisse, Manuel des lois et coutumes de la guerre (1963), p. 5

7/ War Office. The Law of War on Land, Part III of the Manual of Military Law of the United Kingdom (1958), p. 41.

8/ United States Department of the Army, U.S. Army Field Manual 27-10, The Law of Land Warfare (1956), p. 37.

9/ J. B. Scott, ed. Texts of the Peace Conferences at the Hague, 1899 and 1907 (1908), pp. 51 and 209. See chapter I, supra.

10/ See Die Völkerrechtlichen Regeln der Kriegsführung (1968), p. 38.

municipal law of several States in implementation of their international obligations. 11/

3. There are comparatively few references in State practice to the specific practices and weapons excluded by article 23 (a) of the Hague Regulations, either as treaty law or customary international law. The British and Swedish manuals provide that the poisoning of wells and springs falls within the prohibition, even if notification is given that the well is poisoned. 12/ However, the drying up of springs and the diversion of rivers and aqueducts is not, according to several manuals, a violation of law. 13/

4. The United States Government has asserted that

"the use of chemical herbicides, harmless to man, to destroy crops intended solely for consumption by the enemy's armed forces (if that fact can be determined) is not prohibited by article 23 (a) or any other rule of international law. It involves an attack by unprohibited means against legitimate military objectives." 14/

The same opinion in which this statement appears explains that article 23 (a) is a "special case" of the more general prohibition in article 23 (e) of the prohibition of the employment of weapons "calculated to cause unnecessary suffering" ("maux superflus" in the authentic French text).

5. Statements have been made by a number of States in connexion with recent armed conflict condemning the use of poisonous substances in general. 15/

11/ Argentina, Decree No. 3.189, 28 March 1960, Boletín Oficial de la República Argentina, vol. 68, 5 April 1960, p. 1; Italy, Leggi di Guerra, art. 35, para. 1, annexed to Royal Decree No. 1415, 8 July 1938, Raccolta Ufficiale delle Leggi et dei Decreti del Regno d'Italia, vol. 1938-XVI, p. 4307.

12/ For the United Kingdom, see The Law of War on Land, op. cit., p. 42; for Sweden, Jagerskiöld and Wulff, op. cit., p. 72.

13/ E.g. The United Kingdom Manual, op. cit., p. 42 and United States Army Field Manual, op. cit., p. 37.

14/ Letter from the General Counsel of the Department of Defense to the Chairman of the Senate Foreign Relations Committee, 5 April 1971, in International Legal Materials, vol. 10, 1971, p. 1300. The letter is followed by a legal opinion of the Judge Advocate General of the Army of March 1945, upholding the legality of the destruction of crops by chemicals sprayed from the air. Ibid., p. 1304.

15/ E.g. a statement issued on 9 December 1965 by the Supreme Soviet of the USSR (Izvestiya, 10 December 1965); a statement of 4 January 1966 by a representative of the Ministry of Foreign Affairs of the Democratic Republic of Viet-Nam (Novoe vremya, 1966, No. 4); and a declaration by the States parties to the Warsaw Treaty - Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR - in a statement issued at a meeting of the Political Consultative Committee in Bucharest on 6 July 1966 (Pravda, 6 July 1966).

B. Doctrine

6. The impermissibility of the use of poison in war is of ancient origin. "When Odysseus had gone to Ephyra to procure a deadly drug for smearing his arrows, Ilus refused to give it to him, on the ground that the gods would not sanction such an act." 16/ One of the rules that primitive societies develop for armed conflict is that poisoned weapons must not be used. 17/ Grotius deals with the matter at some length, asserting that poison, poisoned weapons, and poisoning of waters are forbidden, but not the pollution of waters by the diversion of streams. 18/

7. Under these circumstances, it is hardly surprising that a number of authorities speak of article 23 (a) of the Hague Regulations as incorporating and as being declaratory of a pre-existing rule of customary international law. 19/ Others make it clear that at least the rule of article 23 (a) has passed into general international law, binding on parties and non-parties alike. 20/ Yet a third category of learned writers are content to mention article 23 (a) or the norm that it incorporates without making it clear that the rule is binding only on parties to the Hague Regulations or on all States qua customary international law. 21/ It may be appropriate to read this last group of writings in light of the

16/ Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (1911), vol. 2, p. 209, citing The Odyssey, i. 261-3.

17/ Quincy Wright, A Study of War, 2d ed. (1965), p. 97.

18/ Hugo Grotius, De Jure Belli ac Pacis (1646), Book III, chap. IV, xv-xvii.

19/ James M. Spaight, Air Powers and War Rights, 3d ed. (1947), p. 188; Julius Stone, Legal Controls of International Conflict, 2d impression revised with supplement (1959), pp. 553-554; L. F. L. Oppenheim, International Law, 7th ed., Lauterpacht, ed. (1952), vol. 2, p. 342; G. Balladore Pallieri, Diritto bellico, 2d ed. (1954), pp. 168 and 170; Quadri, Diritto internazionale pubblico, 5th ed. (1968), p. 305; Fleck, "Völkerrechtliche Gesichtspunkte für ein Verbot der Anwendung bestimmter Kriegswaffen", reprinted from Institut für Internationales Recht an der Universität Kiel, Beiträge zur Weiterentwicklung des Humanitären Völkerrechts für Bewaffnete Konflikte (1972), p. 5.

20/ Accioly, Manual de direito internacional público, 9th ed. (1970), p. 310; Morris Greenspan, The Modern Law of Land Warfare (1959), p. 359; Djatikoesoemo, Hukum Internasional Bagian Perang (1956), p. 44; Kleen, Kodificerad Handbok i Krigets Lagar till Lands och till Sjös (1909), p. 361; Berber, Lehrbuch des Völkerrechts (1962), vol. 2, p. 170.

21/ Erik J. S. Castrén, The Present Law of War and Neutrality (1954), p. 192; François, Grondkignen van het Volkenrecht, 3d ed. (1967), p. 672; Cansacchi, Nozioni di diritto internazionale bellico, 5th ed. (1968), p. 78; Delbez, Les principes généraux du droit international public, 3d ed. (1964), p. 532; Paul Guggenheim, Traité de droit international public (1954), vol. 2, p. 390; Josef L. Kunz, Kriegsrecht und Neutralitätsrecht (1935), p. 81; Roger Pinto, Le droit des relations internationales (1972), p. 308; Ghanim, Mabadi Al-Qa'um Al-Dawli Al'Amm (1967), p. 742; Abu-Hayf, Al Qa'um Al-Dawli Al'Amm, 6th ed. (1962), p. 773, note 4.

statement in the judgement of the International Military Tribunal at Nuremberg that the Hague Regulations form part of customary international law. 22/

8. Several international lawyers depart from this general line of authority. Sereni finds the prohibition of article 23 (a) binding only on the parties, 23/ while McDougal and Feliciano regard the prohibition as having been overtaken by the course of events and as being obsolete. 24/

9. Von der Heydte, one of the few international lawyers to have had combat military experience in a senior rank, draws attention to the fact that the prohibition of poisoned weapons, which he considers to be part of customary international law, is limited to those weapons whose intrinsic and essential nature is to poison and which inflict an injury which is insignificant in comparison with the chemical effect produced by the weapons. Thus, he asserts, weapons having poisonous side-effects are not forbidden, according to widespread and prevalent State practice. 25/

10. Works published in many socialist countries show that the use of herbicides and other poisonous substances is regarded as being an illegal use of weapons in armed conflict, for reason similar to those advanced in support of the illegality of use of chemical and bacteriological weapons in general. 26/

11. The question of the poisoning of water sources, to which Grotius addressed himself, has received conflicting treatment. Fauchille refers to the practice during the First World War, when charges and countercharges were exchanged on the poisoning and diversion of water supplies, and appears to conclude that water supplies may be poisoned to preclude their use if this is done openly and with notice to the belligerent affected. 27/ Berber asserts that the prohibition of

22/ See chapter III, infra.

23/ Angelo P. Sereni, Diritto internazionale (1965), vol. 4, p. 1983.

24/ Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order (1961), p. 619, stating that "no recorded instance appears of the use of poisoned arms, projectiles, or bullets in war by modern armies". But see note 34, infra.

25/ Von der Heydte, "Atomare Kriegsführung und Völkerrecht", Archiv des Völkerrechts, vol. 9 (1961), p. 162. He refers to the use of smoke shells and phosphor ammunition in the Second World War, which caused symptoms of poisoning if used intensively; these were not regarded by the principal belligerents as prohibited poison weapons. A. V. W. Thomas and A. J. Thomas reach the same conclusion as to the practice of States concerning the legality of the use of smoke generally. Legal Limits on the Use of Chemical and Biological Weapons (1970), p. 185.

26/ See section 2 B, note 66, infra.

27/ Paul Fauchille, Traité de droit international public (1921), vol. 2, p. 124.

poison extends to the treacherous poisoning of springs and water mains. 28/ The United States manual on the law of war no longer deals with this question. It has been explained that the former stipulation upheld the legality of contaminating water supplies by throwing in dead animals or like devices, provided notice was given to the enemy. This statement was removed because it was in conflict with other authority and related to a situation which was thought to be of marginal importance. 29/ McDougal and Feliciano question why, if watercourses can be diverted or water supplies destroyed, this action cannot be taken by the poisoning or contamination of those waters. 30/ Colonel Djatikoesoemo refers expressly to the illegality of the poisoning of wells. 31/

12.. Aside from the ancient origin of the rule against the use of poison, it has been explained that the prohibition is derived from the legal prohibition of perfidy and treachery in the conduct of warfare. 32/ The illegality of this method of warfare is also related to the prohibition of unnecessary suffering. 33/ If a soldier is put out of action by a bullet, there is no reason why his suffering should be aggravated by the action of a poison which serves no military purpose.

13. Poison and poisoned weapons continue to be used in contemporary conflicts. Meyrowitz speaks of the use of "chausse-trapes dont le fond est garni de pointes de bambou ou de fer infectées; flèches empoisonnées" as being in violation of article 23 of the Hague Regulations. 34/ Other contemporary writers do not take up what specific types of weapons or methods of warfare are precluded by the prohibition of poison and poisoned weapons.

28/ As well as the poisoning of fresh water tanks on vessels in naval war, poisoning of food, and the use of herbicides sprayed from aircraft. Berber, op. cit., p. 171.

29/ United States Department of the Army Pamphlet 27-161-2, International Law, (1962), vol. 2, p. 41.

30/ Op. cit., p. 620.

31/ Op. cit., p. 44.

32/ Kunz, op. cit., p. 81; Stone, op. cit., p. 553. However, Spetzler finds theoretical difficulties with this view in that the use of poison gas, which can be easily detected by the enemy, for that reason cannot be characterized as clandestine or perfidious. Luftkreig und Menschlichkeit (1956), p. 95.

33/ Stone, op. cit., p. 553.

34/ Henri Meyrowitz, "Le droit de la guerre dans le conflit vietnamien", Annuaire français de droit international, vol. 13 (1967), p. 186, n. 77.

SECTION 2. CHEMICAL AND BACTERIOLOGICAL WEAPONS

A. State practice

- (a) The norms of customary international law as related to conventional law, particularly the Geneva Protocol of 1925

14. As the number of parties to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare 35/ has increased to the point that they now comprise a strong majority of States, the question whether the Protocol is binding qua customary international law as to non-parties affects a correspondingly diminishing group of States.

15. In 1938, the Assembly of the League of Nations adopted a resolution affirming that "the use of chemical or bacterial methods in the conduct of war is contrary to international law". 36/

16. In connexion with recent armed conflict, statements have been made by a number of States condemning the use of poisonous substances in general. 37/ Policy statements have also been made specifically condemning the use of chemical and bacteriological weapons. For example, a joint Soviet-Viet-Nameese communiqué issued in April 1965 condemned "the use of barbarous weapons of annihilation, including ... poison gases, against the peaceful population". 38/ And in a message of 24 January 1966 the President of the Democratic Republic of Viet-Nam condemned the use of poison gases and toxine chemical substances to destroy the countryside and annihilate the civilian population. 39/

17. The representative of Romania in the Disarmament Committee stated on 3 April 1969, with regard to the prohibition of chemical and bacteriological weapons, that "the Romanian delegation feels that /the/ true solution must be based on the consolidation of the Geneva Protocol of 1925 through strict observance of its provisions and adherence to it by all States". 40/

35/ League of Nations, Treaty Series, vol. XCIV, p. 65. See chapter I supra. For specific instances of the use by States or allegations of use by States of chemical and bacteriological methods of warfare, see Stockholm Institute for Peace Research, The Problem of Chemical and Biological Warfare (1971), vol. 1 (The Rise of CB Weapons), pp. 125-320.

36/ League of Nations, Official Journal, Special Supplement No. 182, p. 16.

37/ See note 15 supra.

38/ See Novoe Vremya, 1965, No. 17; Pravda, 18 April 1965.

39/ See Pravda, 30 January 1966.

40/ Conference of the Eighteen-Nation Committee on Disarmament, Final Verbatim Record of the 400th Meeting (ENDC/PV.400), para. 61.

18. The General Assembly, in resolution 2162 (XXI), adopted on 5 December 1966, called for

"strict observance by all States of the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and condemns all actions contrary to those objectives;"

and invited all States to accede to the Protocol. The General Assembly reiterated its call for "strict observance by all States of the principles and objectives of the Protocol" in resolution 2454 (XXIII) of 20 December 1968 and resolution 2827 (XXVI) of 16 December 1971. In resolution 2853 (XXVI) of 20 December 1971 and resolution 3032 (XXVII) of 18 December 1972 it called upon "all parties to any armed conflict" to observe the rules laid down in the Protocol. Whatever may be the effect of General Assembly resolutions in customary international law, the affirmative votes of a majority of the parties to the Geneva Protocol may be regarded as reflecting the interpretation placed on the treaty by States parties to the instrument.

19. In the debates in the First Committee and in the plenary of the General Assembly, a number of delegations 41/ variously expressed the view that the use of gas and of bacteriological methods of warfare had already been prohibited in general international law under the Brussels Declaration of 1874, 42/ the prohibition of the use of poison and poisoned weapons contained in the Regulations respecting the Laws and Customs of War on Land annexed to the Hague Conventions of 1899 and 1907 43/ and the Geneva Protocol itself. This was by no means a new theme. In 1936, the French Government had expressed the view that, independently of any special restrictions, the prohibition of chemical warfare flowed from the more general principles incorporated in article 23 of the Hague Regulations which prohibited poison and poisoned weapons that cause unnecessary suffering. 44/

20. Also during the debates, some hesitations were expressed about the General Assembly's passing judgement on "the existence and the scope of customary rules and

41/ E.g. the delegations of Mexico (Official Records of the General Assembly, Twenty-seventh Session, First Committee, 1888th meeting), Chad (Ibid., Twenty-fourth Session, First Committee, 1707th meeting) and Sweden (Ibid., 1695th meeting, paras. 159-161).

42/ Martens, Nouveau recueil général de traités, 2d ser. (1879-1880), vol. 4, p. 219.

43/ Scott, op. cit., pp. 51 and 209. See chapter I, supra.

44/ Ministère des affaires étrangères, Note du Service juridique, 6 April 1936, in Kiss, Répertoire de la pratique française en matière de droit international public (1969), vol. 6, p. 105.

their relation to contractual rules of international law". 45/ The United States, although not a party to the Geneva Protocol, voted in favour of resolution 2162 (XXI) of 5 December 1966, with an expression of support of the "worthy objectives" of the Protocol. 46/

21. The instructions which had been given to the United States Army a decade earlier had been that

"The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, ..., or of bacteriological warfare."

and that the Geneva Protocol was not binding on the United States. 47/

(b) The types of prohibited chemical and bacteriological weapons

22. States have exhibited some difference of views concerning the scope of the language of the preamble of the Geneva Protocol referring to the prohibition of the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" and of the extension of this prohibition to "the use of bacteriological methods of warfare". The use in recent conflicts of chemical herbicides and of lachrymatory or harassing agents (variously referred to as "tear gas" or "riot control agents") has made this question of interpretation of major importance.

23. The General Assembly in resolution 2603 A (XXIV) of 16 December 1969 declared as "contrary to the generally recognized rules of international law" as embodied in the Geneva Protocol the use in international armed conflicts of

"(a) Any chemical agents of warfare - chemical substances, whether gaseous, liquid or solid - which might be employed because of their direct toxic effects on man, animals or plants;

"(b) Any biological agents of warfare - living organisms, whatever their nature, or infective material derived from them - which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked."

The definition that was adopted had been urged by the Secretary-General in the foreword to the report on chemical and bacteriological weapons and their use prepared by a group of experts in response to resolution 2454 A (XXIII). 48/

45/ E.g. the delegation of the Netherlands (Official Records of the General Assembly, Twenty-fourth Session, First Committee, 169th meeting, para. 59).

46/ Ibid., Twenty-first Session, Plenary Meetings, 1484th meeting, para. 43.

47/ United States Army Field Manual, op. cit., pp. 18-19.

48/ "Chemical and bacteriological (biological) weapons and the effects of their possible use: Report of the Secretary-General" (A/7575/Rev.1; S/9292/Rev.1), p. xii. (For the printed text, see United Nations publication, Sales No.: E.69.I.24).

24. The resolution was adopted by 80 votes to 3 with 36 abstentions. Statements made in support of the resolution prior to its adoption and in other debates in the General Assembly alluded not only to the effects of chemical and bacteriological weapons but also to the view that prohibitions on these weapons had already become part of customary international law and did not necessarily flow from the Geneva Protocol of 1925. 49/ Some of the dissenting and abstaining States expressed the view that it was inappropriate for the General Assembly, comprising both parties and non-parties to the Geneva Protocol, to express itself on the correct interpretation of the instrument. 50/ Several States, both in the course of the debate on this resolution and in other contexts, have expressed the view that the Protocol does not exclude the use of lachrymatory agents 51/ and of chemical herbicides. 52/

49/ E.g. the delegations of India (Official Records of the General Assembly, Twenty-fourth Session, First Committee, 1706th meeting, para. 22) and of Sweden (ibid., 1695th meeting, paras. 159-161, and A/C.1/PV.1882, p. 37. The delegation of Sweden explained that:

"the draft resolution does not interpret the Protocol per se but rather expresses the generally recognized rules of international law which have emerged in the matter. In large part, these have resulted from the impact of the Protocol and may even be taken to have the same scope as the Protocol, but they have emerged not exclusively as a result of the Protocol but also from other sources of international law, for instance agreements, State practice and the weight of doctrine."

(Ibid., Twenty-fourth Session, First Committee, 1716th meeting, para. 188)

50/ E.g. the delegations of the Netherlands (ibid., 1717th meeting, para. 12), the United States (ibid., paras. 37 and 39) and Canada (ibid., 1716th meeting, para. 147).

51/ E.g. the delegations of Australia (ibid., 1704th meeting, para. 69) and the United States (ibid., 1717th meeting, para. 41). So far as Japan is concerned, the Director-General of the United Nations Bureau, Ministry of Foreign Affairs, expressed the view to the Foreign Affairs Committee of the House of Representatives of the Diet on 6 May 1970 that the prohibition under the Geneva Protocol does not extend to gases, such as tear gas, used for the purpose of putting down riots or mob violence, that it is for the parties to the Protocol to provide an authoritative interpretation of the Protocol, and that there is no established view of the parties that tear gases are prohibited under the Protocol. See Fujita, "Ratification, par le Japon, du Protocole de Genève de 1925", Japanese Annual of International Law, vol. 17 (1971), p. 81. Canada declared that it did not possess any chemical weapons other than "devices of the type used for crowd and riot-control purposes in many countries" (A/C.1/PV.1829, p. 32).

52/ E.g. the delegations of Australia (ibid., Twenty-fourth Session, First Committee, 1704th meeting, para. 69) and the United Kingdom (ibid., 1717th meeting, para. 51).

When the Geneva Protocol was submitted by the President of the United States to the Senate for its advice and consent prior to ratification, the Secretary of State stated the understanding of that Government that the Protocol "does not prohibit the use in war of riot-control agents and chemical herbicides". ^{53/} The United States Senate has thus far failed to approve ratification of the Protocol. In the debate preceding the adoption of resolution 2603 A (XXIV), the delegate of the United States expressed the same view, which he asserted found support in the travaux préparatoires and subsequent history of the Geneva Protocol. ^{54/} The United Kingdom, while considering that tear gases fall within the prohibition of the Protocol, has taken the view that

"Modern technology has developed CS smoke which, unlike the tear gases available in 1930, is considered to be not significantly harmful to man in other than wholly exceptional circumstances; and we regard CS and other such gases accordingly as being outside the scope of the Geneva Protocol. CS is in fact less toxic than the screening smokes which the 1930 statement made in Parliament with respect to screening smokes specifically excluded." ^{55/}

25. There appears to be no dissent from the proposition that the Geneva Protocol prohibits the use of toxins, whether they be considered as chemical or bacteriological agents. The United States Government, in renouncing unilaterally the use of biological warfare, made it clear that it regarded this renunciation as extending to any use of toxins, even in response to a first use by another State. ^{56/}

(c) The question whether chemical and bacteriological weapons may be used in retaliation or reprisal

26. In becoming parties to the Geneva Protocol a number of States have entered reservations of which those of France, the depositary State, are typical:

^{53/} Department of State Bulletin, vol. 63, 1970, p. 274; and see letter from the General Counsel of the Department of Defense to the Chairman of the Senate Foreign Relations Committee, 5 April 1971, asserting that article 23 (a) of the Hague Regulations and the Geneva Protocol of 1925 do not prohibit the use of chemical herbicides harmless to man for the destruction of crops intended solely for consumption by the enemy's armed forces. International Legal Materials, vol. 10 (1971), p. 1302.

^{54/} Official Records of the General Assembly, Twenty-fourth Session, First Committee, 1717th meeting, para. 43.

^{55/} Parliamentary Debates (Commons), vol. 795 (1970), col. 18 (Written Answers to Questions).

^{56/} Statement by President Nixon on 25 November 1969, Department of State Bulletin, vol. 61 (1969), p. 541, and White House Announcement, 14 February 1970, ibid., vol. 62 (1970), p. 226.

/...

"(1) The said Protocol is only binding on the Government of the French Republic as regards States which have signed or ratified it or which may accede to it.

(2) The said Protocol shall ipso facto cease to be binding on the Government of the French Republic in regard to any enemy State whose armed forces or whose Allies fail to respect the prohibitions laid down in the Protocol." 57/

The reservations have the effect of requiring mutuality of obligation under the Protocol and of making the Protocol a prohibition on first use of the proscribed modes of warfare. The United Kingdom and the Soviet Union have entered similar reservations. The United States declared its intention of reserving the right to use chemical weapons in retaliation against a State violating the Protocol, when the Protocol was submitted to the Senate for its approval. 58/

27. The possibility of incompatibility between the terms of the various resolutions of the General Assembly calling for "strict observance by all States of the principles and objectives of the Protocol" and the foregoing reservations was alluded to in the course of the debates preceding the adoption of those resolutions. 59/ The question was implicitly raised whether the terms of the resolution or what was asserted to be a rule of customary international law would prevail over the limitations placed by States on their conventional obligations.

28. States have also expressed the view that chemical and bacteriological weapons may be used by way of reprisal against an adversary making first use of such weapons 60/ or that independently of treaty obligations, the State concerned will refrain from the use of chemical and bacteriological weapons against an adversary which declares that it will refrain from the use of such weapons and actually does so. 61/ These assertions, which antedate the resolutions of the General Assembly referred to above, suggest some limitations on a comprehensive prohibition of the employment of such weapons.

57/ League of Nations, Treaty Series, vol. XCIV, p. 67, note 1.

58/ Department of State Bulletin, vol. 63 (1970), p. 274.

59/ E.g. the delegations of the United States (Official Records of the General Assembly, Twenty-fourth Session, First Committee, 1717th meeting, para. 45), Canada (ibid., 1716th meeting, para. 147), and Australia (ibid., paras. 178-179).

60/ See Armée Suisse, op. cit., pp. 5, 42; Federal Republic of Germany, Kriegsvölkerrecht, Leitfaden für den Unterricht (Teil 7), Allgemeine Bestimmungen des Kriegsführungsrechts und Landkriegsrecht, ZDv 15/10 (1961), pp. 51-52; and Netherlands Manual, op. cit., chap. 7, para. 11 (but only as to retaliatory use of chemical weapons).

61/ Italy, Legge di Guerra, loc. cit., p. 4311.

(d) The question of the types of conflict in which chemical and bacteriological weapons are prohibited

29. The prohibitions of the Protocol extend to the use of chemical and bacteriological methods of warfare in "war". Resolution 2603 A (XXIV) alluded to the use of such weapons in "international armed conflicts". A few delegations considered that the resolution purported to effect some variance in the obligations of States parties to the Protocol. 62/

(e) Incorporation of rules in municipal law

30. A number of States have incorporated the prohibition on chemical and bacteriological weapons in their municipal law. 63/ Those States that consider that either treaty or customary law prohibits the use of chemical and bacteriological weapons may also incorporate that principle in their military manuals. 64/ The Swedish manual takes account of General Assembly resolution 2603 A (XXIV) of 1969 and previous related resolutions. 65/

62/ E.g., Australia (Official Records of the General Assembly, Twenty-third Session, First Committee, 1716th meeting, para. 176), Canada (ibid., para. 148), Netherlands (ibid., 1717th meeting, paras. 16-17) and Malta (ibid., para. 85).

63/ E.g., Argentina, Decree No. 3.180, 28 March 1960, art. 3, loc. cit., p. 1; Turkey, Law No. 2399, 7 April 1934, Resmî Gazete, No. 2676, 15 April 1974, Düster, vol. 15 (1934), p. 319.

64/ E.g., Federal Republic of Germany, Völkerrechtliche Grundsätze der Landkriegführung, Sonderdruck des Anhangs Teil III zu HDv 100/2 (1961), p. 17, and Kriegsvölkerrecht, op. cit., pp. 51-52, prohibiting the use of chemical warfare and of bacteriological warfare against human beings, animals, and plants; United Kingdom, The Law of War on Land, op. cit., p. 41; Ecuador, Estado Mayor del Ejército, op. cit., p. 39, citing Código Penal Militar, art. 99 (6). Austria in Bundesministerium für Landesverteidigung, Truppenführung (1965), p. 253, and Krivinyi, op. cit., pp. 7 and 45-46; the Netherlands in Manual for the Soldier, op. cit., chap. 7, para. 11. The language of the manuals often echoes that of the Geneva Protocol of 1925, but the manuals do not necessarily stipulate whether effect is being given to the Protocol or to a universal norm of international law. For its part, the guidebook "Rules of Warfare under International Law", which is issued to members of the armed forces of the German Democratic Republic, points out that the 1925 Geneva Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare is binding in its application. Die Völkerrechtlichen Regeln der Kriegführung (1968), p. 40.

65/ Jagerskiöld and Wulff, op. cit., p. 73.

B. Doctrine(a) The norms of customary international law as related to conventional law, particularly the Geneva Protocol of 1925

31. In works published in many socialist countries, writers have consistently regarded the use of tear and poisonous gases, herbicides, defoliants and other chemicals, and bacteriological (biological) weapons to be an illegal use of weapons in armed conflicts. 66/ In general, those writers consider that chemical and bacteriological weapons are interrelated and must therefore be regulated in the same manner in conditions of armed conflict. 67/ Their approach is based

66/ See F. I. Kozhevnikov, Velikaya otechestvennaya voyna Sovetskogo Soyuza i nekotorye voprosy mezhdunarodnogo prava (1964), p. 136; F. I. Kozhevnikov, Uchebnoe posobie po mezhdunarodnomu publichnomu pravu (1947), pp. 259-261; O. V. Pogdanov, Razoruzhenie - garantiya mira (1972), pp. 61-80; A. M. Iadyzhensky and V. N. Durdenevsky, "Primenenie bakteriologicheskogo oruzhiya - prestuplenie po mezhdunarodnomu pravu", Vestnik Moskovskogo universiteta, 1952, No. 11, p. 40; A. I. Trainin, Zashchita mira i ugolovny zakon (1969), p. 403; A. I. Poltorak and L. I. Savinsky, Prestupnaya voyna, Agressiya SShA protiv Vyetnama (1968), pp. 201-220; Kurs mezhdunarodnogo prava (1969), vol. V, pp. 321-323; F. I. Kozhevnikov, ed., Kurs mezhdunarodnogo prava (1972), pp. 367-386; V. Shestov, "Realny shag na puti razoruzheniya", Mezhdunarodnaya zhizn, 1972, No. 2; Y. Tomilin, "Khimicheskoe oruzhie - vne zakona", ibid., 1972, No. 5; S. Penkov, Mezhdunarodnopravni problemi po razor'zhavaneto (1966), pp. 5-14; S. Stefanova, Nyakovi pravni aspekti na problema za razor'zhavaneto (1961); J. Gilas, Zagadnienie rozbrojenia (1966); K. Slezak, "Zasada Vseobecnogo a plnogo ozbrojeni", Časopis pro mezinárodní právo, 1961, No. 2; D. Gieryez, "Aktualne problemy Zakazu broni biologieznoj i chemieznoj", Państwo i Prawo, 1971, No. 6; A. Gorbiel, Bojowe Środka chemiczne jako zagadnienie iuris in bello (Prace naukowe Uniwersytetu Śląskiego Katowice, 1971, No. 21); A. Karkoszka, "Konwencja o Zakazie broni B i toksyn", Sprawy Międzynarodowe, 1972, No. 7; T. Sesko, "Istota konwencji o zakazie posiadania i przechowywania broni biologicznej toksyn oraz o ich zniszczeniu", Wojskowy Przegląd Prawniczy, 1972, No. 2; R. Bierzanek, Prawa człowieka w konfliktach zbrojnych (1972), p. 95; M. Genevski, Osnovi na mezhdunarodnoto pravo (1969), p. 330; D. M. Krno, "Główność bakteriologicznej wojny", Pravny obzor, 1952, No. 6; B. Donner, "Valka ABC ve světle mezinárodního zákazu používání plynu v ozbrojených konfliktech", Časopis pro mezinárodní právo, 2/1966; J. More Benitez D'estefano, Vietnam, Violaciones de acuerdos internacionales y crímenes de guerra (1968); Benitez D'estefano, Derecho internacional público (1965). Gozze-Gučetić Vuko, "Hemijsko i biolosko oružje u pregovorinju o razoružanju", Međunarodni problemi, 1970, No. 2; G. Perazić, Međunarodnopravna zabrana upotrebe u ratu sredstava za masovno uništavanje (1968).

67/ Contemporary writings make reference in support of this position to the research undertaken by the United Nations. In their recent works on the formulation of international legal rules for the abolition of chemical and bacteriological weapons, socialist writers attach great importance to the report by the Secretary-General on "Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use". See note 48, supra.

/...

primarily on the Hague Declaration of 29 July 1899, (Hague, IV, 3) under which the Contracting Powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases, the (IV) Hague Convention of 18 October 1907 respecting the Laws and Customs of War on Land and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare. In their view, an additional argument in favour of the existing ban on the use of such weapons is the fact that they may be directed against the civilian population, non-combatants and the human environment in violation of other international legal instruments, in particular, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

32. The generality of learned writings published on chemical and bacteriological warfare antedate the recent substantial increase in the number of parties to the Geneva Protocol and the resolutions of the General Assembly calling upon States strictly to observe the "principles and objectives" of the Geneva Protocol and later the rules of the Protocol itself. They may thus be based on a juridical situation somewhat different from that of today.

33. A number of standard treatises merely refer to the existence of the Geneva Protocol and do not indicate whether the norms of the Protocol have passed into general international law. 68/ In other instances, learned writers allude to a general norm of international law prohibiting chemical and bacteriological warfare. 69/

(i) Chemical warfare

34. The authorities explore a number of possible sources for the existence of a rule of customary international law prohibiting the use of chemical warfare. Some 70/ find it in the Hague (IV, 3) Declaration of 1899 concerning Asphyxiating Gases. 71/ The limitation of the prohibition to the use of projectiles is sometimes referred to. 72/

68/ Delbez, op. cit., p. 532; Podestá Costa, Derecho internacional público, 3d ed. (1955), vol. 2, p. 88; Paul Reuter, Droit international public, 3d ed. (1968), p. 316; Charles Rousseau, Droit international public, 4th ed. (1968), p. 348; Ruiz Moreno, Tratado de derecho internacional (1963), vol. 2, pp. 649-650; Salonga and Yap, Public International Law, 3d ed. (1966), pp. 413-414; Guerrero Burgos, Nociones de derecho de guerra (1955), p. 63; Shabat, Al-Huqūq Al-Dawliya Al'Ammah, 2d ed. (1959), p. 574; Abu-Hayf, op. cit., p. 773; Ghanim, op. cit., p. 741.

69/ E.g., Accioly, op. cit., p. 310.

70/ E.g., Berber, op. cit., p. 170; Oppenheim, op. cit., p. 342; Spaight, op. cit., pp. 188-189.

71/ Scott, op. cit., p. 81. See chapter I, supra.

72/ Spaight, op. cit., p. 188.

35. A second source of law is found in the Regulations annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land of 18 October 1907, 73/ which was held by the Nuremberg Tribunal to have passed into general international law. 74/ Three provisions of article 23 are regarded as germane. The prohibition of poison or poisoned weapons in paragraph a is thought by some authorities to extend to chemical warfare, 75/ but dissenting voices have been heard. 76/ The stipulation of paragraph b forbidding the killing or wounding of individuals "treacherously" might be thought to have some bearing, but it has been pointed out that chemical weapons which may be detected could not fall afoul of a prohibition grounded in notions of stealth and perfidy. Only a weapon which could wound or kill without the victim's being aware of what was happening could be regarded as killing "treacherously". 77/ The third applicable provision is that of paragraph e, forbidding the employment of "arms, projectiles, or materials calculated to cause unnecessary suffering" 78/ ("maux superflus," in the authentic French text). The applicability of that provision may turn on whether chemical warfare is employed against civilians or against military personnel. 79/

36. There is no clear preponderance of views on the legality or the illegality of chemical warfare under a rule of customary international law resulting from the Hague Declaration of 1899, the Hague Regulations of 1907, and the Geneva Protocol of 1925. Some authorities speak of the agreements as having created a general rule of international law. 80/ Meyrowitz 81/ and Berber, 82/ for example, see that rule as having developed even before the conclusion of the Geneva Protocol of 1925. For others an emergent rule of customary rule seems to be binding on almost all

73/ Scott, op. cit., p. 209. See chapter I, supra.

74/ See chapter III, infra.

75/ Berber, op. cit., p. 170; Greenspan, op. cit., p. 359; H. Meyrowitz, Les armes biologiques et le droit international (1968), pp. 88-91; Oppenheim, op. cit., p. 342; Spaight, op. cit., p. 188.

76/ Kruse, "Gaskreig," in Strupp-Schlochauer, Wörterbuch des Völkerrechts, (1960), vol. 1, pp. 615 ff.; Castrén, op. cit., p. 194.

77/ Castrén, ibid.; Spetzler, op. cit., pp. 95-96 (disagreeing with Randermann, Das Verbot technischer Waffen (1954), p. 92).

78/ Oppenheim, op. cit., p. 342.

79/ Kruse, "Gaskreig", loc. cit., p. 615; Castrén, op. cit., pp. 194-195.

80/ E.g., Ian Brownlie, "Legal Aspects", in Rose, ed., CBW: Chemical and Biological Warfare (1969), p. 151; Fujita, loc. cit., p. 86. But cf. Kunz, op. cit., pp. 86-88; Castrén, op. cit., pp. 192-193; and Thomas and Thomas, op. cit., p. 57, who find the pre-World War I conventional principles "of extremely limited utility as legal fetters on the use of chemical-biological agents in war" and are not prepared to say that the Geneva Protocol has passed into general international law.

81/ Op. cit., pp. 91-92.

82/ Op. cit., p. 170.

States. ^{83/} Meyrowitz, writing after the adoption of resolution 2162 B (XXI) of 1966, is able to assert that it "prouve, d'une façon particulièrement explicite, l'élément psychologique de la coutume relative à l'interdiction des armes C et B". ^{84/}

37. The views of the authorities appear to be not uninfluenced by the position taken by their country with respect to the treaties concerning chemical warfare. Italian writers ^{85/} are troubled by the fact that article 52 of the Legge di Guerra ^{86/} requires Italy to refrain from the use of chemical warfare only with respect to treaty partners and those States that have declared that they will not employ chemical warfare and in fact do not do so. They find the existence of a general norm of customary international law difficult to reconcile with this stipulation.

38. The United States of America is not a party to the Geneva Protocol of 1925 nor to the Hague Declaration of 1899; it is a party to Convention No. IV of The Hague. There is therefore in that country a strong, ^{87/} but by no means unanimous current of opinion, ^{88/} that there is no rule of customary international law prohibiting chemical warfare and that the United States is therefore under no legal restraint with respect to this weapon qua weapon.

(ii) Bacteriological warfare

39. The Hague Declaration of 1899 would appear to bear no direct relationship to bacteriological warfare, but the question must be asked what impact article 23 of the Hague Regulations and the Geneva Protocol of 1925 have had on customary international law with respect to that form of warfare. The views of a number of authorities often run parallel to their views on the passage of the norms of the

^{83/} Lauterpacht makes the guarded statement that the effect of the previous treaties "is probably to render such prohibition legally effective upon practically all States" /emphasis supplied/ (Oppenheim, op. cit., p. 344; and to the same effect Stone, op. cit., p. 556.

^{84/} Op. cit., p. 101.

^{85/} Quadri, op. cit., p. 306; Sereni, op. cit., p. 1983; Balladore Pallieri, op. cit., pp. 173-174.

^{86/} See note 11, supra.

^{87/} Tucker, The Law of War and Neutrality at Sea, in United States Naval War College, International Law Studies, vol. 50 (1955), pp. 50-53; Kelly, "Gas Warfare in International Law Today", Military Law Review, vol. 9 (1960), p. 1; Thomas and Thomas, op. cit., pp. 57 and 102.

^{88/} Greenspan, op. cit., p. 358; O'Brien, "Biological/Chemical Warfare and the International Law of War", Georgetown Law Review, vol. 51 (1962), p. 59; Mallison, "The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars", George Washington Law Review, vol. 36 (1969), p. 328 /"possibly"/.

treaties into the customary international law regarding chemical warfare. The trend of the American authorities is thus again to deny any prohibition, in customary international law, although admitting the military ineffectiveness of the weapon and the grave danger that it poses to the civilian population. ^{89/} Outside the United States, the views are mixed, some maintaining that the prohibition of the Protocol is part of customary international law, ^{90/} others denying that the Protocol reflects or has created general international law. ^{91/}

(b) Applicability of the conventional and customary law to particular types of weapons

(i) Lachrymatory agents

40. In connexion with the initiative taken by the United States to become a party to the Geneva Protocol of 1925, but subject to understanding with respect to "riot-control agents" (i.e. lachrymatory agents, tear gas, harassing agents) and herbicides, there has been some debate in the United States whether the Protocol forbids the use of tear gas. This analysis has looked to both the travaux préparatoires, subsequent practice and the resolutions adopted by the General Assembly. The conclusions reached by Moore, Baxter and Buergenthal is that the Protocol does cover tear gas; ^{92/} Bunn has emphasized the lack of agreement on this question. ^{93/}

41. Elsewhere those who have given close attention to the question incline to the

^{89/} Neinst, "United States Use of Biological Weapons", Military Law Review, vol. 24 (1964), p. 40; McDougal and Feliciano, op. cit., p. 637; Brungs, "The Status of Biological Warfare in International Law", Military Law Review, vol. 24 (1964), p. 83; Tucker, loc. cit., pp. 52-53, n. 16; O'Brien, loc. cit., p. 56; Mallison, loc. cit., p. 328; but see Greenspan, op. cit., p. 358.

^{90/} Berber, op. cit., p. 171; Meyrowitz, op. cit., p. 101; G. Schwarzenberger, The Legality of Nuclear Weapons (1958), p. 38; Fujita, loc. cit., p. 86.

^{91/} Stone, op. cit., pp. 86-88; Moritz, "The Common Application of the Laws of War Within the NATO Forces", Military Law Review, vol. 13 (1961), pp. 21-22.

^{92/} Moore, "Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis", Virginia Law Review, vol. 58 (1972), p. 465 (concluding that "substantially greater support exists for a broad interpretation prohibiting such agents than for a restrictive interpretation permitting such agents"); Richard R. Baxter and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925", American Journal of International Law, vol. 64, 1970, p. 866; McDougal and Feliciano indicate that the Protocol is so broadly drawn that non-lethal chemical agents with only temporary disabling effects could be construed by "future interpreters" to come within the scope of the instrument. Op. cit., p. 636.

^{93/} "Banning Poison Gas and Germ Warfare: Should the United States Agree?", Wisconsin Law Review, 1969, pp. 294-406.

opinion that tear gas falls within the prohibition of the Protocol. ^{94/} It has been pointed out that there is a grave danger of escalation from tear gas to more dangerous forms of chemical warfare, that in certain concentrations it can be lethal, and that the intention of the draftsmen of the Geneva Protocol was to provide a comprehensive prohibition.

(ii) Herbicides

42. A parallel dispute about herbicides has led some writers in the United States to a somewhat more guarded conclusion that these agents fall within the prohibition of the Protocol. ^{95/} Elsewhere the question has not been widely considered, and there is no clear line of opinion on the matter. ^{96/}

(iii) Psychochemical weapons

43. The thorough study of this subject conducted by Meyrowitz has led to the conclusion that such weapons fall within the prohibition of the Geneva Protocol of 1925 but that they are not prohibited by the customary international law forbidding

^{94/} E.g., Spaight, op. cit., p. 199; Meyrowitz, "Le droit de la guerre ...", loc. cit., p. 189. Pinto takes the view that although "les gouvernements se considèrent généralement autorisés à employer des gaz affirmés comme non toxiques, simplement 'incapacitants' ou irritants," public opinion, as manifested in General Assembly resolution 2162 B (XXI) of 1966, condemns the employment of such gases. Op. cit., pp. 310-311. Khan concedes that "the prohibition perhaps could be discriminately applied so as to exclude non-lethal irritants", "Chemical and Bacteriological Weapons and International Law", Indian Journal of International Law, vol. 9 (1969), p. 510.

^{95/} Moore, loc. cit., pp. 467-468; Baxter and Buergenthal, op. cit., pp. 853 and 867.

^{96/} Berber, op. cit., p. 170, condemning the dropping of herbicides from aircraft; Meyrowitz, "Le droit de la guerre ...", loc. cit., pp. 189-190, finding no violation of the law in the use of defoliants but that the use of herbicides against crops is unlawful because of the effect of such measures on the civilian population; Meyrowitz, Les Armes Biologiques et le Droit International (1968), pp. 32-33, inclining to the view that the Geneva Protocol ought to be interpreted to apply to the use of chemical and bacteriological herbicides but conceding the existence of two opposing views on this question. Pinto sees both defoliation and the destruction of crops as coming within the prohibition of the Protocol. Op. cit., p. 311.

the use of chemical warfare because they are not "léthifères ou nuisables à la santé". 97/

(c) Other circumstances in which use of chemical and bacteriological weapons is or is not permitted

44. Some authorities refer to the fact that, under customary international law, chemical and bacteriological weapons may be used in retaliation or by way of reprisals. 98/ This view is linked to the first-use reservations that a number of major military Powers have made. 99/ It has been suggested that the reservations made by these States, making it clear that they accept an obligation to refrain only from the first use of chemical and bacteriological weapons are a desirable clarification of the power of parties to take retaliatory measures against violations of the Protocol. 100/ Kalshoven concludes that the large number of reservations of this character has virtually reduced "the unqualified prohibition laid down in the Protocol to a prohibition on condition of reciprocity". 101/

45. The references to "war" and "warfare" in the conventional law have apparently been assumed to make the customary law applicable only in the case of international armed conflicts, but Meyrowitz has suggested that the Geneva Protocol should be given effect in internal armed conflicts as well. 102/

97/ "Les armes psychochimiques et le droit international", Annuaire Français de Droit International, vol. 10 (1964), p. 111.

98/ Oppenheim, op. cit., p. 344; Stone, op. cit., p. 556; Khan, loc. cit., p. 510; O'Brien, loc. cit., pp. 59-60.

99/ See section 2 A (c) supra.

100/ Moore, loc. cit., p. 483.

101/ F. Kalshoven, Belligerent Reprisals (1971), pp. 347-348.

102/ Op. cit., p. 104.

SECTION 3. PROJECTILES OF VARIOUS KINDS

A. State practice

46. The prohibitions against the use of particular types of projectiles are derived from article 23 (a) and (e) of the Regulations respecting the Laws and Customs of War on Land annexed to the Hague Conventions of 1899 and 1907 103/ from the Hague (IV, 2) Declaration of 1899 concerning Expanding Bullets, 104/ and the Declaration of St. Petersburg of 1868. 105/ The use of poison and poisoned weapons proscribed by article 23 (a) of the Hague Regulations has been dealt with in section 1, supra. Poison and poisoned weapons and projectiles of under 400 grammes containing explosive or inflammable materials are dealt with in section 4, "Incendiary Weapons", infra.

47. The parties to the Declaration of 1899 concerning Expanding Bullets agreed inter se and subject to the si omnes clause "to abstain from the use 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" - or what are commonly called "dum-dum bullets". 106/ Article 23 (e) of the Hague Regulations containing a prohibition of weapons "calculated to cause unnecessary suffering" ("maux superflus" in the authentic French text) may be looked upon as incorporating on a higher level of abstraction inter alia the prohibition of the Declaration of 1899. The United States, which is not a party to the Declaration of 1899, nevertheless instructs its Army not to use certain types of projectiles forbidden by other States under the Hague Declaration; the United States regards these instructions as being an application of article 23 (e) of the Hague Regulations. 107/ As to the Soviet Union, attention may be drawn to the note of 7 March 1955 sent by the Ministry of Foreign Affairs of the USSR to the Government of the Netherlands which stated, inter alia: "The Government of the USSR recognizes the Hague Conventions and Declarations of 1899 and 1907, which were ratified by Russia to the extent, of course, that those Conventions and Declarations do not run counter to the Charter of the United Nations and provided that they have not been amended or replaced by subsequent international agreements to which the USSR is a party, such as the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare and the 1949 Geneva Conventions for the Protection of War Victims." 108/

103/ Scott, op. cit., pp. 51 and 209. See chapter I, supra.

104/ Ibid., p. 83. See chapter I, supra.

105/ British and Foreign State Papers, vol. 58, 1867-68, p. 16. See chapter I, supra.

106/ It has been pointed out that the dum-dum bullet, which flattened out on contact with the human body and created thereby a much larger wound, had by 1899 become both "obsolete and inefficient". McDougal and Feliciano, op. cit., p. 620.

107/ United States Army Field Manual, op. cit.

108/ See Pravda, 9 March 1955.

48. The military manuals and laws of a number of States, most of which were signatories of the Declaration of 1899, forbid the use of dum-dum bullets as defined in the Declaration. 109/ They infrequently go beyond this definition to specify what particular types of weapons are forbidden. The British Manual 110/ and the United States Law of Land Warfare 111/ forbid the scoring of bullets and the filing off of the end of their hard case. They also forbid the use on projectiles of any substance intended to inflame a wound, an obligation which may be thought to be derived from the prohibition of the use of poisoned weapons under article 23 (a) of the Hague Regulations.

49. The British and United States manuals also forbid the use of lances with barbed heads, irregularly shaped bullets and projectiles filled with broken glass as being weapons calculated to cause unnecessary suffering. The British Manual notes that article 23 (e) of the Hague Regulations has no application to "the use of explosives contained in mines, aerial torpedoes or hand-grenades".

50. The question of the use of shot-guns has been a recurrent one. During the First World War, Germany protested on the basis of article 23 (e) ("unnecessary suffering") against the possession of shot-guns by American soldiers. The United States asserted that the use of that weapon was not forbidden by the Hague Regulations. 112/ The question arose again in 1960-1961, and the Judge Advocate General of the United States Army expressed the opinion that

"The use of anunjacketed lead bullet is now considered a violation of the laws of war. The use of shotgun projectiles sufficiently jacketed to prevent explosion or flattening upon penetration of a human body and shot cartridges with chilled shot regular in shape would not constitute violations of the laws of war." 113/

109/ Argentina, Decree No. 3.189, 28 March 1960, art. 3, loc. cit.; Austria, Krivinyi, op. cit., p. 10 (but noting that artillery shells are permitted); Ecuador, Estado Mayor del Ejército, op. cit., p. 40; Federal Republic of Germany, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, p. 10, and Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 17; Italy, Legge di Guerra, loc. cit., art. 35, para. 6; Netherlands, Manual for the Soldier, op. cit., chap. 7, para. 10, and Rules of the Law of War, op. cit., chap. III, para. 14; Sweden, Jägerskiöld and Wulff, op. cit., p. 72; United Kingdom, The Law of War on Land, op. cit., p. 41; United States Army Field Manual, op. cit., p. 18.

110/ The Law of War on Land, op. cit., p. 41.

111/ Op. cit., p. 18.

112/ Hackworth, Digest of International Law (1943), vol. 6, pp. 271-272.

113/ JAGW 1960/1305, 4 January 1961, cited in Department of the Army Pamphlet 27-161-2. International Law, vol. 2 (1962), p. 45. In 1942, the Judge Advocate General of the Army expressed the view that arming of men with "single slug short gun shells with scored sides and no hard case", which "expanded materially on contact" would be a violation of both the Hague Declaration of 1899 and of article 23 of the Hague Regulations. Bulletin of the Judge Advocate General of the Army, vol. (1942), p. 207.

51. In the General Assembly, renewed concern has been expressed about weapons which are asserted to "cause excessive human suffering - such as napalm, flêchettes, fragmentation bombs and others used as anti-personnel weapons". 114/

B. Doctrine

52. In works published in a number of countries 115/ the general view is found that it is unlawful to use weapons which inflict unnecessary suffering. Writers base this conclusion on references to "the existing rules of international law" and, in particular, to the St. Petersburg Declaration of 29 November 1868 renouncing the use in war of certain explosive projectiles, the 1899 Hague (IV, 2) Declaration prohibiting the use of bullets which expand or flatten in the human body, and the "Martens Clause". Specific reference is made by writers to the provision of the 1868 Declaration of St. Petersburg which emphasizes the inadmissibility of "the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable".

53. Among writers in a number of other countries, the minority of those who allude to the prohibition on the use of dum-dum bullets incorporated in the Hague Declaration of 1899 actually state that the weapon is prohibited to all States under customary international law. 116/ The greater number simply allude to the Declaration or to the prohibition of expanding bullets and leave it to the reader to determine whether the prohibition is a universally binding norm. 117/ Several

114/ Remarks of the Delegate of Sweden, A/C.1/PV.1882, p. 31.

115/ See Kurs mezhdunarodnogo prava (1969), vol. V, pp. 314, and 320;

A. I. Poltorak, Nyurnbergsky protsess (osnovnye pravovye problemy) (1969); E. P. Meleshko, "Kistorii voprosa ob otvetstvennosti za narushenie zakonov i pbychaev voyny", Sovetskoe gosudarstvo i pravo, 1960, No. 6; M. Genovski, Osnovi na mezhdunarodnoto pravo (1969), p. 330; S. Penkov, op. cit.; R. Bierzanek, op. cit., p. 93; S. Nahlik, "Dorobek wielkiej kodyfikacji W 60-lecie konferencji haskiej z 1907", Państwo i Prawo, 1967, No. 12; A. Klafkowski, Prawo miedzynarodowe publiczne (1962); J. Mrázek, "Zenevské únlavy zr. 1949 na ochranu obětí války a jejich tzestuěpravní Zajistění", Časopis pzo mezinárodní právo, 3/1957; A. Hobza, Přehled mezinárodního práva vábečuého (1946); G. Perazie, Medjunarodno ratno pravo (1972).

116/ Balladore Pallieri, op. cit., pp. 168, 170; C. C. Hyde, International Law, Chiefly as Interpreted and Applied by the United States of America, 2d ed. (1945), vol. 2, pp. 1817-1818; Spetzler, p. 92 (holding the prohibition applicable to air warfare); Quadri, op. cit., p. 305; and see Meyrowitz, "Le Droit de la Guerre dans le conflit vietnamien", loc. cit., p. 186 at note 76 (alluding to the provisions of United States Department of the Army Field Manual 27-10, which he construes as an acceptance of the obligation not to use dum-dum bullets).

117/ Oppenheim, op. cit., p. 341; Fauchille, op. cit., p. 119; Reuter, op. cit., p. 316; Shabat, op. cit., p. 574; Podestá Costa, op. cit., p. 87; Delbez, op. cit., p. 532; Pinto, op. cit., p. 308; Cansacchi, op. cit., p. 78; Guerrero Burgos, op. cit., p. 62.

authorities state, or seem to state, that the prohibition extends only to those States parties to the Declaration. 118/

54. Authorities addressing themselves to the question of the legality of dum-dum bullets record that complaints were made in the First World War, 119/ in the Italo-Ethiopian War, 120/ and in the Second World War 121/ that such projectiles had been employed.

55. Several American military writers allude to the views of their Government with respect to the compatibility of the use of shot-guns with the customary international law of war and do not dissent from those views. 122/

56. The matter of exploding bullets is taken up in connexion with the prohibition of incendiary bullets under the Declaration of St. Petersburg of 1868. However, it may be mentioned that at least one authority takes the view that the prohibition, which he regards as having passed into customary international law, extends only to projectiles that explode after entering the human body; such a weapon causes unnecessary suffering and is illegal. 123/ Stone finds that the Declaration, in so far as it extends to exploding bullets, "has little relevance to modern warfare" and that "technical developments moved beyond the range of the problem". 124/ He notes that the Powers that concluded the Declaration of St. Petersburg drew back from a proposal to prohibit "balls which inflict wounds needlessly cruel, such as explosive balls, and in general, every species of ball which exceeds the limit necessary to place a man immediately 'hors de combat'". 125/

57. The use of "flêchettes" - small darts or arrows employed in air and air-to-ground warfare during the First World War - was considered by some not to be a violation of customary international law. 126/

58. Several types of weapons which have been used in recent armed conflict have been likened in their effect to the dum-dum bullets prohibited by the Hague Declaration of 1899 and have also been asserted to cause unnecessary suffering in

118/ Sereni, op. cit., p. 1983; Castrén, op. cit., p. 189; Stone, op. cit., p. 552; Djatikoesoemo, op. cit., p. 44.

119/ Garner, International Law and the World War (1921), vol. 2, pp. 262-271.

120/ L.N. Doc. C.242. M.140. 1936. VII.

121/ Balladore Pallieri, op. cit., p. 169.

122/ Kelly, "Legal Aspects of Military Operations in Counterinsurgency", Military Law Review, vol. 21 (1963), p. 207; United States Department of the Army Pamphlet 27-161-2, op. cit., pp. 45-46.

123/ Knackstedt, "Kampfmittel, verbotene", in Strupp-Schlochauer, op. cit., vol. 2, p. 187.

124/ Stone, op. cit., p. 552.

125/ Ibid., p. 552, note 31.

126/ Spaight, op. cit., p. 202.

violation of article 23 (e) of the Hague Regulations. Projectiles from the AR-15 or M-16 rifle, which tumble in a portion of their trajectory and thus tear their way through flesh, and fragmentation bombs which produce great numbers of small-calibre pellets have been said to have effects like those of a dum-dum bullet and, on that account, to be of doubtful legality. ^{127/} However, these weapons are sufficiently new that there has been no opportunity for a substantial number of publicists to pronounce themselves on these questions.

SECTION 4. INCENDIARY WEAPONS

A. State practice

- (a) Projectiles of less than 400 grammes which are explosive or charged with fulminating or inflammable substances

59. The prohibition imposed by the St. Petersburg Declaration of 29 November/ 11 December 1868 against "l'emploi par leurs troupes /i.e. those of the parties/ de terre ou de mer, de tout projectile d'un poids inférieur à 400 grammes qui serait ou explosible ou chargé de matières fulminantes ou inflammables" ^{128/} has been reproduced in several military manuals. However, as it is sometimes stressed, lack of evidence either in the form of military manuals or other evidence of State practice, makes it difficult to determine whether the conventional obligation has received the approbation of a sufficient number of States to permit the generalization that the treaty norm has passed into customary international law. It is significant that the obligation is referred to in such a way as not necessarily to limit its applicability to other parties to the Declaration of St. Petersburg and without the si omnes condition that accompanied it.

60. The British Manual of Military Law quotes the provision of the treaty and then amplifies it in the following way:

"The use of tracer and incendiary ammunition by the armed forces of belligerents was general during the Second World War and must be considered to be lawful provided that it is directed solely against inanimate military targets (including aircraft). The use of such ammunition is illegal if directed solely against combatant personnel. This is so for two reasons, first the renunciation contained in the Declaration of St. Petersburg, 1868, referred to and second the prohibition in Hague Rules 23 (e)." ^{129/}

^{127/} Meyrowitz, "Le droit de la guerre dans le conflit vietnamien", loc. cit., p. 186; Petroski, "Law and the Conduct of the Vietnam War", R. Falk, ed., The Vietnam War and International Law (1969), vol. 2, pp. 504-505; but cf. Fleck, who takes the view that the use of fragmentation bombs against military personnel is permissible. Op. cit., p. 19.

^{128/} British and Foreign State Papers, vol. 58, 1867-68, p. 17.

^{129/} Op. cit., pp. 40-41. The provision of the Hague Regulations referred to is that prohibiting "arms, projectiles, or material calculated to cause unnecessary suffering" ("maux superflus", in the authentic French text). A Netherlands manual forbids "certain types of tracer ammunition" amongst those arms and projectiles that may cause unnecessary suffering. Rules of the Law of War, op. cit., chap. III, para. 14.

The Federal Republic of Germany manual quotes the Declaration but then stipulates that it is permissible under customary international law to use projectiles of under 400 grammes if they are fired from weapons other than small arms, such as, for example, 20 mm. high explosive shell. 130/ The Swedish manual 131/ refers to the prohibition of the St. Petersburg Declaration. The Italian Legge di Guerra 132/ incorporates the prohibition of explosive and incendiary projectiles of less than 400 grammes, but makes an exception in case of fire from aircraft or directed against aircraft. The manual of Ecuador refers merely to explosive projectiles of small calibre. 133/

61. It may be noted that the Commission of Jurists which drew up the Hague Air Warfare Rules of 1923 stipulated in article 18 of this code, which has never entered into force, that "The use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited." 134/ This provision is quoted in the annotation in the British Manual. 135/

62. A number of other military manuals, such as those of the United States, which was not a party to the St. Petersburg Declaration, and of Switzerland, contain no reference to the Declaration of St. Petersburg.

(b) Flame-throwers and other incendiary weapons

63. Although the use of incendiary modes of warfare began in ancient times, the flame-thrower appears to have been an invention of the First World War. Its use was characterized by the French Government in a memorandum of 24 April 1915 as an "abominable method, contrary to all the undertakings solemnly given by the German

130/ Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 17.

131/ Jagerskiöld and Wulff, op. cit., p. 78.

132/ Art. 24, para. 5, annexed to Royal Decree No. 1415, 8 July 1938, loc. cit., p. 4307.

133/ Op. cit., p. 39.

Other official compilations of the international agreements of the law of war include the text of the Declaration of St. Petersburg. See, e.g. Foreign Ministry of the Kingdom of Norway, Krigens Rett: Overenskomster som Norge Står Tilsnittet (1962), p. 6 (Norway was one of the original signatories).

134/ Rules of Aerial Warfare, in General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Cmd. 2201 (1924), p. 24; American Journal of International Law, vol. 17, Supplement (1923), p. 249.

The Report explains that "The use of tracer bullets against aircraft was a general practice in all the contending armies" during the First World War and that airmen could not be expected to employ "one sort of ammunition for other aircraft and another sort for land forces by whom he may be attacked."

135/ Op. cit.

Imperial Government to the other powers and in contempt of all the sentiments of humanity". 136/

64. This view does not appear to have been accepted in the general practice of States. A Federal Republic of Germany manual considers that the use of flame-throwers and other incendiary means is lawful. 137/ However, it is elsewhere stipulated that the release of incendiaries on dwellings violates article 23 (e) and (g) of the Hague Regulations. 138/ The British Manual also upholds the legality of flame-throwers and napalm "when directed against military targets". 139/ The United States Law of Land Warfare stipulates that weapons which employ fire, including tracer ammunition and flame-throwers, do not violate international law if they are employed "against targets requiring their use" and if they are not "employed in such a way as to cause unnecessary suffering to individuals". 140/ The United States Government has also stated that it does not consider that smoke and flame are rendered unlawful by the Geneva Protocol of 1925. 141/

65. In so far as any conclusions may be drawn from this fragmentary evidence, it would appear that the legality of the use of flame-throwers and other incendiaries turns on whether the weapon is directed against an appropriate military target.

(c) Napalm

66. In resolution 2932 A (XXVII) of 29 November 1972, the General Assembly stated that it "Deplores the use of napalm and other incendiary weapons in all armed conflicts". The resolution, which took account of the report that had been rendered by the Secretary-General, 142/ noted that, "the massive spread of fire through incendiary weapons is largely indiscriminate in its effect on military and civilian targets"; that burn injuries are extremely painful and require facilities

136/ Garner, op. cit., vol. 1, p. 288.

137/ Völkerrechtliche Grundsätze der Landkriegsführung, op. cit., p. 18.

138/ Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 32.

139/ Op. cit., p. 41.

140/ Op. cit., p. 18. The corresponding manual for the United States Navy states that "Weapons of chemical types which are at times asphyxiating in nature, such as white phosphorous, smoke, and flame throwers" are lawful. The Law of Naval Warfare (1955), p. 6-3.

141/ Letter from the Secretary of State to the President, 11 August 1970, Department of State Bulletin, vol. 63 (1970), p. 274.

142/ "Napalm and other incendiary weapons and all aspects of their possible use: Report of the Secretary-General" (A/8803/Rev.1). (For the printed text, see United Nations publication, Sales No.: E.73.I.3.) Twenty-one Member States submitted written comments on the report of the Secretary-General, in accordance with General Assembly resolution 2932 A (XXVII). Those comments have been circulated on 11 October 1973 as a document of the current session of the General Assembly (A/9207 and Corr.1).

for treatment that are beyond the reach of most countries; and that such weapons posed a threat to "the long upheld principle of the immunity of the non-combatant".

67. Those delegations speaking in support of the resolution did so in terms suggesting that the use of napalm - for it was to this weapon that attention was principally given - ought to be forbidden but was not yet prohibited by general international law. 143/

68. The proposal submitted in 1972 by the governmental experts of Egypt, Finland, Mexico, Norway, Sweden, Switzerland and Yugoslavia to the Conference of Governmental Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, calling for a prohibition on "incendiary weapons, containing napalm or phosphorous" 144/ also suggests that these weapons are not now forbidden by any generally accepted rule of customary international law.

69. The British Manual states that the use of napalm against military targets is lawful. 145/ The United States manual takes a similar line and adds, as noted in connexion with flame-throwers, that the weapon must not be used in such a way as to cause unnecessary suffering to individuals. 146/

70. The Japanese Government has indicated that it possesses napalm bombs for possible use against an invading force but that it has no intention of using them for offensive purposes against a foreign country. 147/

71. During the Korean conflict, questions were put in the Parliament about the position of the British Government with respect to napalm bombs, which were characterized by the questioners as inhumane, indiscriminate, and disturbing to the conscience. The response of the Government was that it is a more discriminatory

143/ E.g., the delegations of Cyprus (A/C.1/PV.1882, p. 78); Ireland (A/C.1/PV.1883, p. 44); Syrian Arab Republic (A/C.1/PV.1887, pp. 8-10); Chile (A/C.1/PV.1888, pp. 87-99); Sierra Leone (A/C.1/PV.1889, p. 16); but cf. the views of the delegations of Egypt that "i/ts use is indiscriminate since it is directed against the military and the civilian, and against the human being and his environment" (A/C.1/PV.1885, p. 27).

The Report of the Secretary-General on respect for human rights in armed conflicts submitted to the General Assembly at its twenty-fifth session recalled that "the legality or otherwise of the use of napalm would seem to be a question which would call for study and might be eventually resolved in an international document which would clarify the situation" (A/8052, para. 125).

144/ Doc. CE/COM III/C 33, Second Session, Report of the Work of the Conference (1972), vol. 2, p. 57.

145/ The Law of War on Land, op. cit., p. 41.

146/ United States Army Field Manual, op. cit., p. 18.

147/ Statement made by the Minister of International Trade and Industry in the Budget Committee, House of Representatives, 1 March 1971.

weapon than high explosive and that almost all weapons create terrible suffering. 148/ Meyrowitz reports that "During the Korean War, the Security Council and the General Assembly tolerated the use of these munitions by the United Nations forces". 149/

72. In connexion with recent armed conflict, statements have been made by a number of States condemning the use of napalm. For instance, in a joint Soviet-Viet-Nameese communiqué issued in April 1965 the two parties condemned "the use of barbarous weapons of annihilation, including napalm bombs, against the peaceful population". 150/ In a message of 24 January 1966 the President of the Democratic Republic of Viet-Nam, condemned the use of napalm to destroy the countryside and annihilate the civilian population. 151/ The States parties to the Warsaw Treaty - Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the Union of Soviet Socialist Republics - declared, in a statement issued at a meeting of the Political Consultative Committee in Bucharest on 6 July 1966, their condemnation of the use of napalm. 152/

B. Doctrine

73. In the course of a century, the focus of concern with incendiary weapons has shifted from the explosive and inflammable projectiles prohibited by the Declaration of St. Petersburg to flame-throwers, and then to napalm, 153/ which was an invention of the Second World War.

- (a) Projectiles of less than 400 grammes which are explosive or charged with fulminating or inflammable substances

74. A number of standard authorities on international law and on the law of war simply refer to the Declaration of St. Petersburg of 1868 or to the prohibition of explosive and incendiary projectiles effected by that instrument without indicating

148/ Parliamentary Debates (Commons), 5th ser., vol. 500 (1951-1952), cols. 848-850, 1425-1426. In 1967, the Secretary of State for Foreign Affairs stated that napalm would be covered by a general disarmament agreement. Ibid., vol. 751 (1966-1967), col. 31 (written answer to question).

149/ "The Law of War in the Vietnamese Conflict", in Falk, op. cit., vol. 2, p. 554.

150/ See Novoe Vremya, 1965, No. 17; Pravda, 20 April 1965.

151/ See Pravda, 30 January 1966.

152/ See ibid., 6 July 1966.

153/ See generally Stockholm International Peace Research Institute, Napalm and Incendiary Weapons: Legal and Humanitarian Aspects; SIPRI Interim Report (1972), and World Armaments and Disarmament: SIPRI Yearbook 1973, pp. 132-163.

its present position in international law. 154/ Some authorities refer to the Declaration as binding only the parties to it. 155/

75. Several publicists assert that the prohibition effected by the Declaration is a specific application in conventional law of a pre-existing norm of customary international law which prohibits inhumane weapons, such as those causing unnecessary suffering. 156/

76. A variety of considerations lead certain writers to dismiss the Declaration as being of slight contemporary importance. 157/ Sereni found the instrument, which he regarded as being binding only on the parties, as having been overtaken by the course of events. 158/ McDougal and Feliciano conclude that "The universal use of these /explosive or incendiary/ bullets in the last war and the lack of any protest strongly suggest their legitimation, and the desuetude of the prohibition at least in aerial war." 159/ Development of new weapons systems leads Fleck to conclude that the prohibition can apply only to projectiles of considerably less than 400 grammes, capable of putting out of action only the individual directly hit, and causing unnecessary suffering. 160/

77. Some expressly deny that the principle of the St. Petersburg Declaration has passed into customary international law. 161/ It has been pointed out that the widespread acceptance by States of the view that incendiary projectiles may be used by and against aircraft has in any event carved out an exception to the prohibition. 162/

154/ Cansacchi, op. cit., pp. 78-79; Guerrero Burgos, op. cit., pp. 62-63; Rousseau, op. cit., p. 348; Podestá Costa, op. cit., p. 87; Reuter, op. cit., p. 316; Accioly, op. cit., p. 310; Delbez, op. cit., p. 532; Salonga and Yap, op. cit., p. 413; Ghanim, op. cit., p. 741; Shabat, op. cit., p. 574; Abu-Hayf, op. cit., p. 773.

155/ Kunz, op. cit., p. 80; Djatikoesoemo, op. cit., p. 44.

156/ E.g., Balladore Pallieri, op. cit., p. 170; Quadri, op. cit., p. 305.

157/ E.g., Guggenheim, op. cit., p. 390.

158/ Op. cit., vol. 6, p. 390.

159/ Op. cit., p. 621.

160/ Fleck, op. cit., pp. 2-4.

161/ Kunz, op. cit., p. 80; Tucker, loc. cit., p. 50; United States Department of the Army Pamphlet 27-161-2, op. cit., p. 42.

162/ Tucker, loc. cit., p. 51; Greenspan, op. cit., p. 360. Spaight takes the opposite view but concedes that the rule was widely violated during the two World Wars. Op. cit., p. 198-199.

/...

(b) Flame-throwers and other incendiary weapons

78. A substantial number of learned writers uphold the legality of flame-throwers. 163/ Their assertions that this weapon is not prohibited by international law are frequently qualified by the condition that it must be used against military objectives. 164/ The weapon is seen as valuable for attacking strongly entrenched troops or troops in bunkers. Its use against civilians would be unlawful. The weapon is thus not regarded as being illegal per se.

79. Some publicists consider that flame-throwers are unlawful because, like other incendiaries, they cause unnecessary suffering, whether used against non-combatants or combatants. 165/

80. Objections have been raised to the dropping of incendiary bombs on the ground that they may indiscriminately destroy civilian and military objectives. Castrén asserts serious consideration should be given to limiting their use to the field of battle and then only for the destruction of military objectives that are so important that they cannot be destroyed by ordinary high explosives. 166/ It has also been suggested that the poisonous and asphyxiating effects of such weapons are such that they bear an analogy to chemical weapons forbidden by the Geneva Protocol of 1925 and that there has been a higher casualty rate amongst those affected by incendiaries than amongst those exposed to gas. 167/

(c) Napalm

81. As napalm is a comparatively new weapon and has been mainly in the public eye as a result of its use in the Korean and Viet-Nam conflicts, references to it expressis verbis in published works are comparatively few in number and come largely from Great Britain and the United States. A number of authorities group it with other incendiary weapons, including flame-throwers, and find that it is,

163/ Knackstedt, "Kampfmittel, verbotene," loc. cit., p. 187 (not unlawful under art. 23 (a) of the Hague Regulations); Tucker, loc. cit., p. 51; Brownlie, "Legal Aspects" loc. cit., p. 150 (do not fall within Geneva Protocol of 1925); Kunz, op. cit., p. 80; Singh, Nuclear Weapons and International Law (1959), p. 151; Schwarzenberger, op. cit., p. 44; Thomas and Thomas, op. cit., p. 155; Stone, op. cit., p. 550; McDougal and Feliciano, op. cit., p. 622; Castrén, op. cit., p. 42; Philip C. Jessup, A Modern Law of Nations (1948), p. 216. (use permitted to international forces).

164/ Oppenheim, op. cit., p. 340, n. 2; Greenspan, op. cit., pp. 360-361.

165/ Brownlie, loc. cit., p. 150; McDougal and Feliciano, op. cit., p. 622; Knackstedt, loc. cit., p. 187.

166/ Castrén, "La protection juridique de la population civile dans la guerre moderne: remarques et suggestions", Revue Générale de Droit International Public, vol. 59 (1955), p. 134.

167/ Czesany, Nie Wieder Krieg gegen die Zivilbevölkerung, 2d ed. (1964), pp. 118-119.

de maiore ad minorem, on that account a permissible weapon. 168/ As in the case of flame-throwers, the point is often made that napalm and napalm bombs must be used only against legitimate targets in the sense of military objectives. 169/

82. As the result of the use of napalm in the war in Viet-Nam, a number of persons writing on the subject have stated that the weapon has been used so indiscriminately and causes such suffering that it belongs in the category of weapons which are forbidden on those accounts. 170/ It has been suggested that the emission of napalm of large quantities of carbon monoxide gas brings the weapon within the scope of the proscription of gas warfare contained in the Geneva Protocol. 171/

83. A similar position is found among writers in Socialist countries, for whom napalm, in particular, is subject to a special understanding concerning its prohibition. Those writers acknowledge the dangerous consequences of the use of napalm and other weapons of a like nature and consider that the use of such weapons in the context of existing international agreements is restricted inasmuch as napalm, for example, gives off large quantities of carbon monoxide, which may cause poisoning and death. In other words, the use of napalm for military purposes is regarded as particularly cruel because its victims, besides being burnt alive, are asphyxiated and poisoned. Such use is therefore considered to be a violation of the 1907 Hague Convention and the 1925 Geneva Protocol for the prohibition of the use of chemical and bacteriological (biological) weapons. The view is also held among Socialist writers that napalm and other incendiary weapons do not discriminate between combatants and civilians or between military and non-military objects and that they are weapons which cause unnecessary suffering. In this connexion, they make reference, in particular, to the provision of the 1868 Declaration of St. Petersburg stating that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military

168/ Tucker, loc. cit., p. 51; Brownlie, loc. cit., p. 150; Department of Army Pamphlet 27-161-2, op. cit., p. 42; Thomas and Thomas, op. cit., p. 154; McDougal and Feliciano, op. cit., p. 622; Schwarzenberger, op. cit., p. 44; Castrén, op. cit., p. 190; Knackstedt, loc. cit., p. 187; Kalshoven, "Incendiary Weapons: Legal and Humanitarian Aspects" (ms.), p. 16; but cf. Greenspan, op. cit., p. 361.

169/ Meyrowitz, "Le droit de la guerre dans le conflit vietnamien", loc. cit., p. 186; Tucker, loc. cit., p. 51; Brownlie, loc. cit., p. 150; McDougal and Feliciano, op. cit., p. 622; Knackstedt, loc. cit., p. 187.

170/ Petrowski, "Law and the Conduct of the Vietnam War" in Falk, op. cit., vol. 2, p. 504 ("While not specifically violating international law, ... could be considered a violation by analogy"); D'Amato, Gould and Woods, "War Crimes and Vietnam: The 'Nuremberg Defense' and the Military Service Register", ibid., vol. 3, pp. 448-449.

171/ D'Amato, Gould and Woods, ibid., and cf. Pinto, for whom, while napalm does not fall under any prohibitions, the weapon can be assimilated to gas. Op. cit., p. 312.

force of the enemy". In their view, the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable, must be recognized as not conforming to this object. In the words of the Declaration, "the employment of such arms would, therefore, be contrary to the laws of humanity". Authors make also reference to article XXII of the annex to the Fourth 1907 Hague Convention, which states that "The right of belligerents to adopt means of injuring the enemy is not unlimited", to resolution XXIII of the 1968 Teheran Conference on Human Rights, which condemns the use of napalm, and to General Assembly resolution 2444 (XXIII), which reaffirms that resolution. 172/

84. A recent SIPRI Yearbook adopts the position that incendiary weapons are not unequivocally prohibited under conventional law, that they fall within the principle against the use in war of weapons causing unnecessary suffering or which are indiscriminate in their effect, and that it would be well "to undertake to prohibit the use of incendiary weapons which evoke widespread feelings of horror and disgust frequently associated in the popular mind with chemical weapons". 173/

C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences

85. Reference has been made above 174/ to article 18 of the Hague Air Warfare Rules relating to the permissibility of use of explosive and incendiary projectiles by or against aircraft, notwithstanding the Declaration of St. Petersburg. The Rules did not enter into force.

86. When the International Committee of the Red Cross drew up its "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War" in 1956, it provided in article 14 that it was forbidden to use "weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population". 175/ The commentary pointed out that incendiary weapons "are sometimes limited in their effects e.g. the flame-thrower or napalm when used against a tank, but sometimes have uncontrollable consequences as in the case of certain bombs scattering inflammable material over a considerable distance". 176/ It would appear that the I.C.R.C. was attempting in article 14 to deal with incendiaries other than napalm and flame-throwers, which were then seen as having limited effects.

172/ See F. I. Kozhevnikov, ed. Kurs mezhdunarodnogo prava (1972); A. I. Poltorak, and L. I. Sovinsky, op. cit., H. Ganelin, "Kistorii voprosa o zapreshchenii varvarskikh sposobov vedeniya voyny", Sovetskoe gosudarstvo i pravo, 1953, No. 1: M. Genovski, Osnovi na mezhdunarodnoto pravo, 1969, p. 330; R. Bierzanek, op. cit., p. 93.

173/ Stockholm International Peace Research Institute, World Armaments and Disarmament: SIPRI Yearbook 1973, pp. 149-151.

174/ See paragraph 61 supra.

175/ XIXth International Red Cross Conference, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956), p. 101.

176/ Ibid., p. 104.

SECTION 5. NUCLEAR WEAPONS

A. State practice

87. The question of the prohibition of the use of nuclear weapons has arisen largely in the context of disarmament, the history of which has been described elsewhere. 177/

88. The conflicting views of States on the legality or illegality of the weapon were probably most clearly demonstrated in the voting in the General Assembly on resolution 1653 (XVI), Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons, adopted on 24 November 1961. The resolution provided:

"The General Assembly,

...

Recalling that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties,

Considering that the use of nuclear and thermo-nuclear weapons would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations and agreements to be contrary to the laws of humanity and a crime under international law,

Believing that the use of weapons of mass destruction, such as nuclear and thermo-nuclear weapons, is a direct negation of the high ideals and objectives which the United Nations has been established to achieve through the protection of succeeding generations from the scourge of war and through the preservation and promotion of their cultures,

1. Declares that:

(a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;

(b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;

(c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

(d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization;"

...

The resolution, which had been originally submitted by Ceylon, Ethiopia, Ghana, Guinea, Indonesia, Liberia, Libya, Nigeria, Somalia, the Sudan, Togo and Tunisia (A/C.1/L.292 and Add.1-3) 178/ was adopted by 55 votes to 20, with 26 abstentions. 179/ The States voting against the resolution included three of the nuclear Powers, France, the United Kingdom and the United States.

89. The resolution, as did subsequent ones, 180/ also alluded 181/ to the conclusion of a convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes, but no such convention has as yet been concluded. The supporters of such a convention did not make clear whether that convention would be declaratory of customary international law or would create new legal obligations for the parties. Such assertions as those that the convention would not be legally binding on non-parties 182/ and that it "would eventually become part of international law" 183/ suggest that several States at least considered that the legal obligation in positive law not to use nuclear or thermo-nuclear weapons had not yet been established.

90. The supporters of resolution 1653 (XVI) of 1961 and of a treaty prohibiting the use of nuclear weapons expressed the view that the illegality of the weapons sprang from the fact that it is used against civilians, 184/ that the Charter does not permit war, "least of all nuclear war", 185/ and that it is a weapon of

178/ A similar draft resolution had been submitted at the fifteenth session of the General Assembly (A/C.1/L.254 and Add.1-3) but was not acted upon.

179/ Official Records of the General Assembly, Sixteenth Session, Plenary Meetings, vol. II, 1063rd meeting, paras. 122-126.

180/ E.g. resolutions 1801 (XVII), 14 December 1962; 1909 (XVIII), 27 November 1963; 2164 (XXI), 5 December 1966; 2289 (XXII), 8 December 1967.

181/ Para. 2.

182/ Ceylon (Official Records of the General Assembly, Seventeenth Session, First Committee, 1288th meeting, para. 8).

183/ Ethiopia (ibid., Twenty-first Session, First Committee, 1463rd meeting, para. 23).

184/ Iraq (ibid., Sixteenth Session, First Committee, 1190th meeting, para. 27).

185/ Ethiopia (ibid., 1191st meeting, para. 8).

/...

mass destruction. 186/ In addition to voting for the Declaration, several States, during the exchange of views on the Declaration and on the proposed convention, spoke of nuclear weapons as being in violation of existing customary international law and of the Charter. 187/

91. Those who opposed the Declaration and the proposed convention objected that those States that are the victim of an act of aggression would be entitled to use nuclear weapons in the exercise of the right of self-defence recognized by Article 51 of the Charter, 188/ that nuclear weapons could be of crucial significance in determining whether a nation would survive, 189/ that a prohibition in treaty form would induce a false sense of security, 190/ and that the matter should be dealt with in the framework of disarmament. 191/ It was also pointed out that the use of nuclear weapons or of any other type of weapons was not prohibited by the Charter and that customary international law does not forbid the use of nuclear weapons. 192/

92. At the twenty-seventh session of the General Assembly, resolution 2936 (XXVII) of 29 November 1972 was adopted. By this resolution, the General Assembly solemnly declared

"on behalf of the States Members of the Organization, their renunciation of the use or threat of force in all its forms and manifestations in international relations, in accordance with the Charter of the United Nations, and the permanent prohibition of the use of nuclear weapons;".

The resolution was adopted by a vote of 73 in favour, 4 against, with 46 abstentions. Delegations supporting the resolution spoke of the need to ban the use of such weapons "permanently, under all circumstances and by all" 193/ and asserted that "the prohibition of the use of force would a fortiori imply prohibition of the use of nuclear weapons". 194/

186/ Venezuela (ibid., 1193rd meeting, para. 56).

187/ E.g. India (ibid., Twenty-second Session, First Committee, 1539th meeting, para. 8), Nigeria (ibid., Seventeenth Session, Annexes, agenda item 26, document A/5174/Add.2, p. 17).

188/ United Kingdom (ibid., Sixteenth Session, First Committee, 1190th meeting, para. 7); United States (ibid., 1190th meeting, para. 16); Spain (ibid., 1193rd meeting, para. 44); Peru (ibid., Seventeenth Session, Annexes, agenda item 26, document A/5174 and Add.1-2, p. 13).

189/ Ireland (ibid., p. 10).

190/ The Netherlands (ibid., p. 12) and Turkey (ibid., p. 14).

191/ The generality of the States expressing negative views or having some doubts about the calling of a special conference for the purpose of concluding such a treaty laid emphasis on the discussions on disarmament being carried on in the Conference of the Eighteen-Nation Committee on Disarmament (ibid., pp. 8-16).

192/ United States (ibid., Sixteenth Session, First Committee, 1192nd meeting, para. 6; ibid., Plenary Meetings, vol. II, 1063rd meeting, para. 18).

193/ Egypt (A/PV.2080, p. 21).

194/ Cyprus (A/PV.2084, p. 32).

93. Resolution 2936 (XXVII) of 29 November 1972 was adopted by the General Assembly in connexion with the item entitled "Non-use of force in international relations and permanent prohibition of the use of nuclear weapons" which had been inscribed in the agenda of the twenty-seventh session at the request of the USSR. During the consideration of this item statements were made by the delegations of the Soviet Union - as sponsor of the item and of the corresponding draft resolution (A/L.676) - and of several other socialist States. Excerpts from some of those statements are reproduced below, in extenso, as reflecting the national policies of these States regarding the prohibition of the use of nuclear weapons. 195/

94. The Minister for Foreign Affairs of the USSR stated, inter alia: 196/

"The essence of our proposal is that it provides for the renunciation by States of any use of force to resolve international disputes, including the use both of nuclear weapons and of such types of weapons as are commonly called conventional. It is proposed that this renunciation be of such nature that no one could avoid observing it strictly; this is possible if the United Nations shows the necessary understanding of its responsibility for the fate of the world,

"Such an approach is fully in accordance with the fundamental principle proclaimed in the United Nations Charter under which the Members of the United Nations 'shall refrain in their international relations from 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' ...

"More than 10 years ago, the United Nations General Assembly adopted a Declaration in which it proclaimed the use of nuclear weapons to be a crime against mankind and civilization. Since then the United Nations has repeatedly advocated the signing of an appropriate international convention by all States. However, the Declaration on the prohibition of the use of

195/ The policy of these States regarding the prohibition of the use of nuclear weapons is also reflected in statements relating to the establishment of nuclear-free zones in various parts of the world. Reference may be made in this connexion, for instance, to the reply of the Soviet Government of 22 February 1964 to a communication of 23 January 1964 from the Government of Ceylon (Pravda, 25 February 1964) and to the joint Soviet-Iranian communiqué of 31 March 1970 (ibid., 1 April 1970). Attention may also be drawn to the memorandum submitted on 28 March 1962 by the Government of Poland to the Eighteen-Nation Committee on Disarmament concerning the establishment of a denuclearized and limited armaments zone in Europe (ENDC/C.1/1) and to the statement and a draft treaty on the complete renunciation of nuclear weapons by both German States submitted to the Eighteen-Nation Committee on Disarmament on 3 February 1964 by the Government of the German Democratic Republic (ENDC/124 of 3 February 1964).

196/ A/PV.2040, pp. 26-33.

nuclear weapons was not supported by all the nuclear Powers and it has still not been possible to initiate productive negotiations on the conclusion of an international convention on the question.

"Many reasons can be found for the ineffectiveness of the decision adopted by the United Nations on these questions, but one of the most substantial is unarguably that they were considered and decided upon by the United Nations in isolation from one another.

"When the question of prohibiting the use of nuclear weapons was raised, several States had doubts as to the possibility of taking such a step if the use of force was not precluded in relations between States. We shall not now enter into a discussion of the question of the extent to which those doubts were justified, but, whatever the case, they became an obstacle to agreement.

"At the same time, when the question of prohibiting the use of force was considered, the significance of any decisions adopted proved to be limited in the absence of agreement concerning nuclear weapons, that is to say, the most powerful weapons of mass destruction. The separation of one question from the other introduced a certain lack of understanding and suspicion and weakened the effectiveness of the best decisions of the United Nations. Furthermore, their effectiveness was further restricted because they were all in the form of recommendations, or, at best, declarations of intent. They were not given the force of law.

...

"The proposed /Soviet/ draft speaks for itself. It envisages a major step on the part of the General Assembly - a decision on behalf of States Members of the United Nations on their renunciation of the use or threat of force in international relations and the permanent prohibition of the use of nuclear weapons. It contains an appeal to the Security Council to take action to make this declaration binding on all States. For this purpose, and in accordance with well-known provisions of the United Nations Charter, a meeting of the Security Council should be convened at the level of members of Governments or other specially designated representatives.

"The Soviet delegation is authorized to state that the Soviet Union will stand ready to participate in the convening of such a meeting of the Security Council and in its work. We shall be ready to join in this political action with all other States which are permanent members of the Council. We are convinced that there can be no higher duty for those States on which the Charter of the United Nations places a special responsibility for the maintenance of international peace and security."

95. The representatives of Bulgaria, Czechoslovakia, Hungary, Mongolia and Poland 197/ supported in general the idea that the question of the prohibition

of the use of nuclear weapons should be settled in conjunction with that of the prohibition of the use of force in international relations and the permanent prohibition of nuclear weapons as the most destructive weapon of all.

96. The representative of Romania stated, inter alia:

"The Non-Proliferation Treaty provides for no measure to call a halt to the production of nuclear arms and to eliminate stockpiles of these arms. Nor does it offer any guarantees that nuclear weapons will not be used in any future war or give any assurance whatsoever as to the non-use of these weapons. Until such time as there is a general agreement on the prohibition and destruction of nuclear weapons, countries which have renounced the right to acquire such weapons, as well as all other peoples, are entitled, politically, juridically and morally, to request and to obtain, without further delay, firm guarantees that never, and in no circumstances, will they be subjected to attack or to the threat of attack by nuclear weapons.

"Those States which possess nuclear weapons will have to assume the obligation not to have recourse, on any pretext whatsoever or in any circumstances, to the use of nuclear arms, or the threat of them, against any State whatsoever regardless of whether that country possesses such weapons or not. We believe that every Government and every political leader has the duty and the great responsibility towards their own people, and, in the final analysis, towards the destiny of mankind as a whole, to act in the most energetic way possible to impose, without further delay, a prohibition on the use of nuclear arms.

"In our view, an effective way to achieve this would be, as is indicated in the resolution of the National Conference of the Romanian Communist Party, circulated to the General Assembly as document A/8749, the achievement of a universal agreement which could enshrine the higher requirements of conduct and action of States in their international relations. An important element of such an agreement should be, in our view, the solemn reaffirmation of the commitment of all States to renounce force and the threat of force against other States, and the obligation assumed by those countries which possess nuclear weapons that they will never use these weapons or threaten to use them against anyone whatsoever and in any circumstances whatsoever." 198/

97. The representative of Yugoslavia stated, inter alia:

"Yugoslavia has always pleaded in favour of the non-use of force in relations between States and the prohibition of all weapons of mass destruction, nuclear and thermo-nuclear weapons in particular ... The renunciation of the use of force is a prerequisite for the realization of coexistence and peaceful co-operation among States and peoples, while the prohibition of the use of nuclear weapons is one of the basic conditions of international security and peace ...

"The prohibition of all nuclear tests, the withdrawal of nuclear weapons and forces within national borders, the establishment of denuclearized zones, the cessation of the manufacture of fissionable materials for military purposes, the freezing of nuclear armaments, and the discontinuance of work on research and on the advancement of nuclear weapons could be the first concrete measures aimed at eliminating nuclear weapons from the arsenals of all States.

"In order to preserve the necessary balance in this process it is indispensable that steps in the field of nuclear disarmament be accompanied by adequate measures limiting and reducing conventional armaments as well. Practically speaking, this means that the question of armaments has to be considered as a whole, because it is only within this broader context that all the realities can be taken into account and a common denominator of the interests of all countries be found. It seems that the present international constellation and the degree of development attained in the field of armaments, particularly nuclear armaments, make it imperative and possible to place on the agenda the over-all complex of disarmament problems and, proceeding from this broad platform, to find adequate partial solutions more easily.

"The world has never been faced with such dangers of devastation as it is today. Only through common efforts and the political will of all countries can we create conditions in which these dangers will give way to co-operation, peace and the security of all countries." 199/

98. In his statement, the head of the delegation of China recalled the proposal of his Government that "as a first step towards the complete prohibition and destruction of nuclear weapons, all nuclear Powers should undertake not to be the first to use nuclear weapons at any time, under any circumstances, particularly against non-nuclear countries ... The proposal of the People's Republic of China concerning an undertaking not to be the first to use nuclear weapons is unconditional". 200/

99. The military manuals of Western European States normally state that the use of nuclear weapons is not prohibited by customary international law. 201/ It is, however, frequently stipulated that the use of such weapons is subject to the general limitations placed by international law on the use of weapons, 202/ particularly in so far as aerial bombardment is concerned. Thus, the use of

199/ A/PV.2080, pp. 30 and 33-36.

200/ A/PV.2083, p. 7.

201/ Austria, Bundesministerium für Landesverteidigung, Truppenführung (1965), p. 254; Krivinyi, op. cit., pp. 10-11; Federal Republic of Germany, Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 18; Netherlands, Manual for the Soldier, chap. 7, para. 11; Armée Suisse, op. cit., p. 5; United Kingdom, The Law of War on Land, op. cit., p. 42; United States Army Field Manual, p. 18, and The Law of Naval Warfare, op. cit., p. 6-4.

202/ All of the manuals cited in the preceding note except the Army manual of the United States.

explosive nuclear weapons against enemy troops or other military targets is not per se violative of international law. 203/ A manual of the Federal Republic of Germany provides that the use of nuclear weapons in a manner which would otherwise be prohibited by international law is permitted by way of reprisal against a particularly grave violation of international law by an enemy. A Swedish manual states that attempts have been made to link the use of nuclear weapons to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and describes the various efforts that have been made to control the testing, possession, and use of nuclear weapons. 204/ The one manual from a Latin American Republic examined states that the use of nuclear weapons has not yet been regulated by international law. 205/

100. In response to a parliamentary question in the Japanese House of Representatives about the views of the Government on the Shimoda case dealing with the atomic bombing of Hiroshima and Nagasaki, 206/ the Minister for Foreign Affairs replied that

"the atomic bombing was no doubt a tragic and regrettable incident, but he could not state conclusively, as a matter of strict law, that the bombing had been in violation of international law, inasmuch as no rule of positive international law would appear to have existed on this point". 207/

The Director of the Treaties Bureau of the Ministry of Foreign Affairs affirmed this position and alluded to the fact that "The majority view among international lawyers in Japan was that the atomic bombardment upon Hiroshima and Nagasaki should be condemned as violation of international law" but that none of them would confirm the existence of a rule of positive law which was directly applicable. 208/

203/ See, e.g., the manual of the Federal Republic of Germany cited supra note 201 at p. 18.

204/ Jagerskiöld and Wulff, op. cit., pp. 73-74.

205/ Ecuador, Estado Mayor del Ejército, op. cit., p. 40.

206/ See chapter III, infra.

207/ House of Representatives, 46th Session of the Diet, Minutes of Standing Committee for Budget, 16th Meeting (28 February 1964), p. 29, in Japanese Practice in International Law, The Japanese Annual of International Law, vol. 10 (1966), p. 91.

208/ Ibid.

B. Doctrine

101. Writers in many socialist countries ^{209/} adopt a more or less uniform approach to the problem of the prohibition of the use of nuclear weapons. In general, they affirm that there are no special rules prohibiting the use of nuclear weapons. A number of writers are of the opinion that the prohibitions contained in the 1868 Declaration of St. Petersburg, the 1899 and 1907 Hague Conventions and the 1925 Geneva Protocol should extend to nuclear weapons. They consider that the purpose of such prohibitions is to cover new destructive varieties of armaments which had not been invented when the instruments in question were concluded. They recognize the existence in contemporary international law of a customary rule requiring States to adopt measures for the prohibition under international law of new weapons whose use involves a violation of the generally recognized principles of international law. There is, therefore, in their view, a need to elaborate and conclude a specific treaty prohibiting the use of nuclear weapons, which would closely reflect the generally recognized principles of international law. They stress that attempts to achieve the prohibition of the use of nuclear weapons outside the context of the generally recognized principles of international law, and in particular separately from the principle of the prohibition of the threat or use of force, have not been successful. They have expressed the view that the

^{209/} See F. I. Kozhevnikov, ed., Kurs mezhdunarodnogo prava, (1972), p. 368; Kurs mezhdunarodnogo prava (1969), vol. V, p. 324; E. Korovin, "Atomnoe oruzhie i mezhdunarodnoe pravo", Mezhdunarodnaya zhizn, 1955, No. 5; V. N. Durdenevsky, A. N. Shevchenko, "Vesovmestimost ispolzovaniya atomnogo oruzhiya s normami mezhdunarodnogo prava", Sovetskoe gosudarstvo i pravo, 1955, No. 5; P. S. Romashkin, Prestupleniya protiv mira i chelovechestva (1967); A. N. Trainin, Zashchita mira i ugolovny zakon (1969), p. 403; I. Cheprov, Novye prolemy mezhdunarodnogo prava (1969), pp. 14-35; G. F. Kalinkin, "Dogovor o nerastrostranenii yadernogo oruzhiya - effektivny instrument mira i bezopasnosti narodov", Sovetskoe gosudarstvo i pravo, 1968, No. 10; O. V. Bogdanov, Dogovor, kotory nuzhen lyudyam (1968); O. V. Bogdanov, Vseobshchee i polnoe razorushenie (1964), p. 201; Problemy kollektivnoi bezopasnosti v Evrope, materials of the scientific session of Polish Academy of Sciences, Warsaw, 3-6 April 1955 (Professors T. Cyprjan, I. Laks, C. Brzezowski, Polish People's Republic; Professor R. Reintanz, German Democratic Republic); M. Radojković, "Les armes nucléaires et le droit international", Year Book of World Affairs, vol. 16 (1962); S. Hahlik, "Bron atomowa a pravo miedzynarodowe", Sprawy Miedzynarodowe, 1961, No. 5; R. Bierzanek, op. cit., p. 95. Ecobesco, Unlawful Weapons, in The law of armed conflicts (1971), pp. 75-76; K. J. Skubiszewski, in The law of armed conflicts (1971), p. 74. S. Penkov, "Dogovor't za Antarktika - programma za razor'zhavana i mezhdunarodno s'trudnichestvo", Pravna mis'l, 1960, No. 2; S. Penkov, "Problemi na nerastrostranyavaneto na yadrenite or'zhiya", Izvestiya na Instituta za pravni nauki, 1973; M. Genovski, Osnovi na mezhdunarodnoto pravo (1969), pp. 301, 402-404; B. Donner, "Válka atomová, biologické a chemická ve světle mezinárodního práva", Právník, 1950 No. 9; B. Donner, Válka ABC ve světle mezinárodního práva (1952); A. Echim, "Interzicerea folosiri armelor nucleare, problemă a dreptului international", Justitia nauă, 1966, No. 4; E. Glaser, "Problema de drept international ale dezarmării nucleare (Probleme curente ale dreptului international si activitatea organizatii los internationale)", Studii si cercetăsi juridice, 1969, No. 3; K. Ernst, "Fin michtiger Schristt zur Verwinderung der Atomkriegsgefahr", UNC-Bilaun, 67/68, 1968; L. Reintanz, "Der Kernwaffensperrvertrag und die Haltung der beiden deutschen Staaten", Deutsche Aussenpolitik, 1968, No. 7; V. Shitov, Mezhdunarodnaya zhizn, 1973, No. 2. /...

prohibition of the use of nuclear weapons may be achieved in the specific context of the realization of the principle of the prohibition of the threat or use of force, and some emphasize the agreement with this approach which they find was expressed at the twenty-seventh session of the United Nations General Assembly. In recent works some have stressed as major the importance of the reports by the Secretary-General on the economic and social consequences of the arms race and of military expenditures (A/8469 and Add.1) and, in particular, on the Effects of the Possible Use of Nuclear Weapons and the Security and Economic Implications for States of the Acquisition and Further Development of These Weapons (A/6858). Yugoslav writers on the question of the use of nuclear weapons in general hold the view that their use is contrary to existing international treaties and agreements concerning the laws and customs of war. 210/

102. Amongst the authorities in a number of other countries there is a divergence of views on the legality of the employment of nuclear weapons.

(a) Nuclear weapons regarded as not in violation of international law

103. Some assert that in the absence of any specific prohibitory rule of customary or conventional law applicable to nuclear weapons, the use of such weapons must be presumed to be lawful. It is denied that such a prohibitory rule can be established through "processes of derivation and 'analogy' from conventional rules and inherited principles". 211/ In the words of the late Judge Lauterpacht:

"It would thus appear that the total elimination or limitation, as a matter of law, of the use of the atomic weapon cannot be accomplished by way of a re-statement of an existing rule of law. Such a restatement denying the legality of the use of the atomic weapon must, of necessity, be based on controversial deductions from supposedly fundamental principles established in conditions vastly different from those obtaining in modern - total and scientific - warfare." 212/

210/ M. Radojkovic, "Nukleorno oruzje i medjunarodno pravo", Arhiv za pravne i drusvne nauke, 1962, No. 1-2; M. Sahovic, "Nuklearna energija i medjunarodno pravo" (1964); G. Jerazić, Medjunarodno-pravna zabrana upotrebe u ratu sredstava za masovno unustavenje (1968); G. Perazić, "Medjunarodno ratno pravo i upotreba nuklearnog oružja", Pregled, No. 10/1962.

211/ McDougal and Feliciano, op. cit., p. 667.

212/ "The Problem of the Revision of the Law of War", British Year Book of International Law, vol. 29 (1952), p. 370.

Thus, not only in the United States, 213/ Great Britain, 214/ and France 215/ - three of the nuclear Powers - but elsewhere as well, 216/ the assertion has been made that it is premature to lay down any comprehensive prohibitory rule of customary international law against the use of nuclear weapons as such. That prohibition would have to come about through a treaty prohibiting use of such weapons or through effective measures of arms control and disarmament.

(b) Nuclear weapons regarded as in violation of international law

104. Those learned writers who regard nuclear weapons as violative of international law often find the source of that rule in provisions of treaties which, for the most part, are regarded as having passed into customary international law. The treaty provisions invoked include the following:

213/ McDougal and Feliciano, op. cit., pp. 659-668; Brittin and Watson, International Law for Seagoing Officers, 3d ed. (1972), p. 220; O'Brien "Legitimate Military Necessity in Nuclear War", Yearbook of World Polity, vol. 2 (1960), pp. 116-117, quoted in Whiteman, Digest of International Law (1968), vol. 10, pp. 498-499. O'Brien, "Some Problems of the Law of War in Limited Nuclear Warfare", Military Law Review, vol. 14 (1961), p. 7; Tucker, loc cit., p. 55; United States Department of the Army Pamphlet 27-161-2, op. cit., p. 43 (but warning that the use of an atomic weapon, the effect of which was confined to radiation, might be a violation of the prohibition of the use of poison and poisoned weapons); Mallison, loc cit., pp. 328-333.

Falk distinguishes two schools of thought, the one dealing with the "intrinsic legal character of the weapon" and the other assessing legality by reference to "the context in which the weapon is used". He concludes his examination of the Shimoda case (see chapter III infra) by stating that "the legal status of nuclear weapons, then, is very inconclusive. It depends greatly on the perspective one selects as dominant". Nevertheless, he discerns a "gathering consensus" on a "no first use proposal". "The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki", American Journal of International Law, vol. 59 (1965), pp. 787 and 793.

214/ Oppenheim, op. cit., p. 351; Lauterpacht, loc. cit., p. 370.

215/ Rousseau, op. cit., p. 348.

216/ Stone, op. cit., pp. 550-551; Guggenheim, op. cit., pp. 390-391; Sereni, op. cit., p. 1983; Balladore Pallieri, op. cit., p. 634; Quadri, op. cit., p. 306.

A number of authors simply refer to the problem of trying to bring nuclear weapons under international control. See, e.g. Podestá Costa, op. cit., p. 88; Monaco, Manuale di Diritto Internazionale Pubblico (1960), p. 446.

(1) The Preamble of the Declaration of St. Petersburg of 1868 217/ is violated by these weapons in that they uselessly aggravate the sufferings of disabled men or make their death inevitable. 218/

(2) At least one authority views the Hague Declaration of 1899 on Asphyxiating Gases 219/ as being one of the rules of positive law contributing to the prohibition of nuclear weapons. 220/

(3) Article 22 of the Regulations annexed to the Hague Convention of 1907 respecting the Laws and Customs of War on Land 221/ which provides that "The right of belligerents to adopt means of injuring the enemy is not unlimited". 222/

(4) The radio-activity and fall-out engendered by the explosion of nuclear weapons involves the employment of poison or of a poisoned weapon in violation of article 23 (a) of the Hague Regulations. 223/

217/ British and Foreign State Papers, vol. 58, 1867-68, p. 18.

218/ Greenspan, op. cit., p. 372; Spaight, op. cit., p. 275; Menzel, "Atomwaffen", Strupp-Schlochauer, op. cit., vol. 1, p. 105; Shabat, op. cit., p. 579. Spetzler rejects this view, arguing that the Preamble has no binding force. Op. cit., p. 91.

219/ Scott, op. cit., p. 81.

220/ Charlier, "Questions juridiques soulevées par l'évolution de la science atomique", Hague Academy of International Law, Recueil des Cours, vol. 91 (1957), p. 354. Meyrowitz denies that nuclear weapons fall within the definition of the Hague Declaration of 1899. "Les juristes devant l'arme nucléaire", Revue Générale de Droit International Public, vol. 67 (1963), pp. 841-842.

221/ Scott, op. cit., p. 218.

222/ Charlier, loc. cit.

223/ Schwarzenberger, op. cit., pp. 26-36; Singh, op. cit., p. 155; Greenspan, op. cit., p. 372; Setalvad, "Nuclear Weapons and International Law", Indian Journal of International Law, vol. 3 (1963), p. 387; Menzel, Legalität oder Illegalität von Atomwaffen (1960), pp. 35 ff. (relying on the definition in the Paris Agreements of 23 October 1954); R. L. Bindschedler, "Das Völkerrecht und die Nuklearwaffen", Mélanges Frégastat (1968), p. 499; D. Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts", Report of the Conference on Contemporary Problems of the Law of Armed Conflicts, Geneva: 15-20 September 1969 (1971), p. 31; Berber, op. cit., p. 172; Czesany, Nie wieder Krieg gegen die Zivilbevölkerung, 2d ed. (1964), p. 169; Schwarzenberger, Report on Self-Defence under the Charter of the United Nations and the Use of Prohibited Weapons, submitted by the Committee on the Charter of the United Nations, International Law Association, Report of the Fiftieth Conference Held at Brussels, 1962 (1963), p. 219 (The resolution adopted by the Conference did not allude to this point).

This view is disputed by Euler, Die Atomwaffe im Luftkriegsrecht (1960), p. 128; Spetzler, op. cit., p. 96; Wengler, Völkerrecht (1964), vol. 2, p. 1396.

/...

(5) Nuclear weapons cause "unnecessary suffering" ("maux superflus" in the authentic French text) in violation of article 23 (e) of the Hague Regulations because of the heavy death toll they exact, because of their extensive effects in time and space, because the damage they cause is out of proportion to the military advantage to be gained, or because of the injuries caused by fire, radiation, and fall-out. 224/

(6) Nuclear weapons cannot be used in such a way as not "to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected", as required by article 27 of the Hague Regulations. 225/

(7) A great many learned writers 226/ - not without dissent 227/ - view the use of nuclear weapons as being in violation of the Geneva Protocol of 1925 for

224/ Menzel, op. cit., p. 47; Menzel, Völkerrecht (1962), pp. 372-373; Meyrowitz, "Les juristes devant l'arme nucléaire", loc. cit., pp. 844-848; Schwarzenberger, op. cit., pp. 43-44; von der Heydte, loc. cit., p. 171; Berber, op. cit., p. 173; Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", International and Comparative Law Quarterly, vol. 14 (1965), p. 450; Shabat, op. cit., p. 579, Ghanim, op. cit., p. 742; Pessoa, Le da guerra e armas nucleares (1969), p. 176. Wengler takes the view that the weapon, in so far as it causes instant death, cannot be regarded as causing unnecessary suffering. Op. cit., p. 1397, n. 1. The view is taken by several who have written on the subject that the prohibition of article 23 (e) of the Hague Regulation cannot apply absolutely to nuclear weapons because the tactical use of such weapons against military targets is lawful. See Euler, op. cit., p. 146; Randermann, op. cit., p. 139; Spetzler, op. cit., p. 99.

225/ Czesany, op. cit., p. 163.

226/ Berber, op. cit., p. 172; Czesany, op. cit., p. 169; Spetzler, op. cit., p. 109; Stone, op. cit., p. 343; Seidl-Hohenveldern, Völkerrecht (1965), p. 288; Charlier, loc. cit., p. 354; Greenspan, op. cit., p. 372; Schwarzenberger, op. cit., pp. 37-38; Singh, op. cit., pp. 163-194; Djatikoesoemo, op. cit., pp. 46-47; Menzel, Völkerrecht (1962), pp. 372-373; Menzel, Legalität oder Illegalität von Atomwaffen (1960), pp. 39 ff.; Menzel, "Atomwaffen", loc. cit., p. 104; Scheuner, "Die Stellung der Streitkräfte im modernen Völkerrecht", in Bundeswehr und Recht (1965), p. 52; Shabat, op. cit., p. 579. The radioactivity caused by nuclear weapons makes their use "questionable" according to Castrén. Op. cit., p. 207; "La protection juridique de la population civile ...", loc. cit., p. 136.

227/ Meyrowitz, writing in 1963, alluded to the controversy about whether the Geneva Protocol of 1925 had passed into customary international law and concluded that this controversy "suffit pour rendre impossible de fonder l'illégalité de l'arme nucléaire sur l'interdiction des armes chimiques" in the Protocol. "Les juristes devant l'arme nucléaire", loc. cit., p. 843. Euler finds the employment of strategic nuclear weapons per se unlawful but not by reason of the prohibition in the Geneva Protocol. Op. cit., p. 134.

the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare. 228/ The radio-activity and fall-out occasioned by the explosion of nuclear weapons falls within the category of "tous liquides, matières ou procédés analogues" prohibited by the treaty.

(8) Several international lawyers 229/ have asserted that if nuclear weapons were deliberately directed against the civilian population, such conduct might violate the Genocide Convention of 1948, 230/ which may be regarded as incorporating a norm of general international law. 231/

105. Amongst those who assert that the employment of nuclear weapons is in contravention of international law, the view is widely entertained that a central reason for the illegality of these weapons is that they are weapons of mass extermination and are not capable of being used in such a way as to maintain the distinction between civilian and military targets. 232/ For this reason, they are often referred to as "indiscriminate" or "blind" weapons or "weapons of mass destruction". The blast of such weapons is immensely greater than that of conventional weapons; the fires set by the weapon can rage out of control; the radiation may poison and cause unnecessary suffering to civilians; and the fall-out can have its impact at substantial distances, even to the extent of causing injury in neutral territory. Only strategic nuclear weapons may,

228/ League of Nations, Treaty Series, vol. XCIC, p. 65.

229/ Berber, op. cit., p. 173; Menzel, Völkerrecht (1962), pp. 372-373; Schwarzenberger, op. cit., pp. 45-46; Shabat, op. cit., p. 579.

230/ United Nations, Treaty Series, vol. 78, p. 277.

231/ Schwarzenberger points out that, by reason of the restrictive definition given to "protected persons" under the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (United Nations, Treaty Series, vol. 75, p. 287), the restrictions imposed by the treaty on the use of nuclear weapons are less consequential than might appear on the surface. Op. cit., p. 21.

232/ Singh, op. cit., pp. 190-196; Spaight, op. cit., p. 276; Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", loc. cit., p. 450; Greenspan, op. cit., p. 371; Setalvad, loc. cit., p. 388; von der Heydte, "Luftbombardment", in Strupp-Schlochauer, op. cit., p. 437; von der Heydte, "Atomare Kriegsführung und Völkerrecht", loc. cit., p. 171; Haug, "Ansätze zur Weiterbildung des Kriegsrecht", Festschrift für Walther Hug (1968), pp. 430-431; Menzel, Völkerrecht (1962), pp. 372-373; Sloutzky, "La population civile devant la menace de destruction massive", Revue Générale de Droit International Public, vol. 59 (1955), pp. 227-228; Spetzler, op. cit., pp. 370 and 381 (if used in such a way as to terrorize or decimate the civilian population through bombardment of an area with insignificant military targets); D. Bindschedler-Robert, loc. cit., p. 31; Pinto, op. cit., p. 314; Abu-Hayf, op. cit., p. 840; Ghanim, op. cit., p. 742; de Visscher, Théories et réalités en droit international public, 4th ed. (1970), p. 338; Meyrowitz, "Les juristes devant l'arme nucléaire", loc. cit., p. 850.

in the view of some, 233/ be prohibited for these reasons. And Bindschedler, having reached the conclusion that logic compels the characterization of the weapon as unlawful, nevertheless asserts that the prohibition is unrealistic in view of the present-day maintenance of peace through the deterrent power of such weapons. 234/

(c) Strategic and tactical nuclear weapons

106. That some authorities consider that only "strategic" nuclear weapons are unlawful on the ground that they make impossible the protection of the civilian population is the consequence of a distinction drawn by these and other writers between "strategic" and "tactical" nuclear weapons. 235/ Although it is sometimes acknowledged that it is difficult to draw a line between the two types of weapons, 236/ the prevailing view seems to be that tactical nuclear weapons are at the lower end of the range of destructive power and are used against military personnel or other military targets. Those who make a distinction of this character define strategic weapons as weapons of high yield used against the civilian population or against civilian and military targets indiscriminately. A distinction of this character is relied upon by some, but not all, of the writers who uphold the legality of the use of "tactical" nuclear weapons or the use of nuclear weapons against military targets in such a way as to avoid great harm to the civilian population. 237/ Those who find lawful the use of nuclear weapons against troops are persuaded that such weapons are not poisonous, do not cause unnecessary suffering and do not fall under some other prohibition of customary international law. It is not always clear whether a weapon is regarded as being a tactical one by reason of its inherent nature as a smaller nuclear weapon or by reason of the fact that it is used only against military targets. If some nuclear weapons may be lawfully employed, then it

233/ Berber, op. cit., p. 172; Euler, op. cit., pp. 151 ff.; Schwarzenberger, op. cit., p. 48; Seidl-Hohenveldern, op. cit., p. 288.

234/ "Die Unterscheidung zwischen Zivilbevölkerung und bewaffneten Kräften - Ein Grundproblem des Kriegsrecht in der heutigen Zeit", Internationale Festschrift für Alfred Verdross (1971), p. 65.

235/ Wengler, op. cit., p. 1396; Pinto, op. cit., pp. 314-315 (but inclining to the view that tactical nuclear weapons may be regarded as unlawful); Scheuner, "Krieg und Kriegswaffen im heutigen Völkerrecht", Atomzeitalter (1959), p. 90; Euler, op. cit., pp. 151 ff.; Menzel, Legalität oder Illegalität von Atomwaffen (1960), pp. 17-18 (finding both types to be unlawful by reason of their radio-activity and resultant danger to civilians); Spetzler, op. cit., p. 99; von der Heydte, Völkerrecht (1960), p. 254.

236/ Charlier, loc. cit., pp. 355-356; Scheuner, loc. cit.

237/ Tucker, loc. cit., pp. 54-55; Moreno Quintana, Tratado de derecho internacional (1963), vol. 2, p. 650 (referring to atomic artillery); Spetzler, op. cit.; Euler, op. cit.; Verdross, Völkerrecht, 5th ed. (1964), p. 479; Bindschedler, "Die Unterscheidung zwischen Zivilbevölkerung und bewaffneten Kräften ...", loc. cit., p. 65; Castrén, op. cit., p. 206.

/...

follows that nuclear weapons are not per se unlawful. However, if there is something inherent in the nature of smaller and "cleaner" nuclear weapons called "tactical" that sets them apart from "strategic weapons", then it could be said that "strategic" weapons as a category are unlawful per se.

(d) Use of nuclear weapons in reprisal or self-defence

107. The question whether all or some nuclear weapons are unlawful per se or are unlawful depending on the scale of their use and their targets is related to the issue whether nuclear weapons may be used in reprisal. Some of those who maintain that nuclear weapons are unlawful per se deny that they may be used by way of reprisal. 238/ Those who consider that use in reprisal is lawful - a view which appears to be more widely entertained - generally qualify this conclusion with an assertion that such use is lawful only by way of reprisal against a first use of nuclear weapons by the enemy - not against other violations of the law of war. 239/ Related to this problem is the question whether nuclear weapons may be used in the exercise of the inherent right of individual or collective self-defence under Article 51 of the Charter. Comparatively few authorities have directed themselves to this question, but the prevailing view seems to be that a violation of Article 2 (4) of the Charter does not of itself permit the victim of an unlawful use of force to employ nuclear weapons. 240/

(e) Consideration of the question by the Institut de Droit International

108. At its Edinburgh Conference of 1969, the Institut de Droit International adopted a resolution on "The distinction between military objectives and

238/ Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", loc. cit., p. 445; Setalvad, loc. cit., p. 388; Charlier, loc. cit., p. 357 (alluding to the danger of allowing use in reprisal).

239/ Berber, op. cit., p. 166; Menzel, Legalität oder Illegalität der Anwendung von Atomwaffen (1960), pp. 56 ff.; Schwarzenberger, op. cit., p. 48; Singh, op. cit., pp. 222-223; Euler, op. cit., p. 166; Bindschedler, "Die Unterscheidung zwischen Zivilbevölkerung und bewaffneten Kräften ...", loc. cit., p. 65; Meyrowitz, "Les juristes devant l'arme nucléaire", loc. cit., pp. 858-859; Schwarzenberger, Report on Self-Defence under the Charter of the United Nations and the Use of Prohibited Weapons, loc. cit., p. 221 (The resolution adopted by the Conference did not allude to the use of nuclear weapons by way of reprisal). Menzel regards as an open question whether "strategic" nuclear weapons may be used in reprisal against the employment of "tactical" nuclear weapons. Lauterpacht's view that "recourse to the atomic weapons may be justified against an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of consideration of humanity and compassion" does not appear to have been widely accepted. Oppenheim, op. cit., p. 351.

240/ Draper, The Red Cross Conventions (1958), pp. 98-99; Menzel, Legalität oder Illegalität der Anwendung von Atomwaffen (1960); Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", loc. cit., pp. 446-447; Singh, op. cit., p. 211. /...

non-military objects in general and particularly the problems associated with weapons of mass destruction" 241/ by a vote of 57 in favour and 1 against, with 2 abstentions. 242/ The last three paragraphs of the resolution provide

"6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.

"7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of "blind" weapons.

"8. Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military objectives and non-military objects."

The resolution, it will be observed, does not refer expressis verbis to nuclear weapons, but von der Heydte, the rapporteur on the subject of weapons of mass destruction, made it clear weapons of mass destruction are largely confined to atomic, bacteriological, and chemical weapons and that nuclear weapons are "le type même des armes de destruction massive". 243/ If a "clean" nuclear weapon could be limited to military objectives, then the weapon would not be one of mass destruction. 244/ The illegality of such a weapon of mass destruction lies in the fact that, even if it is directed against a military objective, there is the danger that it will destroy the civilian population en masse. 245/ Several members of the commission opposed the rapporteur's formulation on the grounds that nuclear weapons do not necessarily cause mass destruction 246/ and that positive international law did not forbid the use of all weapons of mass destruction. 247/

241/ Annuaire de l'Institut de Droit International, vol. 53 (1969-II), p. 377.

242/ Ibid., pp. 124-125.

243/ Exposé préliminaire, 13 March 1961, ibid., vol. 52 (1967-II), pp. 82-83.

244/ Ibid., p. 85.

245/ Ibid., pp. 86-87.

246/ Kunz, ibid., p. 124.

247/ Giraud, ibid., p. 114-115; Chaumont, ibid., p. 229. Several also dissented from the rapporteur's views concerning "blind" and "indiscriminate" weapons. Kunz, for example, maintained that "blind" weapons are ones which cannot be directed with precision against a target (and could therefore include conventional weapons), and that nuclear weapons may bring about indiscriminate destruction without being "blind". Ibid., p. 126.

109. The rapporteur was of the view that most nuclear weapons are poisonous and on that account violate article 23 (a) of the Hague Regulations and the Geneva Protocol of 1925; 248/ they are also weapons which cause unnecessary suffering in the sense of article 23 (e) of the Hague Regulations. 249/ He rejected any distinction between strategic and tactical nuclear weapons. 250/ Von der Heydte's view that weapons of mass destruction may not be used in reprisal 251/ was not accepted by several members of the commission. 252/

C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences

110. The International Committee of the Red Cross submitted "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War" to the XIXth International Red Cross Conference held at New Delhi in 1957. 253/ While a number of the Draft Rules would have affected aerial bombardment with nuclear weapons, the one article dealing with nuclear weapons (as well as chemical and bacteriological weapons) was article 14, the first paragraph of which provided

"Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population." 254/

The commentary of this article explained

"The ICRC therefore decided that the very nature of the Draft Rules did not allow of the introduction of a new rule imposing an absolute ban on nuclear weapons. In addition ..., in its desire to preserve the general nature of the rule in Article 14, the ICRC considered it preferable not to insert a special provision covering these weapons in addition to the reference in the list of instances. But it can easily be seen that the application of Article 14 and also of the rules as a whole would in practice rule out the use of nuclear weapons in the manner which all can remember." 255/

248/ Exposé préliminaire, 13 March 1961, ibid., p. 87.

249/ Ibid., p. 88.

250/ Plenary meeting of 8 September 1969, ibid., vol. 53 (1969-II), p. 99.

251/ Exposé préliminaire, 13 March 1961, ibid., p. 90.

252/ Kunz, ibid., vol. 52 (1967-II), p. 131; Castrén, ibid., p. 108 (but warning that "les conséquences peuvent être désastreuses"); Bindschedler, ibid., vol. 53 (1969-II), p. 105 (noting that the commission had not wished to deal with this problem).

253/ XIXth International Red Cross Conference, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956)

254/ Ibid., p. 12.

255/ Ibid., p. 108

The New Delhi Conference adopted a resolution stating that the aims of the Draft Rules conformed "aux aspirations de la Croix-Rouge et aux exigences de l'humanité" and referring the Draft Rules to Governments. 256/ The Draft Rules were never adopted.

SECTION 6. BOMBARDMENT FROM THE AIR, LAND AND SEA

A. State practice

111. Bombardment, whether from the air, from the sea, or from land may be said to be a mode of warfare rather than a weapon. However, bombardment in all its forms involves the use of shells, bombs, rockets, missiles, and other projectiles of large calibre, and it is impossible to separate the question of the legality or illegality of the weapons from the question of the legality or illegality of the ways in which they are employed.

112. Large-scale land and naval bombardment has been condemned, in general, in statements made by several States in connexion with recent armed conflicts. 257/

(a) The prohibition on attacking the civilian population as such

113. In resolution 2444 (XXIII), unanimously adopted on 19 December 1968, the General Assembly affirmed a resolution adopted at the XXth International Conference of the Red Cross 258/ which laid down the following principles "for observance by all governmental and other authorities responsible for action in armed conflicts"

"(b) That it is prohibited to launch attacks against the civilian populations as such;

256/ Resolution XIII, Revue Internationale de la Croix-Rouge, vol. 39 (1957), p. 684.

257/ See, for instance, the reply from the Chairman of the Council of Ministers of the USSR to a letter from a group of Nobel Prize Winners on the need for a cease-fire in Viet-Nam (Pravda, 14 September 1965); the statements issued by the Soviet Government in 1966 (ibid., 16 December 1966) and in 1968, the latter in connexion with the understanding reached in Paris between representatives of the United States of America and the Democratic Republic of Viet-Nam (ibid., 3 October 1968); the statement adopted at the meeting of the Political Consultation Committee of the States Party to the Warsaw Treaty held on 26 January 1972 (Pravda, 27 January 1972); the statement issued on 17 February 1972 by the People's Republic of Bulgaria (Press Release of 17 February 1972 of the Permanent Mission of the People's Republic of Bulgaria to the United Nations); the statement issued on 6 April 1972 by the Ministry of Foreign Affairs of the Democratic Republic of Viet-Nam.

258/ Resolution XXVII of the Conference held at Vienna, 1965.

"(c) That 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;" 259/

114. These principles have been reflected in the pronouncements of States over the last decades. In connexion with recent armed conflicts, statements have been made by a number of States condemning as illegal the bombing of civilian or peaceful population, populated areas and civilian objectives. 260/ At the threshold of the Second World War, the Assembly of the League of Nations adopted a resolution recognizing that "The intentional bombing of civilian populations is illegal." 261/ In 1939, the President of the United States appealed to each of those States which were then belligerents in the Second World War "publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents." 262/ Affirmative replies were received from all of the recipients of the message. 263/ That the principles have been seriously violated on a number of occasions since 1939 has not destroyed their validity.

115. The Japanese Minister of Foreign Affairs stated in 1964 with reference to the Shimoda case that "he could not state conclusively as a matter of strict law, that the bombing /of Hiroshima and Nagasaki/ had been in violation of international law, inasmuch as no rule of positive international law would appear to have existed on this point." The Director of the Treaties Bureau of the Ministry of Foreign Affairs alluded to the fact that the failure of States to adopt the Hague Rules of Aerial Warfare meant that "there had not been a body of rules directly applicable to the air warfare up to the present." 264/

259/ For an affirmation by the United States of these principles as reflecting customary international law see letter from the General Counsel of the Department of Defense to Senator Kennedy, 22 September 1972, in American Journal of International Law, vol. 67 (1973) p. 122.

260/ See, for instance, in connexion with the situation in the Middle East, the provisional verbatim records of the seventeen-hundred and forty-fourth meeting of the Security Council (S/PV.1744).

261/ Resolution on "Protection of Civilian Populations against Bombing from the Air in Case of War," 30 September 1938, League of Nations Official Journal, Special Supplement, No. 183 (1938), p. 135.

262/ 1 September 1939, in Hackworth, Digest of International Law (1943), vol. 6, p. 267.

263/ Foreign Relations of the United States, vol. 1939-I, pp. 542-546. On 3 September 1939, a joint declaration of the British and French Governments asserted that instructions had been given "prohibiting the bombardment whether from the air, or the sea, or by artillery on land or any except strictly military objectives in the narrowest sense of the word."

264/ House of Representatives, 46th Session of the Diet, Minutes of Standing Committee for Budget, 16th meeting (28 February 1964), pp. 29-32, in Japanese Practice in International Law, Japanese Annual of International Law, vol. 10 (1966), pp. 90-92.

116. A number of military manuals spell out the necessity of maintaining a distinction between the civilian population and military objectives and of sparing the civilian population as much as possible. ^{265/} Other manuals achieve this end by specifying what are and what are not legitimate targets for bombardment. The assertions of States are sometimes limited either to aerial, naval, or land bombardment and on other occasions treat the three forms of bombardment identically.

(b) Permissible and impermissible targets for bombardment

117. The pronouncements of States often echo article 25 of the Regulations annexed to the Hague Convention of 1907 respecting the Laws and Customs of War on Land, which provides that "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." ^{266/} Like other provisions of the Hague Regulations, this article has become part of customary international law, according to the judgement of the International Military Tribunal at Nuremberg. ^{267/} A similar prohibition is to be found in Convention No. IX of The Hague of 1907 concerning Bombardment by Naval Forces in Time of War. ^{268/}

118. In statements made in connexion with recent armed conflict, several States have condemned as illegal the bombing of towns and other populated places, the strafing of houses and hospitals and the destruction of dams and dikes. ^{269/}

119. Manuals sometimes speak in general terms of a prohibition of bombardment of "undefended places" ^{270/} and appear thereby to make the law applicable to (a) relations with States not parties to Hague Convention No. IX (thus suggesting that the norm is one of customary international law) and (b) to aerial bombardment, which is not the subject of any multilateral treaty. Other manuals confine the

^{265/} Armée suisse, op. cit., p. 5; Sweden, in Jagerskiöld and Wulff, op. cit., p. 95; Italy, Legge di Guerra, art. 42, loc. cit., p. 4309.

^{266/} Scott, op. cit., p. 220.

^{267/} See chapter III, infra.

^{268/} Art. 1, Scott, op. cit., p. 260. See chapter I, supra.

^{269/} See, for instance, the statements issued by the Soviet Government in February 1965 (Pravda, 9 February 1965) and June 1966 (ibid., 1 July 1966); the statement of 3 August 1966 by the Supreme Soviet of the USSR (ibid., 4 August 1966).

^{270/} Armée suisse, op. cit., p. 6; Ecuador, Estado Mayor del Ejército, op. cit., p. 40; Federal Republic of Germany, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 31 (which expressly states that article 25 of the Hague Regulations is applicable to aerial bombardment).

prohibitions to land and naval bombardment. 271/ The view of the Austrian Government is that the "defended" character of a place is not relevant in the case of aerial bombardment; in this instance, the criterion is whether the target is a permissible one in the sense of being a legitimate military objective. 272/

120. A number of States identify those objectives that can lawfully be attacked. For example, the Swiss Army manual provides that:

"Only clearly defined and properly identified military objectives may be bombed or subjected to long-range or highly destructive artillery fire. By 'military objectives' is meant, inter alia, armed forces, their equipment and supplies, the locations and buildings occupied by them (barracks, fortresses, arsenals, etc.), militarily significant means of communication and transport, and factories, plants and other establishments directly connected with the activities of the armed forces." 273/

A manual of the Federal Republic of Germany 274/ likewise lists concentrations of troops, defence works, munitions plants, depots of arms and munitions, transportation centres and routes, and generally (in the words of the Hague Air Warfare Rules) any objective the total or partial destruction of which "would constitute a direct military advantage to the belligerent". A defended place which may be bombarded from the ground includes, in the view of the United States, "a fort or fortified place"; a "city or town surrounded by detached defense positions ... /forming/ an indivisible whole"; or a place occupied by a force or through which a force is passing. Legitimate targets for land bombardment are factories producing military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads used for the transport of such munitions and supplies "and other places devoted to the support of military operations or the accommodation of troops." 275/

271/ Great Britain, The Law of War on Land, op. cit., p. 96 (land); United States Army Field Manual, op. cit., p. 19; United States Department of the Navy, Law of Naval Warfare, p. 6-4.

272/ Bundesministerium für Landesverteidigung, Truppenführung (1965), p. 185; Krivinyi, op. cit., pp. 46-47.

273/ Armée suisse, op. cit., p. 6 (Quotation translated into English by the Secretariat).

274/ Federal Republic of Germany, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 32. To the same effect, see Krivinyi, op. cit., pp. 46-47.

275/ United States Army Field Manual, op. cit., p. 19. The Chairman of the Joint Chiefs of Staff recently listed amongst military targets subject to aerial bombardment "logistics lines of supply, warehouses, repair stations, power-plants and communications facilities". Hearings before the sub-committee of the House Committee on Appropriations on Department of Defense Appropriations (Briefings on Bombings of North Viet-Nam), 93d Congress, 1st Session (1973), p. 44.

/...

The position of the United States with respect to aerial warfare 276/ appears to be that the customary international law may be derived from articles 1 and 2 of Hague Convention No. IX and from the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, under article 8 of which it is recognized that the following are vulnerable to armed attack: "any large industrial centre or ... any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication." 277/ Specifically rejected was the view of the Institut de Droit International in its resolution of 1969 that there can be considered as military objectives only those the destruction of which "gives a substantial, specific and immediate military advantage". 278/

121. Several States 279/ have incorporated in instructions to their armed forces express prohibitions on attacks (presumably extending to attacks by way of bombardment) against certain types of installations protected under conventional international law. The French instructions are typical:

"1. Combat troops are under orders to respect hospitals and collection points for sick or wounded civilian or military personnel as well as medical personnel, units, buildings, equipment and transport and to spare buildings intended for religious, artistic, scientific or charitable use and historical monuments, provided that they are not used for military purposes." 280/

(c) Injury to civilians incident to bombardment of military objectives

122. In a number of military manuals, 281/ statements may be found which resemble that in the British Manual of Military Law:

"In defended towns and localities modern methods of bombardment will inevitably destroy many buildings and sites which are not military objectives. Such destruction, if incidental to the bombardment of military objectives, is not unlawful." 282/

276/ Letter from General Counsel of the Department of Defense to Senator Kennedy, 22 September 1972, in American Journal of International Law, vol. 67 (1973), pp. 122-125.

277/ United Nations, Treaty Series, vol. 249, p. 246.

278/ See para. 139 infra.

279/ E.g., Great Britain, The Law of War on Land, op. cit., p. 99; United States Army Field Manual, op. cit., p. 21 (incorporating the provisions of article 27 of the Hague Regulations).

280/ Décret du 1er octobre 1966, portant règlement de discipline générale dans les armées, art. 34, Journal Officiel de la République Française, vol. 98 (1966), pp. 8859-9860, Kiss, op. cit., vol. 6, p. 401 (Quotation translated into English by the Secretariat).

281/ Armée suisse, op. cit., p. 6; Federal Republic of Germany, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 32.

282/ The Law of War on Land, op. cit., pp. 96-97.

/...

However, the assertion that incidental damage is not unlawful is qualified by the condition that the damage caused to civilian objectives and persons must not be out of proportion to the military advantage to be gained. 283/

(d) Target area bombardment

123. Although most military manuals are silent on the subject, several assert that target area bombardment is unlawful. 284/ A manual of the Federal Republic of Germany states that it is unlawful to treat several military targets and the residential areas located between them as one target and to fire on or bombard this entire area indiscriminately. 285/

(e) Bombardment with the intention of terrorizing the civilian population

124. Several military manuals state that bombardment effected with the purpose of terrorizing the civilian population is unlawful. 286/

B. Doctrine

125. There is widespread dissatisfaction with the state of the law, whether conventional or customary, with respect to aerial bombardment, as well as with respect to bombardment in land warfare or by naval forces. The authorities are

283/ Armée suisse, op. cit., p. 6; Federal Republic of Germany, Völkerrechtliche Grundsätze der Landkriegsführung, op. cit., p. 22. The German manual goes on to stipulate that in choosing targets, the effects on the civilian population must be taken into account. If a choice exists between several military targets in order to achieve a military object, that target must be chosen firing on which causes the least danger to the civilian population; and if a choice of means to achieve the military object exists, that means must be chosen which can be expected to have the least effect on the civilian population. Ibid. The United States view appears to be that "The correct rule of international law which has applied in the past and continued to apply in the conduct of our military operations in South-East Asia is that 'the loss of life and damage to property must not be out of proportion to the military advantage to be gained.'" Letter from the General Counsel of the Department of Defense to Senator Kennedy, 22 September 1972, in American Journal of International Law, vol. 67 (1973), pp. 124-125.

284/ Austria, Bundesministerium für Landesverteidigung, op. cit., p. 278; Krivinyi, op. cit., pp. 46-47.

285/ Völkerrechtliche Grundsätze der Landkriegsführung, op. cit., p. 22.

286/ Federal Republic of Germany, ibid., p. 19; Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 32; Krivinyi, op. cit., pp. 46-47; United States, Department of the Navy, Law of Naval Warfare, p. 6-4.

heard to say that the law is "fragmentary", 287/ or that it is archaic, 288/ or that it is unrealistic. 289/ An examination of the literature shows that the Hague Rules of Aerial Warfare of 1922 290/ are often described but are only selectively cited as evidence of a presently existing rule of law. 291/ Some writers expressly state that they are not, and have not been, a source of law binding on belligerents. 292/ Throughout the literature runs a concern that the large-scale bombardments of the Second World War, technological developments, especially the invention of nuclear weapons, and the mobilization of the total economy of a country in support of its war effort have called in question what fragile legal restraints there are. 293/ But a more hopeful note is struck by such authorities as von der Heydte 294/ and Verdross, 295/ who maintain that the general legal principles that govern bombardment, especially from the air, were not invalidated by the course of hostilities in the Second World War.

287/ Silbert, "Remarques et suggestions sur la protection des populations civiles contre les bombardements aériens", Revue Générale de Droit International Public, vol. 59 (1955), p. 183. This leads him to suggest that there should be a total prohibition of aerial bombardment, both of non-combatants and combatants. Ibid., p. 188. In this, he echoes an earlier proposal for a complete prohibition of bombardment from the air, such as that made by Strupp. "Schranken eines Verbots des Luftwaffe und die Möglichkeit ihrer Beseitigung", Zeitschrift für Völkerrechts, vol. 16 (1932), p. 574.

288/ Rousseau, op. cit., p. 349; Lubrano-Lavadera, Les lois de la guerre et de l'occupation militaire (1956), p. 29.

289/ Kunz, "The Laws of War", American Journal of International Law, vol. 50 (1956), p. 316.

290/ Great Britain, General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Cma. 2201 (1924), p. 15, American Journal of International Law, vol. 17, Supplement (1923), p. 245. See para. 141 infra.

291/ E.g., Delbez, op. cit., p. 563; Guggenheim, op. cit., p. 430.

292/ E.g., Verdross, op. cit., pp. 477-479 (but stating that they may nevertheless be applications of general principles of the law of war); Spaight, op. cit., pp. 42-43.

293/ Monaco, Manuale di Diritto Internazionale Pubblico (1960), pp. 444-445; Oppenheim, op. cit., pp. 527-530; Balladore Pallieri, op. cit., p. 241; Tucker, loc. cit., pp. 146-149; D. Bindschedler-Robert, "A reconsideration of the Law of Armed Conflicts", loc. cit., pp. 16-18.

294/ Völkerrecht (1960), pp. 249-250.

295/ Op. cit., pp. 478-479.

(a) The prohibition on attacking the civilian population as such

126. Writers in many socialist countries 296/ are of the view that, by virtue of existing international treaties and agreements, in particular the 1907 Hague Convention and the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War, contemporary international law prohibits the bombardment of the peaceful civilian population. They maintain that the entire civilian population, not only in the combat area but throughout the territory of the belligerents, is protected from aerial bombardment under international law. An additional argument in support of this conclusion is found in article 25 of the Hague Regulations of 1907, prohibiting the inflicting of damage on the civilian population and its property "by whatever means", thus ensuring protection against operations by military aircraft. Those writers also cite General Assembly resolution 2444 (XXIII), adopted in 1968, which refers specifically to the protection of civilian populations "as such". Yugoslav writers in general refer to the illegality of mass bombing directed against the civilian population. 297/

127. Authorities in other countries start their analysis of the legality of aerial bombardment by laying down the general principle that the civilian population may not be the direct object of aerial bombardment. 298/ Related to this is the principle that bombardment undertaken with the purpose of terrorizing the civilian population is unlawful. 299/ The rule that civilians may not be the direct object of attack undergoes some qualification at the hands of

296/ See Kurs mezhdunarodnogo prava (1969), vol. V, pp. 317-318; Kozhevnikov, ed., Kurs mezhdunarodnogo prava (1972), p. 367; E. A. Korovin, Voprosy mezhdunarodnogo vozdušnogo publichnogo prava (1932); I. P. Blishchenko, "Vooruzhenny konflikt i sovremennoe mezhdunarodnoe pravo", Sovetskoe gosudarstvo i pravo, 1971, No. 9; V. V. Egoryev, "Pravo vozdušnoi voyny", Vestnik vozdušnogo flota, 1920, Nos. 2-4; Rostocki, "Polskie Wytyczne 1939: dot. bombardowania powietrznego na tle rozwoju prawa wojny lotniczej", Zeszyty Nukowe Uniwersytetu Łódzkiego, vol. 57 (1968), p. 51; M. D'estefano, op. cit.

297/ See Gozze-GučetićVuko, "Bombardovanje po Medjunarodnom ratnom pravu", Vojno delo, 1959, No. 6; M. Jovanović, "Regulisanje vazdušnog rata u medjunarodnom ratnom pravu", Vazduhoplovni glasnik, 1956, No. 4; M. Jovanović, "Vazdušno bombardovanje i medjunarodno ratno pravo", Yugoslovenska revija za medjunarodno pravo, 1958, No. 2.

298/ Sloutzky, "La population civile devant la menace de destruction massive", Revue Générale de Droit International Public, vol. 59 (1955), pp. 227-228; Sloutzky, "Le bombardement aérien des objectifs militaires", ibid., vol. 61 (1957), p. 366; Czesany, op. cit., p. 145; Verdross, op. cit., p. 479; Reuter, op. cit., p. 316; Guggenheim, op. cit., p. 70; Meyrowitz, "Les juristes devant l'arme nucléaire", loc. cit., p. 851; Castrén, op. cit., p. 404; D. Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts", loc. cit., pp. 18-19; Abu-Hayf, op. cit., p. 838.

299/ See para. 137 infra.

those who uphold the legality of target-area bombardment primarily directed to the destruction of military objectives. 300/ There are also some who assert that while indiscriminate bombardment of the civilian population and attacks on civilians taking no part in the war effort are prohibited, international law does not preclude attacks on those civilians who work in munitions factories or otherwise labour in direct support of military activities. 301/ This qualification necessarily entails the legitimacy of attacks upon those places in which munitions workers and the like live, as they are in any event exposed to attack when they are within such legitimate military objectives as munitions factories.

128. Recognition is given to the increasing difficulty of making a distinction between persons and places which are part of the war effort of a belligerent, on the one hand, and those civilians whose peaceable character and abstention from war-related work entitle them to immunity, on the other hand. 302/ To various international lawyers, the distinction has become theoretical and nominal only 303/ or the simple prohibition of attacks on civilians quite unworkable. 304/

(b) Permissible and impermissible targets for bombardment

129. Authors in a number of countries consider in general that bombardment of non-military objects is prohibited for reasons similar to those advanced as regards the bombardment of the civilian population. 305/ Reference is made in particular to article 25 of the Hague Regulations of 1907 which prohibits the bombardment of undefended towns, villages, dwellings and buildings.

130. Elsewhere some authorities also apply by analogy the law relating to

300/ See para. 136 infra.

301/ Spaight, op. cit., p. 277 (while condemning indiscriminate bombardment of the general civilian population); Oppenheim, op. cit., p. 525 (although it is not clear whether Lauterpacht, the editor of this treatise, intends by this munitions workers when they are within factories or when they are in their dwellings as well); Stone, op. cit., p. 629; McDougal and Feliciano, op. cit., p. 647; Schwarzenberger, "The Law of Air Warfare and the Trend Towards Total War", American University Law Review, vol. 8 (1959), p. 17. An extensive interpretation of lawful targets is found in Balladore Pallieri, op. cit., pp. 241-242.

302/ See authorities cited, note 301 supra.

303/ Tucker, loc. cit., pp. 147 and 149.

304/ Adler, "Targets in War: Legal Considerations", Houston Law Review, vol. 8 (1970), p. 23.

305/ See para. 126, note 296, supra.

bombardments on land and condemn as unlawful any bombardment of an undefended place, as that prohibition is found in article 25 of the Hague Regulations. 306/ It is commonly pointed out 307/ that in the case of naval bombardment, which is governed by articles 1 and 2 of the Hague Convention of 1907 concerning Bombardment by Naval Forces in Time of War, 308/ certain military objectives may, in addition to defended places, be subjected to bombardment by naval vessels. The preponderant view appears to be that the rule of customary international law flowing from article 25 and regulating land warfare cannot be applied by analogy to aerial warfare. 309/ Here, the writers say, the governing rule is that only legitimate military objectives, whether defended or undefended, may be attacked and that places other than these must not be bombarded. It is emphasized that this distinction between military and civilian objectives still holds true. 310/

131. The question then becomes what are military objectives. The generally accepted targets are those identified in article 24 of the Hague Rules of Aerial Warfare, namely "military forces, military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes". 311/ Beyond this, there is no harmony of views, and there has even been some questioning of several

306/ E.g., Accioly, op. cit., p. 311; Delbez, op. cit., p. 532; Greenspan, op. cit., p. 332; Pinto, op. cit., pp. 320-321; Shabat, op. cit., p. 574. However, Castrén takes a contrary view in holding that "Although article 25 of the Land War Regulations is still formally in force, it seems to have been de facto repealed by contrary practice". Op. cit., p. 199. Lauterpacht points out that article 25 was "a decided advance in the view taken by International Law" and "it is doubtful how far practice came up to the new standard". Oppenheim, op. cit., p. 418. The learned editor of Oppenheim also suggests that long-range artillery bombardment should be governed by the same law as that applicable to aerial bombardment. Ibid., p. 420.

307/ E.g., Tucker, loc. cit., p. 143; Stone, op. cit., p. 588; Colombos, The International Law of the Sea, 6th ed., pp. 542-545; Reuter, op. cit., p. 323.

308/ Scott, op. cit., pp. 260-261. See Chapter I supra.

309/ Czesany, op. cit., p. 22; Guggenheim, op. cit., p. 430; Menzel, Völkerrecht (1962), p. 368; McDougal and Feliciano, op. cit., p. 643; Adler, loc. cit., pp. 26-27; Stone, op. cit., p. 621; Spetzler, op. cit., p. 32; Abu-Hayf, op. cit., p. 838; Accioly, op. cit., p. 341. Verdross takes the view that article 25 of the Hague Regulations has application to tactical aerial bombardments of places which are open to occupation, whereas article 25 has no relevance to strategic air warfare directed to the destruction of installations of military relevance. Völkerrecht, 5th ed. (1964), p. 478.

310/ Von der Heydte, "Luftbombardment", Strupp-Schlochauer, op. cit., vol. 2, p. 436; Meyrowitz, "Les juristes devant l'arme nucléaire", loc. cit., p. 851.

311/ As referred to para. 141 infra. Among the authorities which favour the list of permissible targets in these Rules are Accioly, op. cit., p. 341; Delbez, op. cit., pp. 562-563; Menzel, op. cit., p. 368 (by implication); Guggenheim, op. cit., p. 430.

/...

of the categories in the Hague Rules. Several authorities have expressed approval of the limiting criterion of "fundamental military importance" introduced in the draft Rules prepared by the International Committee of the Red Cross. 312/ They also appear to approve the addition in these Rules of such objectives as broadcasting and television stations, installations providing energy mainly for national defence and experimental research centres for the development of weapons and war material. 313/

132. Reference has already been made to the views of those authorities who maintain that the civilian population engaged in the manufacture of goods in support of the military effort of a belligerent are legitimate objects of attack, whether in their factories or their homes. 314/

133. Article 27 of the Hague Regulations requires that measures be taken to spare in bombardments buildings devoted to religious, cultural, charitable, and medical purposes and those buildings which are of historic significance. But in addition to these, some international lawyers have mentioned as prohibited targets dikes, 315/ nuclear plants, 316/ and food supplies and crops destined for the civilian population. 317/

134. The notion of an enumerative list of permissible or impermissible targets is rejected by a number of authorities. 318/ In the United States in particular, there is a school which considers that the question is a relative one. 319/ As put by McDougal and Feliciano, "... /T/he appreciation of the substantiality of any particular degree of military utility exhibited by specific objects is, of course, dependent upon the particular dimension and characteristics of

312/ See para. 144 infra.

313/ Bindschedler, "Die Unterscheidung zwischen Zivilbevölkerung und bewaffneten Kräften ...", loc. cit., pp. 66-67; Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts", loc. cit., p. 25.

314/ See authorities cited in note 301 supra. and Desaussure, "The Laws of Air Warfare: Are There Any?", The International Lawyer, vol. 5 (1971), p. 534.

315/ Adler, loc. cit., p. 39. D'Amato, Gould, and Woods, "War Crimes and Viet-Nam: The 'Nuremberg Defense' and the Military Service Resister", in Falk, op. cit., vol. 3, pp. 434-435.

316/ Von der Heydte, "Militärische Objekte", in Strupp-Schlochauer, op. cit., vol. 2, p. 525.

317/ Adler, loc. cit., pp. 37-39; Bindschedler-Robert, "A Reconstruction of the Laws of Armed Conflicts", loc. cit., p. 25; Wengler, op. cit., p. 1400.

318/ Czesany, for example, favours a mixed general and exemplary definition. Op. cit., p. 49.

319/ Adler, loc. cit., pp. 25, 32-36; Falk, "The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki", American Journal of International Law, vol. 59 (1965), p. 792.

particular conflicts and the shape of prevailing conceptions of military strategy and tactics". 320/ In an "all-out attrition conflict" objects not of military utility are much more narrowly defined than in a limited war. 321/

(c) Injury to civilians incident to bombardment of military objectives

135. The authorities normally state that injury to civilian installations which is incidental to bombardment of legitimate military objectives is not prohibited by customary international law. 322/ However, as put by Tucker, "the problem of determining the limits of 'incidental' injury ... becomes crucial", and "The failure to provide a concrete solution to this problem may well mean that from a practical point of view the general prohibition against making non-combatants the direct object of attack will prove no more than nominal". 323/

(d) Target area bombardment

136. There is a conflict of views on the permissibility of target area bombardment. A substantial segment of opinion considers such bombardment to violate the prohibition of bombardment of the civilian population as such, the limitation of aerial bombardment to military targets, the rule against indiscriminate attacks on civilians, and the rule of proportionality. 324/ Several writers uphold the legality of target area bombardment, as practised during the Second World War, in view of the necessity of bombing areas in which there are civilians in order to bring about the destruction of military objectives which are scattered amongst the civilian population. 325/ It has been suggested that the legality of this practice must vary according to the circumstances 326/

320/ Op. cit., p. 644.

321/ Ibid. And see the distinction between the use of aerial bombardment in the Second World War and the Viet-Nam Conflict made by Taylor in Nuremberg and Vietnam: An American Tragedy (1970), pp. 142-143.

322/ Menzel, op. cit., p. 368; Reuter, op. cit., p. 316; Guggenheim, op. cit., p. 430; Stone, op. cit., pp. 629-630; Spaight, op. cit., p. 47; Singh, op. cit., p. 193; Adler, loc. cit., pp. 29-30.

323/ Tucker, loc. cit., p. 149.

324/ Castrén, pp. 403-404; von der Heydte, "Luftbombardment", loc. cit., p. 437; Berber, op. cit., p. 182; Spetzler, op. cit., p. 290, n. 413; Sibert, loc. cit., pp. 186-187; Bindschedler, loc. cit., p. 62; Cansacchi, op. cit., pp. 136-137.

325/ Spaight, op. cit., p. 271; Stone, op. cit., p. 627; Schwarzenberger, "The Law of Air Warfare and the Trend Towards Total War", Mélanges en l'honneur de Gilbert Gidel (1961), p. 541.

326/ Lauterpacht takes a somewhat equivocal position on this question but seems to reach the conclusion that target-area bombardment is not unlawful unless it is used indiscriminately or to terrorize the civilian population. Oppenheim, op. cit., pp. 528-530; and see Desaussure, loc. cit., p. 537; and Taylor, op. cit., pp. 142-143.

/...

and that such bombing "is admissible only in zones of military operations ... and zones where military objectives are contiguous and cover a considerable part of the relevant territory". 327/

(e) Bombardment with the intention of terrorizing the civilian population

137. The authorities frequently state that aerial bombardment intended to terrorize the civilian population is in violation of international law. 328/ It has been pointed out that such bombardment is not militarily advantageous because it only strengthens the will of the civilian population to resist. 329/

(f) Proportionality between injury to the civilian population and military advantage gained

138. As a corollary to other rules limiting aerial bombardment, a requirement of proportionality is not infrequently referred to in the literature - that is that the military advantage to be gained must not be out of proportion to the destruction caused to the civilian population. 330/ The means by which this weighing is to be accomplished are not specified, although reference is made to the relatively simple cases in which the presence of a few soldiers or a small armament factory is no justification for target-area bombardment. 331/ The rule of proportionality is differently viewed by the authorities, some viewing it as a limitation additional to other rules of aerial bombardment, while others simply balance military needs against the degree of destruction inflicted on the civilian population in order to determine whether targets may lawfully be attacked. 332/

(g) Consideration of the question by the Institut de Droit International

139. The resolution adopted by the Institut de Droit International at its Edinburgh Conference of 1969 on "The distinction between military objectives and

327/ Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts", loc. cit., p. 26. A similar view seems to be taken by Greenspan. Op. cit., pp. 336-338.

328/ Sibert, loc. cit., p. 185; Cansacchi, op. cit., p. 136; Pinto, op. cit., pp. 325-326 (including within the prohibition the creation of "free fire zones"); Greenspan, op. cit., p. 337; Guggenheim, op. cit., p. 431; Singh, op. cit., p. 195; Abu-Hayf, op. cit., pp. 838-840; Haug, "Ansätze der Weiterbildung der Kriegesrecht", Festschrift für Walther Hug (1968), p. 437. Stone, however, regards bombardment with this purpose as not violative of international law. Op. cit., pp. 629-630.

329/ Adler, loc. cit., p. 41.

330/ Sloutzky, loc. cit., p. 375; Pinto, op. cit., p. 323; Singh, op. cit., p. 193; Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts", loc. cit., pp. 26-27; Greenspan, op. cit., p. 335.

331/ Wengler, op. cit., pp. 1399-1400.

332/ McDougal and Feliciano, op. cit., pp. 528, 616, 650 and 652; Adler, loc. cit., p. 46.

non-military objects in general and particularly the problems associated with weapons of mass destruction" 333/ deals in detail with the distinction between lawful and unlawful bombardment. The resolution noted that the "general principles of international law, the customary rules and the conventions and agreements which clearly restrict the extent to which the parties engaged in a conflict may harm the adversary ... have kept their full validity notwithstanding the infringements suffered" and that the rules enunciated in the resolution "form part of the principles to be observed in armed conflicts". 334/ The operative paragraphs of the resolution provided

1. The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force.

2. There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.

3. Neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered as military objectives, nor yet

(a) under whatsoever circumstances the means indispensable for the survival of the civilian population,

(b) those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs.

4. Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes to such an extent as to justify action against them under the rule regarding military objectives as set forth in the second paragraph hereof.

5. The provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means.

6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.

333/ Annuaire de l'Institut de Droit International, vol. 53 (1969-II), p. 375.

334/ Preamble of the resolution.

The resolution was adopted by a vote of 57 in favour and 1 opposed, with 2 abstentions. 335/

140. During the consideration of the draft of the resolution in the commission dealing with the subject and by the Institut itself, some skepticism was expressed about the practicability of jurists' reaching any solution of the problem of bombardment, notably from the air. It was pointed out that any definition of a non-military objective was more or less "arbitraire et illusaire, la guerre étant par nature inhumaine", 336/ that there is no possibility of using high explosive bombs without any damage to the civilian population and that all one can ask of the law of war is that it keep damage to a non-military objective to a minimum, 337/ and that as to the dividing line between military and non-military objectives "changes may have occurred, which are not fixed by conventional laws of war". 338/ To these and like objections, the rapporteur, Von der Heydte replied that if one were to abandon the distinction between military and civilian objectives, it would become impossible to determine the legality or the illegality of weapons, other than those which are formally prohibited, such as poisoned weapons. The maintenance of the distinction is a sine qua non for a solution of the problem of weapons of mass destruction. 339/ The distinctions between industrial zones, which could lawfully be bombarded, and workers' homes, which could not be, he conceded, were not easy to draw in practice but difficulties must not be allowed to stand in the way of making the theoretical distinction. 340/ It may be observed that Bindschedler drew particular attention to the fact that some weapons, such as thermonuclear weapons and large-calibre nuclear weapons, gas in most cases, and bacteriological weapons, are illegal per se, while in the case of other weapons it is the conditions under which they are employed and the targets against which they are directed which are the criteria of their illegality. 341/

C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences

141. A resolution adopted at the Conference on the Limitation of Armament at

335/ Annuaire de l'Institut de Droit International, vol. 53 (1969-II), pp. 124-125.

336/ Giraud, ibid., vol. 52 (1967-II), p. 26, and to like effect Brüel, ibid., p. 6.

337/ Feliciano, ibid., vol. 53 (1969-II), p. 101. He went on to point out that a military operation would become unlawful when weapons were used in such a way as to make impossible the reduction to a minimum of the damage caused to non-military objectives. Ibid., p. 102.

338/ Kunz, ibid., vol. 52 (1967-II), p. 239.

339/ Exposé préliminaire, 13 March 1961, ibid., p. 77.

340/ Rapport définitif, April 1967, ibid., p. 182.

341/ Ibid., pp. 213-215.

Washington in 1922 called for the appointment of a commission representing the United States of America, the British Empire, France, Italy, and Japan to consider whether the then existing rules of international law adequately covered new methods of warfare developed since the Hague Conference of 1907 and what changes in existing rules ought to be adopted. ^{342/} The Commission, meeting in 1922 and 1923, drew up Rules of Aerial Warfare, ^{343/} of which four articles are directly relevant to aerial bombardment:

"Article 22

Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

Article 23

Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

Article 24

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

^{342/} American Journal of International Law, vol. 32, Supplement (1938), p. 1; Great Britain, General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Cmd. 2201 (1924), p. 4.

^{343/} Ibid., p. 15; American Journal of International Law, vol. 17, Supplement (1923), p. 245, and ibid., vol. 32, Supplement (1938), p. 12.

(5) A belligerent state is liable to pay compensation for injuries to person or property caused by the violation by any of its officers or forces of the provisions of this article.

Article 25

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects, or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white background, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible."

142. The Report of the Commission expressly stated that "for aerial bombardment the test adopted in article 25 of the Land Warfare Regulations that of the town, etc., being defended as abandoned". 344/

143. The Hague Rules of Aerial Warfare, as they came to be known, were never incorporated in any treaty.

144. In 1956, the International Committee of the Red Cross released "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War", 345/ for consideration by the XIXth International Red Cross Conference to be held in New Delhi in the subsequent year. The central articles of the Draft Rules bearing immediately upon aerial bombardment provided:

344/ General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, op. cit., p. 27.

345/ ICRC (September 1956), Revue Internationale de la Croix-Rouge, vol. 38 (1956), pp. 483, 556, 623 and 695. On the legal context of the Draft Rules, see Mirimanoff-Chilikine, "Protection de la population et des personnes civiles contre les dangers résultant des opérations militaires", Revue Belge de Droit International, 1971, p. 619 and ibid., 1972, p. 101.

Chapter II. Objectives barred from attack

Article 6

Attacks directed against the civilian population, as such whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups.

In consequence, it is also forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population.

Nevertheless, should members of the civilian population, Article 11 notwithstanding, be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective.

Article 7

In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.

Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules.

However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.

Chapter III. Precautions in attacks on military objectives

Article 8

The person responsible for ordering or launching an attack shall, first of all:

(a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified.

When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population;

(b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population.

He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated;

(c) whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter.

Article 9

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.

Article 10

It is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives.

Article 11

The Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in an attack - in particular by removing them from the vicinity of military objectives and from threatened areas. However, the rights conferred upon the population in the event of transfer or evacuation under Article 49 of the Fourth Geneva Convention of 12 August 1949 are expressly reserved.

Similarly, the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces, military material, mobile military establishments or installations, in towns or other places with a large civilian population.

Chapter IV. Weapons with Uncontrollable Effects

Article 14

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

This prohibition also applies to delayed-action weapons, the dangerous effects of which are liable to be felt by the civilian population.

Article 17

In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations - such as hydro-electric dams, nuclear power stations or dikes - through the releasing of natural or artificial forces, the States or Parties concerned are invited:

- (a) to agree, in time of peace, on a special procedure to ensure in all circumstances the general immunity of such works where intended essentially for peaceful purposes;
- (b) to agree, in time of war, to confer special immunity, possibly on the basis of the stipulations of Article 16, on works and installations which have not, or no longer have, any connexion with the conduct of military operations.

The preceding stipulations shall not, in any way, release the Parties to the conflict from the obligation to take the precautions required by the general provisions of the present rules, under Articles 8 to 11 in particular.

145. The New Delhi Conference of the International Red Cross adopted a resolution stating that the aims of the Draft Rules conformed "aux aspirations de la Croix-Rouge et aux exigences de l'humanité" and referring the Draft Rules to Governments. ^{346/} The Draft Rules have not been incorporated in any treaty.

146. At the XXth International Conference of the Red Cross in Vienna, the question of the protection of the civilian population against the dangers of modern warfare was once more considered. The Conference adopted a resolution ^{347/} declaring that

^{346/} Resolution XIII, Revue Internationale de la Croix-Rouge, vol. 39 (1957), p. 684.

^{347/} Resolution XXVIII, ibid., vol. 47 (1965), p. 543; International Review of the Red Cross, vol. 5 (1965), p. 588.

all Governments and other authorities responsible for action in armed conflicts should conform to four basic principles, two of which have particular application to aerial bombardment. These are:

- "- That it is prohibited to launch attacks against the civilian populations as such;
- that 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."

It was these principles that were reaffirmed by the General Assembly in resolution 2444 (XXIII).

SECTION 7. FRAGMENTATION BOMBS

A. State practice

147. No evidence of State practice was found concerning fragmentation bombs.

B. Doctrine

148. Several American authors have asserted, in the context of aerial bombardment in the war in Viet-Nam, that the use of anti-personnel fragmentation bombs in areas where military operations were not in progress was inconsistent with international law. 348/ Meyrowitz, without passing judgement on the question, suggests that fragmentation bombs breaking up into small-calibre pellets might be considered as prohibited, either by analogy to dum-dum bullets or as weapons causing unnecessary suffering. 349/

149. Fleck advises caution in drawing up rules dealing with fragmentation bombs, because of their military importance, but recognizes the importance of protecting the civilian population and of avoiding the use of weapons that cause unnecessary suffering. 350/ It has been pointed out that in air warfare, the possibility of confusing areas where civilians live with designated military objectives is very great, so that anti-personnel bombs may mistakenly be dropped on civilians. 351/

150. Because consideration of this type of weapon is a product of the conflict in Viet-Nam, pronouncements on the legality of the weapon are still too sparse to permit the identification of a prevailing view.

SECTION 8. LAND MINES AND BOOBY-TRAPS

A. State practice

151. Comparatively few military manuals concern themselves with land mines and booby-traps. Several manuals of the Federal Republic of Germany characterize as a violation of article 23 (b) of the Hague Regulations, forbidding the killing or

348/ D'Amato, Gould and Woods, loc. cit., pp. 442-443; Falk, A Viet-Nam Settlement: The View from Hanoi, Policy Memorandum No. 34, Center of International Studies, Princeton University (1968), p. 4, quoted in Petrowski, "Law and the Conduct of the Viet-Nam War", loc. cit., p. 499.

349/ "Le droit de la guerre dans le conflit vietnamien", loc. cit., p. 186.

350/ Loc. cit., pp. 18-19.

351/ Taylor, op. cit., pp. 141-142.

wounding of individuals treacherously, the use of harmless-appearing objects which will explode in a person's hands. 352/ A similar prohibition appears in the Austrian manual. 353/

152. The use of land mines is not prohibited, provided they are not laid in areas which serve peaceful purposes, according to the German manuals. 354/ The United States 355/ and British 356/ manuals provide that the explosives contained in land mines are not arms causing unnecessary suffering within the meaning of article 23 (e) of the Hague Regulations.

B. Doctrine

153. The authorities, to the extent that they deal with the question, for the most part uphold the legality of the use of land mines. 357/ However, this assertion is sometimes qualified by the condition that they must not be used in such a way as to imperil civilians. 358/ One writer has observed that the employment of mines against troops is not the use of weapons causing unnecessary suffering or killing treacherously, but that if mines are used so as to affect civilians, article 23 (b) and (e) of the Hague Regulations is violated. 359/ Castrén states that mines which will remain armed for months or years and thus endanger the civilian population should be prohibited, unless laid in military areas but that "The widespread use of these weapons ... discourages observance of any limitations of this kind." 360/ Meyrowitz draws attention to primitive weapons such as "tubes de fer, bourrés de poudre, de ferraille, de tessons de bouteille, de vieux clous, et qui sont déchargés quand l'ennemi est à moins de dix metres" as a violation of article 23 of the Hague Regulations. 361/

352/ Kriegsvölkerrecht: Leitfaden für den Unterricht, op. cit., p. 48;
Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 31;
Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 16.

353/ Bundesministerium für Landesverteidigung, op. cit., p. 253.

354/ Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 18.

355/ United States Army Field Manual, op. cit., p. 18.

356/ The Law of War on Land, op. cit., p. 41, para. 110, note 1.

357/ Balladore Pallieri, op. cit., p. 242; Hyde, op. cit., vol. 3, p. 1818; Knackstedt, "Kampfmittel, Verbotene", loc. cit., p. 187; Greenspan, op. cit., pp. 362-363; McDougal and Feliciano, op. cit., p. 626.

358/ Knackstedt, loc. cit., Greenspan, op. cit., pp. 362-363. Belladore Pallieri holds that the possibility of incidental harm to civilians does not make the use of mines against enemy forces unlawful. Op. cit., p. 242.

359/ Knackstedt, loc. cit. Stone reports that the United Kingdom has in the past maintained that the explosives in land mines do not cause unnecessary suffering. Op. cit., p. 558, note 69.

360/ Op. cit., p. 192.

361/ "Le droit de la guerre dans le conflit vietnamien", loc. cit., p. 186, note 77.

/...

154. There are only fragmentary references to booby-traps in the doctrine. Greenspan condemns them because of the danger they create to civilians, 362/ while McDougal asserts that "belligerents have not raised serious question in respect of the permissibility of 'booby traps'". 363/ Castrén states that the attachment of mines to the wounded, to helpless civilians, or to "objects clearly intended for peaceful purposes" must be condemned. 364/

155. Many authors in Socialist countries 365/ hold that the use of mines in land warfare is not contrary to the provisions of existing international treaties, agreements and customs. They emphasize, however, that the use of booby-traps is contrary to article 23 (b) of the Hague Regulations. In their view, it is absolutely inadmissible to use either mines or booby-traps against civilians, particularly those covered by the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

SECTION 9. MISSILES

A. State practice

156. There is only scant evidence of the position of States with respect to the use of missiles in warfare. A manual of the Federal Republic of Germany requires that they be constructed in such a way that they can be accurately directed against military targets. 366/ The United States 367/ manuals merely state that the explosives contained in "artillery projectiles" and "rockets" do not fall under the interdiction of weapons causing unnecessary suffering.

B. Doctrine

157. In dealing with missiles, a number of the writers of the period after the Second World War looked back to the V-1 and V-2 weapons of that conflict; others have taken into account the intercontinental ballistic missile (ICBM), although if an ICBM has a nuclear warhead, the question of the legality of its use is really one of the legality of nuclear weapons in general.

362/ Op. cit., p. 363.

363/ Op. cit., p. 626.

364/ Op. cit., p. 192.

365/ See G. I. Kozhevnikov, ed., Kurs mezhdunarodnogo prava (1972), chapter XIV; M. Genovski, Osnovi na mezhdunarodnoto pravo (1969).

366/ Federal Republic of Germany, Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 19.

367/ United States Army Field Manual, op. cit., p. 18; Department of the Navy, Law of Naval Warfare, pp. 6-8, note 2.

158. Many writers in Socialist countries 368/ consider that missiles are weapons whose use is not prohibited by international law. They note, however, that there are various provisions in international law which in their view limit the use of missiles for certain purposes. In this respect, reference is made, for example, to General Assembly resolution 1884 (XVIII) calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, and also to the Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, article IV of which repeats this prohibition in treaty form. In addition, reference is made to the 1972 treaties between the USSR and the United States. It is also emphasized that the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Certain Measures with respect to the Limitation of Strategic Offensive Arms, which are mainly designed to curb the arms race, by limiting the entire course of that race, consequently limit the possibility of using missiles.

159. As in the case of aerial bombardment, whether by conventional or nuclear weapons, the concern of the publicists is with the fact that missiles cannot be guided properly, that they will cause grave danger to the civilian population, and that they will be indiscriminate in their effects. The majority of the authorities take the view that a missile, otherwise lawful, becomes unlawful if it cannot be restricted essentially to military targets. If the missile affects

368/ See F.I. Kozhevnikov, ed., Kurs mezhdunarodnogo prava (1972), p. 376; Y. Nikolaev, "SSSR i SShA (k itogam moskovskikh peregovorov)", Mezhdunarodnaya zhizn, 1972, No. 7; I. Chekrov, Novye problemy mezhdunarodnogo prava (1969), pp. 37-50; A. S. Piradov, Kosmos i mezhdunarodnoe pravo (1970), pp. 34-35; Kosmos i mezhdunarodnoe sotrudnichestvo (1963); A. Shevchenko, "Vazhny vklad v realizatsiyu printsipa razorusheniya (k zaklyucheniyu sovetskoamerikanskikh soglashenii ob ogranichenii strategicheskikh voorusheny)", Sovietskoe gosudarstvo i pravo, 1972, No. 10; A. Bolintineanu, Constideratii asupra elaborării regimului juridic al spatiului cosmic in lumina principiilor generale ale dreptului international studii juridice (1960); M. Niciu, Flosirea exclusiv in scopuri pasnice a spatiului cosmic-principin fundamental al dreptului cosmic, studia universitatis Babes-Bolyai (1964); A. Bolintineanu, "Dezvoltarea dreptului international cosmic sistratatul cu privire la principiile de explorare si utilizare a spatiului cosmos si corpurilor ceresti", Revista romana de drept, (1967), N. 6; G. Gal, Space law (Budapest, 1969); G. Reintanz, Weltraumrecht (1967).

military and civilian personnel indiscriminately, it is unlawful. 369/ Von der Heydte would put it in the class of "blind weapons". 370/ Kruse takes this distinction a stage farther in observing that if an ICBM has only relative accuracy over a long distance, its lawfulness may turn on the legality of area bombardment. 371/ If area bombardment is lawful, then the accuracy of the weapon must be assessed relatively to that area.

160. McDougal and Feliciano note that ballistic missiles, which can be launched from the air or from the surface or beneath the surface of land or sea "will perhaps serve to underscore the irrelevance of traditional distinctions about modality of delivery". 372/

161. O'Connell has called attention to the fact that malfunctioning, failure of guidance systems, and deflection of missiles to the wrong targets can imperil neutral shipping at sea. 373/ The same sort of analysis of international law and the new technology of missiles has yet to be performed for other uses of these weapons.

C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences

162. The resolution adopted by the Institut de Droit International on "The distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction" at its Edinburgh session of 1969 contained one provision embracing missiles within its scope

"Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and

369/ Spaight, op. cit., p. 215; Knackstedt, "Kampfmittel, Verbotene", loc. cit., p. 187; Verdross, op. cit., p. 479; Spetzler, op. cit., pp. 326-327 and 331; Kunz, "The laws of War", loc. cit., pp. 332-333; Castrén, op. cit., p. 204; Greenspan, op. cit., pp. 365-367; Czesany, op. cit., p. 150. It has been observed, however, that the "novel terror weapons" V-1 and V-2 were not made the subject of war crimes charges after the Second World War. Phillips, "Air Warfare and Law", George Washington Law Review, vol. 21 (1952), pp. 331-332.

370/ "Atomare Kriegsführung und Völkerrecht", loc. cit., p. 177; Exposé préliminaire, Annuaire de l'institut de Droit International, vol. 52-II (1967), p. 85.

371/ "Geschosse", Strupp-Schlochauer, op. cit., vol. 1, p. 675.

372/ Op. cit., p. 79.

373/ "International Law and Contemporary Naval Operations", British Year Book of International Law, vol. 44 (1970), pp. 61-64; "The Legality of Naval Cruise Missiles", American Journal of International Law, vol. 66 (1972), p. 785.

non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons) as well as of 'blind' weapons." 374/

163. The Draft Rules published by the International Committee of the Red Cross in 1956 referred to a safety device with which missiles would have to be equipped:

"Without prejudice to the precautions specified in article 9, weapons capable of causing serious damage to the civilian population shall, so far as possible, be equipped with a safety device which renders them harmless when they escape from the control of those who employ them." 375/

The commentary explains that the provision is intended to cover the rocket which strays from the radar network. 376/

SECTION 10. DELAYED ACTION WEAPONS

A. State practice

164. No evidence has been found of the contemporary position of States with respect to delayed action weapons.

B. Doctrine

165. Writers in Socialist countries consider that the use of delayed-action weapons, which by their very nature are weapons directed against civilian non-combatants, is illegal. 377/ This view is supported, in particular, by references to article 23 of the Hague Regulations, paragraph (b) of which states that it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army", and to the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

166. Among authors elsewhere Von der Heydte characterizes as unlawful the use of delayed-action bombs, particularly in connexion with target area bombardment

374/ Paragraph 7, Annuaire de l'Institut de Droit International, vol. 52-II (1969), p. 377.

375/ Article 15, paragraph 2, XIXth International Red Cross Conference, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956), p. 115.

376/ Ibid.

377/ Kurs mezhdunarodnogo prava (1969), vol. V, p. 320; R. Bierzanek, op. cit., p. 184.

affecting civilians. 378/ Fauchille regards as perfidious (and on that account presumed a violation of article 24 of the Hague Regulations) the use in the First World War of "mines dites 'à retardement'", which exploded long after the troops that planted them had left the area. 379/ Castrén also regards the use of mines with time ignition as unlawful. 380/

167. The alleged use of delayed-action bombs in the war in Viet-Nam has been considered by several writers to be unlawful. 381/

168. Fleck takes the view that any prohibition of delayed-action weapons should await further study. 382/

C. Relevant considerations on prohibition of use derived from the activity of international organizations and conferences

169. The Draft Rules released by the International Committee of the Red Cross in 1956 contained the following provision:

"Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effect - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

"The prohibition also applies to delayed-action weapons, the dangerous effects of which are liable to be felt by the civilian population." 383/

The commentary explains that "The provision under discussion covers only those weapons whose delayed action is fixed by the persons using them". 384/

378/ "Luftbombarment", Strupp-Schlochauer, op. cit., vol. 2, p. 437.

379/ Op. cit., vol. 2, p. 127.

380/ Op. cit., p. 192.

381/ D'Amato, Gould and Woods, loc. cit., pp. 442-443; Farer and Petrowski, "The Nuremberg Trials and Objection to Service in the Viet-Nam War", Proceedings of the American Society of International Law, 1969, p. 152.

382/ Loc. cit., p. 19.

383/ Art. 14, XIXth International Red Cross Conference, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956), p. 14.

384/ Ibid., p. 113.

SECTION 11. NAVAL WEAPONS

A. State practice

(a) Mines

170. The evidence of the contemporary views of States with respect to the employment of mines in naval warfare is sparse. It is also difficult to isolate the legality of the use of naval mines from related questions of interference with neutral rights, prohibited zones in warfare, and blockade.

171. The few instances of instructions to naval forces with respect to the use of mines come from States that are Parties to Hague Convention No. VIII of 1907 relative to the Laying of Automatic Submarine Contact Mines. 385/ The instructions of France, 386/ the Federal Republic of Germany, 387/ Greece, 388/ Sweden 389/ and the United States 390/ enjoin compliance with the Convention. The German manual adds that the requirement of notification of the laying of mines in the high seas and in passages open to neutral shipping can be considered as part of customary international law and also applies to remote-controlled mines. 391/ The annotation in the United States manual notes that the qualifications contained in articles 2 and 3 of the Convention were sufficient to create serious doubt about whether the treaty would actually give protection to neutral shipping - doubt which it notes was confirmed by the events of the two World Wars. It adds that "it is questionable whether or not these provisions ...

385/ Scott, op. cit., p. 252. See Chapter 1 supra. The deletion from the draft treaty considered at The Hague Peace Conference of 1907 of the articles dealing with where mines might be laid led to a reservation by Great Britain declaring that "mere fact that this Convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's Government from contesting its legitimacy". Ibid., p. 345, listing other reservations to the Convention. The history of the drafting of the Convention is described in Levie, "Mine Warfare and International Law", Naval War College Review, vol. 24 (1972), No. 8, p. 27.

386/ Instructions du Ministre des Armées sur l'application du droit international en cas de guerre, du 31 décembre 1964, in Kiss, op. cit., vol. 6, p. 257 (but under the reservation that all of the belligerents are parties to the Convention).

387/ Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., pp. 35-36.

388/ Handbook of the Public International Law of the Sea and Prize Law, 25 November 1949, art. 25, Hecker and Tomson, eds. Völkerrecht und Prisenrecht: Nationale und Internationale Texte zum Seekriegsrecht, Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg, Dokumente, vol. 39 (1965), p. 168.

389/ Jägerskiöld and Wulff, op. cit., pp. 79-80.

390/ Department of the Navy, Law of Naval Warfare, p. 6-3.

391/ Kriegsvölkerrecht Leitsätze für die allgemeine Ausbildung, op. cit., p. 36

can be considered as applicable to the newer types of mines (magnetic and acoustic) or to the use of aircraft for mine laying". 392/

172. The record of the practice of States in the Second World War is one of extremely extensive use by the major naval Powers of mines, including new forms of magnetic, pressure-operated, and acoustic mines, for defensive and offensive purposes. They were laid in domestic waters, in the territorial waters of the enemy, in straits and other passages used by shipping, and in the high seas. 393/

173. There were complaints in the early stages of the Second World War that proper notifications had not been given to neutrals of the laying of minefields. 394/ Several Latin American countries maintained that mines could be used only in the territorial waters of belligerents and not on the high seas, where they would interfere with the freedom of neutral shipping and that mines should be used only for defensive purposes. 395/ The Norwegian Minister of Foreign Affairs stated that "it is illegal to lay mines with the sole object of intercepting commercial shipping. However, it is practically impossible to prove that the mines have no military objective." 396/ One of the justifications adduced for

392/ Department of the Navy, Law of Naval Warfare, p. 6-8, note 3. The Greek Handbook, cited supra note, p. 168, likewise holds that acoustic and magnetic mines are not covered by The Hague Convention No. VIII of 1907.

393/ See Roskill, The War at Sea, 4 vols. (1954-1961), vol. 1, pp. 44-45, 55-56, 87-89, 95-102, 126, 143, 280-281, 326-327, 498 and 530; vol. 2, pp. 166-168, 255-256, 392-394 and 434; vol. 3-1, pp. 95-96, 288-289, 352 and 353; vol. 3-2, pp. 19-20, 140-142, 163, 181, 231-232, 258-259, 267-271, 274, 370 and 371 (the last referred to operation "Starvation" against Japan); and Morison, History of United States Naval Operations in World War II, 15 vols. (1948-1962), vol. 1, pp. 136-137; vol. 2, pp. 78-79, vol. 4, pp. 229-230; vol. 6, pp. 110-116; vol. 7, pp. 63-64; vol. 8, pp. 32-33; vol. 9, pp. 44-45, 78-79, 340-342, and 346-348; vol. 11, pp. 41-46, 171-173, 372 and 373.

394/ The Netherlands, Overzicht van de voornaamste in verband met den oorlogstoestand door het Ministerie van Buitenlandsche Zaken behandelde en voor openbarrmaking geschikte aangelegenheden (1940), pp. 14-17; Hackworth, op. cit., vol. 6, p. 510. France maintained that French and neutral vessels had been sunk by mines laid by Germany without notification. Rapport au Président de la République Française, Décret du 27 novembre 1939, in Kiss. op. cit., p. 258.

395/ Argentina and Venezuela, Whiteman, Digest of International Law (1968), vol. 10, p. 681. However, it was not possible for the Inter-American Neutrality Committee to reach agreement on a set of rules dealing with the matter. Fenwick, "The Inter-American Neutrality Committee", American Journal of International Law vol. 35 (1941), pp. 31-33.

396/ Whiteman, op. cit., p. 681. A Swedish manual considers that the sowing of mines by Great Britain was not in conformity with the rules of international law. Jägerskiöld and Wulff, op. cit., p. 79.

the First British Reprisals Order, 28 November 1939, was that British, Allied and neutral vessels had been sunk by mines laid by Germany "indiscriminately and without notification". 397/

174. During the war in Viet-Nam, the United States mined the harbour of Haiphong in the Democratic Republic of Viet-Nam. The United States Government defended its action on the ground, inter alia, that it was acting in compliance with the Hague Declaration No. VIII in that

"... /The mines being used are not free-floating mines prohibited by article 1 of the Hague Convention; they do not have the 'sole object of intercepting commercial shipping' forbidden by article 2 of the Convention; every possible precaution has been taken through notification and the like for the security of peaceful shipping, as called for by article 3 of the Convention." 398/

The application of this law under the circumstances might suggest that the United States regarded the Convention as forming part of customary international law.

175. The mining of the harbour of Haiphong was condemned by a number of States. On 11 May 1972, the Soviet Government issued a statement which noted, inter alia: 399/

"... In this way, the United States is trying to disrupt the economic, trade and other relations established by the Democratic Republic of Viet-Nam with other States and to deprive the Democratic Republic of the opportunity to receive aid for its people ... and receive food and other supplies for the peaceful population ...

"As a result of all this, the war is assuming such a nature that the interests of many countries are being more and more seriously affected.

"The mining of the approaches to the ports of the Democratic Republic of Viet-Nam and the attempts to prevent foreign ships from entering its territorial and inland waters are creating a direct threat to the ships of many States carrying cargoes for the population of the Democratic Republic and to the lives of the seamen of those States. Nobody has given the United States the right to restrict anybody's freedom of navigation on the high seas. The measures taken ... constitute a gross violation of the generally recognized principles of freedom of navigation."

397/ Statutory Rules and Orders, vol. /1939/ 2, p. 3606 (No. 1709).

398/ Letter from the Legal Adviser, United States Department of State, 6 June 1972, American Journal of International Law, vol. 66 (1972), p. 838.

399/ Pravda, 12 May 1972.

176. The Chinese Government stated:

"This act of war escalation ... seriously encroaches upon the territory and sovereignty of the Democratic Republic of Viet-Nam, grossly violates the freedom of international navigation and trade and wantonly tramples upon the Charter of the United Nations and international public law. It is a provocation not only against the Viet-Nameese people but against the people of the whole world." 400/

177. A statement issued on 12 May 1972 by the Government of Bulgaria contained the remark that "these actions are contrary to the Geneva Conventions on freedom of navigation. They affect the commercial, economic and other interests of the People's Republic of Bulgaria and of many other countries which maintain normal relations with the Democratic Republic of Viet-Nam, an independent sovereign State. These acts present a real danger to innocent persons." 401/

(b) Submarines

178. There is naturally some question whether the submarine can itself be regarded as a weapon. There can, however, be no doubt that it is an important platform for weapons systems.

179. The practice of States, the most recent of which dates from the Second World War, relates not to the legality of the submarine as a weapon of war per se but to the manner in which it is employed. That question is almost inextricably intertwined with other issues - interference with neutral shipping, the safety of crews and passengers in time of war, the arming of merchant vessels, the establishment of war zones, economic warfare, the right of visit and search, and reprisals.

180. Article 22 of the London Naval Treaty of 1930 had declared as "established rules of international law" that "in their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject" and that in general submarines must not, in the absence of resistance, sink merchant vessels without having first put the passengers and crew in a place of safety. 402/ Whatever may have been the position at the outbreak of the Second World War, the intensification of the conflict at sea in 1939 and 1940 brought directives from Germany that armed merchant ships and ships in convoy would be

400/ Renmin Ribao, 12 May 1972.

401/ Press release of 12 May 1972 of the Permanent Mission of the People's Republic of Bulgaria to the United Nations.

402/ League of Nations, Treaty Series, vol. CXII, p. 65, as incorporated in the London Naval Protocol of 6 November 1936, ibid., vol. CLXXIII, p. 353.

attacked without warning, 403/ followed by a Führer Directive of 24 May 1940 giving the German Navy complete operational freedom in the waters around England. 404/ Restrictions on submarine attacks against German merchant ships in the Skagerrak were removed by Great Britain in May 1940, 405/ and restrictions on submarine attacks against merchant shipping were thereafter lifted in other areas in 1940 and 1941. 406/ The right of reprisals appears implicitly to have served on occasion as justification for those measures. 407/ When the United States entered the war in 1941, the United States undertook unrestricted submarine warfare against Japan; it did not purport to act under any right of reprisal. 408/

181. There is very limited evidence of the contemporary attitudes of States with respect to the employment of the submarine in war. French submarines are required to conform to the same rules of international law that apply to surface ships in their actions against merchant vessels. 409/ The United States manual on naval warfare states that article 22 of the London Naval Treaty, as incorporated in the London Protocol of 1936, is deemed declaratory of customary international law. 410/

B. Doctrine

(a) Mines

182. A substantial number of authorities express skepticism about the effectiveness of Convention No. VIII of The Hague to provide for the security of peaceful shipping. As put by Tucker, a belligerent has only to proclaim that its laying of mines is not for the "sole" purpose of intercepting peaceful shipping to take

403/ Führer's Directive, 30 September 1939, Documents on German Foreign Policy 1918-1945, Ser. D, vol. 8 (1954), p. 176, Whiteman, op. cit., pp. 654-655; Circular telegram of the State Secretary, German Foreign Office, 19 October 1939, Documents on German Foreign Policy 1918-1945, Ser. D, vol. 8 (1954), pp. 319-320, Whiteman, op. cit., p. 656; German Naval Orders of 4 October 1939 and 7 November 1939, ibid., pp. 656-657.

404/ No. 13, 24 May 1940, Documents on German Foreign Policy 1918-1945, Ser. D, vol. 9 (1956), p. 427, Whiteman, op. cit., p. 658.

405/ Speech by Mr. Churchill, 8 May 1940, Great Britain, Parliamentary Debates, House of Commons (5th Ser.), vol. 360 (1940), col. 1351, Whiteman, op. cit., p. 660.

406/ Roskill, op. cit., vol. 1, pp. 172, 334 and 439.

407/ German "Blockade" Announcement, 17 August 1940, United States Naval War College, International Law Documents (1940), p. 48.

408/ Tucker, loc. cit., pp. 66-67, n. 47, quoted in Whiteman, op. cit., p. 661.

409/ Instructions du Ministre des Armées sur l'application du droit international en temps de guerre, 31 December 1964, in Kiss, op. cit., vol. 6, p. 261.

410/ United States Department of the Navy, Law of Naval Warfare, p. 5-11, n. 22.

its conduct outside of the prohibition of the Convention. The reference of article 3 to the obligation to take "every possible precaution ... for the safety of peaceful shipping" applies "when anchored automatic contact mines are employed". Tucker construes this provision to mean that "belligerents may sow anchored automatic contact mines anywhere upon the high seas". And there is no absolute duty to notify neutrals of the laying of a minefield. 411/ Such considerations as these and the practice of belligerents during the Second World War has led a number of writers to assert that the Hague Convention VIII is obsolete, ineffective, 412/ and unlikely to be observed in the future. 413/

183. The development of acoustic and magnetic mines during the Second World War induces certain publicists to assert that these are not regulated by the Hague Convention No. VIII, 414/ which applies only to "automatic contact mines", but this view is not universally held. 415/

184. Some writers who have addressed themselves to the question expressly uphold the legality of the use of mines in the high seas as not forbidden by The Hague Convention No. VIII. 416/ But the qualification is sometimes added that the question is a relative one and the laying of mines must not interfere unreasonably with the right of neutral shipping to navigate upon the high seas. 417/ Among those holding such view are writers in Socialist countries 418/ who point out that the question of the right of belligerents to lay mines in the high seas is not specifically decided by conventions, since international law makes no special reference to areas which it is forbidden to mine. They conclude that mine-laying in the high seas is legitimate under international law provided that the requirements of article 3 of the Hague Convention No. VIII are met.

185. The indiscriminate sowing of mines in the Second World War has been

411/ Tucker, loc. cit., pp. 303-305.

412/ Stone, op. cit., p. 584; McDougal and Feliciano, op. cit., p. 495, n. 271; Sereni, op. cit., p. 1984.

413/ Fenwick, International Law, 4th ed., (1965), p. 699; Colombos, op. cit., p. 533.

414/ Stone, op. cit., p. 584; Guggenheim, op. cit., p. 45, n. 4; Smith, The Law and Custom of the Sea, 3d ed. (1959), pp. 121-122.

415/ Rousseau, op. cit., p. 608; Monaco, op. cit., p. 452, note 51.

416/ Delbez, op. cit., p. 547; McDougal and Feliciano, op. cit., p. 495; Kruse, "Minen", in Strupp-Schlochauer, op. cit., vol. 2, p. 539; Ballardore Pallieri, op. cit., p. 244; Powers, "International Law and Open-Ocean Mining", JAG Journal, vol. 15 (1961), p. 71; Scott, The Hague Peace Conferences of 1899 and 1907 (1911), vol. 1, p. 583; Levie, loc. cit., p. 42.

417/ McDougal and Feliciano, op. cit., p. 2; Kruse, loc. cit., p. 71.

418/ See note 429 infra.

characterized as an unlawful interference with the rights of neutrals. 419/ And the Hague Convention No. VIII, for all of its porosity, is seen by some as being of continuing force 420/ and even to have passed into customary international law. 421/

(b) Submarines

186. The legality of the use of the submarine as a weapon per se is not considered by the authorities. The legal context in which the submarine is considered is that of the destruction of merchant vessels under the London Naval Treaty of 1930 and the London Naval Protocol of 1936 and of the conduct of unrestricted submarine warfare.

187. The practice of the belligerents in the Second World War, the integration of merchant fleets into the military efforts of belligerents and the inevitability of a belligerent's attempts in large-scale hostilities to destroy the economy of the enemy have led to a certain inconclusiveness in the views of the authorities. They refer to the value of the use of the submarine against commerce and the unreality of precluding a belligerent from destroying vessels that it cannot seize. 422/ The unsatisfactory impact of reprisals upon the law is also referred to. 423/

188. Some are led to conclude that the law has changed under the force of events and are willing to assert that submarine attacks without warning on ships carrying goods to or from the enemy are not forbidden. 424/ McDougal suggests that the intensity of measures that may be taken varies with the scale of the conflict and that in a limited war the orthodox rules, such as those of the London Naval Treaty of 1930, apply. 425/

419/ Cansacchi, op. cit., pp. 133-134; Accioly, op. cit., p. 326.

420/ Ibid., p. 327; Ghanim, op. cit., pp. 751-752.

421/ Guggenheim, op. cit., p. 405.

422/ Moreno Quintana, op. cit., vol. 2, p. 682; Tucker, loc. cit., pp. 64-66, 68-69; Stone, op. cit., pp. 606-607; McDougal and Feliciano, op. cit., pp. 565 and 628; Rousseau, op. cit., pp. 614-616.

423/ Tucker, loc. cit., p. 65; Moreno Quintana, op. cit., p. 680.

424/ Stone, op. cit., pp. 606-607; McDougal and Feliciano, op. cit., pp. 626-630 (but warning that circumstances exist in which compliance with a duty to place passengers and crew in a place of safety will not jeopardize the security of the submarine); Taylor, op. cit., pp. 37-38; Burke, "Submarine Warfare and International Law", Yearbook of World Policy, vol. 2 (1960), pp. 195-198. For a defence of the legality of the measures taken by Germany during the Second World War, see Sohler, U-Bootkrieg und Völkerrecht (1956).

425/ McDougal and Feliciano, op. cit., p. 632.

189. A substantial number of those who have considered the subject of submarine warfare consider that the requirements of the London Naval Treaty have not lost their force and that they indeed reflected the state of customary international law. ^{426/} The conduct of belligerents in the two World Wars is thus looked upon as violative of the law rather than a denial of its binding force for those who conduct warfare at sea.

190. The statement of the International Military Tribunal at Nuremberg that it was "not prepared to hold Admiral Doenitz guilty for his conduct of submarine warfare against British arm merchant ships" ^{427/} sheds some light on the present standing of the London Naval Treaty of 1930 and the London Naval Protocol of 1936. The Tribunal went on to allude to the measures taken by Great Britain to integrate its merchant vessels into its military activity, which justified the measures taken by Admiral Doenitz. However, the Tribunal did find Doenitz guilty of violation of the treaties in that he had caused the sinking of neutral vessels without warning in operational zones. This much evidence points to the continued binding force of the London Treaty and Protocol. ^{428/}

191. Works published in some Socialist countries ^{429/} show a definite tendency to strengthen the existing principles and rules of naval warfare in the direction of the greatest possible limitation of the destructive effects of armed conflict at sea. It is felt that the concept of the "peaceful population", in the context

^{426/} Castrén, op. cit., pp. 285 and 289; Oppenheim, op. cit., p. 490; Balladore Pallieri, op. cit., p. 281; Cansacchi, op. cit., p. 124; Podestá Costa, op. cit., p. 130.

^{427/} See chapter III, infra.

^{428/} Oppenheim, op. cit., pp. 492-493; Tucker, loc. cit., pp. 67-70; Robertson, "Submarine Warfare", JAG Journal, vol. 10 (1956), p. 3, quoted in Whiteman, op. cit., vol. 10 (1968), pp. 665-666.

^{429/} See Kurs mezhdunarodnogo prava (1969), vol. V. p.285: F. I. Kozhevnikov, ed., Kurs mezhdunarodnogo prava, p. 368; G. M. Melkov, Nekotorye problemy polnoi demilitarizatsii morskogo dna (1972); A. S. Bakhov, ed., Voенно-морской mezhdunarodno-pravovoi spravochnik (1956); G. A. Antselevich, Nekotorye problemy mezhdunarodnogo prava, kasayushchiesya reglamentatsii voennykh deistvii na more (1970); L. A. Ovanashchenko, Mezhdunarodnoe morskoe pravo (1961); V. F. Meshera, "Problema neitralizatsii otkrytogo morya", Uch, Zap, LVIMU, No. XI, 1958; S. V. Molodtsov, Mezhdunarodno-pravovoi rezhim otkrytogo morya i kontinentalnogo shelfa (1961); A. L. Kolodkin, Pravovoi rezhim territorialnykh vod i otkrytogo morya (1961); G. F. Kalinkin, "Zapretit ispolzovanie morskogo dna v voennykh tselyakh", Mezhdunarodnaya zhizn, 1961, No. 2; V. S. Vereshchetin, Mezhdunarodno-pravovoi rezhim otkrytogo morya (1968); A. P. Kositsin, Vooruzhennnye sily i sposoby voyny na more po mezhdunarodnomu pravu (1955); S. Stefanova, Mezhdunarodno-pravovoi rezhim otkrytogo morya; pravovoi rezhim morskikh prostranstv i voennykh korablei (Sbornik perevodov GDR) (1967); K. Biatkowski, "Wojna podwodna w swietle wyroku MTW wchorvnmberdze", Roczniki Mazynarki Wojennej, 1966, N. 3; Z. Rotocki, "Miedzynarodowo-prawne aspekty wojny podwodnej", Zeszyty Naukowe Uniwersytetu Lodzkiego, 1964, vol. 37; E. Glaser, "Explozazea in scopuzi pasnice a spatilor submarine", Studii si cercetari juridice, 1969, N. 1.

of naval warfare, covers all crew members and passengers of merchant vessels of belligerent as well as neutral States, and the need to protect peaceful shipping on the high seas is regarded as a crucial argument in favour of neutralizing the high seas, particularly those areas of the high seas which are most frequented by merchant vessels. Socialist writers consider it illegal to establish so-called "combat areas" in which any arbitrary actions are possible, since this in practice amounts to a violation of the freedom of the high seas. On the basis of an analysis of international legal instruments and of State practice, Socialist writers conclude that the arming of merchant vessels, in disregard of the provisions of the Hague Convention No. VII relative to the Conversion of Merchant Ships into War Ships but with a request that such vessels should be accorded the legal status of peaceful vessels, obliterates the distinction between military and non-military objects. In such cases, the vessels cannot be regarded as either non-combatants or legitimate combatants and do not come under the protection of international law.

192. The majority of Socialist authors conclude, on the basis of an analysis of the existing international instruments, that submarines are as legitimate a weapon as surface vessels, subject to the reservation that certain methods of using them - such as unrestricted submarine warfare, including the sinking of merchant vessels without warning - are a violation of international law. In this connexion, they cite the documents of the 1921-1922 Washington Conference, the 1936 London Protocol and the 1937 Nyon Arrangement. Yugoslav writers on the laws of naval war uphold the existing agreements on this subject, particularly the Hague Convention. 430/

SECTION 12. WEATHER MODIFICATION

A. State practice

193. More attention appears to have been devoted in the United States than elsewhere to weather modification as a possible weapon of war -- through rainmaking, production of fog, diversion of hurricanes, and the like. The question has been seen as related to the larger matter of environmental modification as a weapon of war.

194. On 11 July 1973, the United States Senate adopted a resolution expressing the sense of the Senate

"that the United States Government should seek the agreement of other governments, including all Permanent Members of the Security Council of the United Nations, to a treaty ... which will provide for the complete

430/ J. Andrassy, "Haške konvencije", Pomorska enciklopedija (1956);
V. Brajković, "Razvok međunarodnog pomorskog ratnog prava (do Haških konvencija)",
Jugoslovenska revija za međunarodno pravo, 2/1958.

cessation of any research, experimentation, and use of any environmental or geophysical modification activity as a weapon of war." 431/

The Executive Branch of the Government did not support the resolution. 432/ In the previous year, the National Advisory Council on Oceans and Atmosphere of the United States had recommended in its first report that an international agreement should be concluded "to eschew the hostile uses of weather modification". 433/

B. Doctrine

195. The dangers posed by the employment of weather modification as a weapon of war have been known for at least two decades. 434/ With the passage of time and the circulation of reports that weather modification had been attempted in the conflict in Viet-Nam, several writers in the United States have called, with an increasing sense of urgency, for measures designed to bring weather modification under control in war. 435/ In the absence of adequate information about the state of the art, those who have directed their attention to weather modification can only suggest that some measures may fall afoul of the prohibitions on indiscriminate damage, uncontrollable weapons, and the causing of unnecessary suffering. 436/ It has been suggested that the creation of rain to conceal military activities is analogous to the use of screening smokes and is on that account not unlawful. 437/

196. Among writers in Socialist countries the view is that the use of weapons such as "weather modification" has not been explored from the viewpoint of international law. It is assumed, however, that such weapons are designed mainly to alter the human environment - in other words, to create conditions which have a marked

431/ Congressional Record, vol. 119 (1973), p. S-13102 (daily ed. 11 July 1973).

432/ Hearings on S. Res. 281 before the Sub-Committee on Oceans and International Environment of the Senate Committee on Foreign Relations, 92d Cong., 2d Sess. (1972), p. 3.

433/ Ibid., p. 155.

434/ H. Taubenfeld, "Weather Modification and Control: Some International Legal Implications", California Law Review, vol. 55 (1967), p. 495.

435/ R. Taubenfeld and H. Taubenfeld, "Some International Implications of Weather Modification Activities", International Organization, vol. 23 (1969), pp. 832-833; Falk, "Environmental Warfare and Ecocide - Facts, Appraisal, and Proposals", in Hearings on S. Res. 281 before the Sub-Committee on Oceans and International Environment of the Senate Committee on Foreign Relations, op. cit., p. 143, and in Oslo Bulletin of Peace Proposals, 1973, No. 1, p. 90; Davis, "Weather Warfare: Law and Policy", Arizona Law Review, vol. 14 (1973), p. 688.

436/ Falk, "Environmental Warfare and Ecocide ...", loc. cit.; Davis, loc. cit., p. 676.

437/ Davis, ibid., pp. 687-688.

adverse effect on the climate and which indiscriminately affect combatants and civilian non-combatants. The conclusion is reached, therefore, that the use of such a weapon in these conditions is contrary to existing international law - articles 22, 23 and 25 of the 1907 Hague Regulations and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War - and that a specific ban on its use is necessary. 438/

438/ See F. I. Kozhevnikov, ed. Kurs mezhdunarodnogo prava (1972), chap. XIV.

PART II. WEAPONS CLASSIFIED ACCORDING TO THEIR EFFECTS

SECTION 13. WEAPONS CAUSING UNNECESSARY SUFFERING

A. State practice

197. The generality of military manuals 439/ incorporate the language of article 23 (e) of the Hague Regulations which forbids the employment of "arms, projectiles, or material calculated to cause unnecessary suffering" ("maux superflus" in the authentic French text). 440/

198. The manuals mention as instances of weapons or use of weapons causing unnecessary suffering

- Shotgun pellets 441/
- Firing on undefended places 442/
- Explosive and incendiary projectiles of a weight below 400 grammes 443/
- Projectiles treated with a substance designed to cause inflammation of wounds 444/
- Dum-dum bullets 445/

439/ Federal Republic of Germany, Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 31; Austria, Bundesministerium für Landesverteidigung, op. cit., p. 253, and Krivinyi, op. cit., p. 10; France, Décret No. 66-749 du 1er octobre 1966 portant règlement de discipline générale dans les armées, art. 34, para. 2, loc. cit., p. 8860; Netherlands, Rules of the Law of War, chap. III, para. 14, and Manual for the Soldier, chap. 7, para. 10; Switzerland, Armée suisse, op. cit., p. 5; Sweden, Jägerskiöld and Wulff, op. cit., p. 75; Italy, Legge di Guerra, art. 35, loc. cit., p. 4307; United States Army Field Manual, op. cit., p. 18, and Law of Naval Warfare, p. 6-8, note 2; United Kingdom, The Law of War on Land, op. cit., p. 41.

440/ Scott, ed., op. cit. See chapter I, supra.

441/ Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 16.

442/ Ibid., p. 20.

443/ Ibid., p. 16.

444/ Ibid., p. 16; United States Army Field Manual, op. cit., p. 18, and Law of Naval Warfare, op. cit., p. 6-8, note 2; United Kingdom, The Law of War on Land, op. cit., p. 41.

445/ Austria, Bundesministerium für Landesverteidigung, op. cit., p. 253 and Krivinyi, op. cit., p. 10; Netherlands, Manual for the Soldier, chap. 7, para. 10, and Rules of the Law of War, chap. III, para. 14; Federal Republic of Germany, Völkerrechtliche Grundsätze der Landkriegführung, op. cit., p. 16.

/...

- Certain types of tracer ammunition 446/
- Bayonets or lances with barbs 447/
- Poison weapons 448/
- Irregular shaped bullets
- Projectiles filled with glass
- Scoring of the surface or filing off the ends of hard cases of bullets 449/

199. The manuals generally do not indicate the criteria by which it may be determined whether a particular weapon causes unnecessary, as distinguished from necessary, suffering. However, the Austrian manuals explain that unnecessary suffering is entailed by the application of force which is not absolutely necessary for the suppression of the enemy or is suffering which is out of proportion to the military advantage to be gained by the weapon. 450/

200. The view that in the use of weapons loss of life and damage to property must not be out of proportion to the military advantage to be gained has been reflected in the pronouncements of several States. 451/

B. Doctrine

201. The prohibition in article 23 (e) of the Hague Regulations against the use of weapons causing unnecessary suffering is normally mentioned by any person writing on that portion of the law of war which pertains to weapons. The absence of any

446/ Netherlands, Rules of the Law of War, chap. IV, para. 14.

447/ Netherlands, ibid., and Manual for the Soldier, chap. 7, para. 10; United States Army Field Manual, op. cit., p. 18, and Law of Naval Warfare, p. 6-8; United Kingdom, The Law of War on Land, op. cit., p. 41.

448/ Netherlands, Manual for the Soldier, chap. 7, para. 70. The United States regards article 23 (a) of the Hague Regulations prohibiting the use of poison and poisoned weapons as a special application of article 23 (e). Letter from the General Counsel of the Department of Defense to the Chairman of the Senate Foreign Relations Committee, 5 April 1971, International Legal Materials, vol. 10 (1971), p. 1302.

449/ The last three instances are found in the United States Army and Navy Manuals cited supra, and in the British Manual cited supra.

450/ Bundesministerium für Landesverteidigung, op. cit., p. 253 and Krivinyi, op. cit., p. 10.

451/ Armée suisse, op. cit., p. 6 (para. 27); United States, Letter from the General Counsel of the Department of Defense to Senator Kennedy, 22 Sept. 1972, in American Journal of International Law, vol. 67 (1973), pp. 124-125.

condition on the application of this prohibition indicates that the rule is viewed as forming part of customary international law. Not infrequently, the rule of article 23 (e) is merely mentioned side-by-side with conventional and customary prohibitions on the use of other weapons. 452/ Several writers allude to the generality of the norm and the difficulty of applying it to particular situations and weapons. 453/ Sereni expresses a view which is shared by several other authorities when he writes "But the principle has slight practical value, because often the means that cause the greatest suffering are those which have the greatest military effectiveness." 454/

202. But Pinto remarks on the fact that "Sans doute l'extension des armes interdites peut resulter, par déduction, de principes généraux qui prohibent les armes causant des maux superflus ou des effets indiscriminés." 455/ Thus many international lawyers regard many of the prohibitions of specific weapons as falling within the scope of article 23 (e). It thus, in their view, forms a general over-arching principle, rather than an auxiliary rule to deal with forms of weapons not specifically dealt with in other treaties or customary rules. Among the weapons that are considered by various authorities to be ones causing unnecessary suffering are:

- Nuclear weapons 456/
- Bombardment of civilians 457/

452/ Cansacchi, op. cit., p. 78; Guerrero Burgos, op. cit., pp. 64-65; Moreno Quintana, op. cit., p. 648; François, op. cit., p. 672; Greenspan, op. cit., pp. 315-316, 353-356; Balladore Pallieri, op. cit., pp. 169-170; Djatijoesoemo, op. cit., p. 44; Kleen, op. cit., p. 361.

453/ Guerrero Burgos, op. cit., pp. 64-65; François, op. cit., p. 672.

454/ Op. cit., p. 1982. And see Guggenheim, op. cit., p. 390 (alluding to how the rule has been overtaken by technological developments). Stone remarks that "By a sardonic paradox, as the scale of destructiveness of new weapons moves towards that of devastation by atomic or hydrogen bombs, their military efficacy increases to a point when the suffering caused to individuals cannot (in military terms) be characterized as unnecessary ...". Op. cit., p. 558.

455/ Op. cit., p. 308.

456/ Menzel, Legalität oder Illegalität der Anwendung von Atomwaffen, pp. 45 ff.; Menzel, "Atomwaffen", loc. cit., p. 104; Scheuner, "Die Stellung der Streitkräfte im modernen Völkerrecht", Bundeswehr und Recht, 1965, pp. 52 and 55; Spetzler, op. cit., p. 373; Rousseau, op. cit., p. 560.

457/ Castrén, op. cit., pp. 202-203; Rousseau, op. cit., p. 561.

- Explosive and incendiary projectiles under 400 grammes, as prohibited by the Declaration of St. Petersburg 458/
- Dum-dum bullets 459/
- Napalm and other incendiary weapons 460/
- Poison and poisoned weapons 461/
- Chemical and bacteriological agents 462/
- Serrated bayonets 463/
- Weapons filled with nails and broken glass 464/
- Covered pit filled with long steel lances 465/

203. Various criteria are set forth for determining whether a weapon causes unnecessary suffering:

- (1) It has been suggested that a weapon causing injury to civilians without

458/ Rousseau, ibid., p. 559; Castrén, op. cit., p. 189; Ghanim, op. cit., p. 741; Berber, op. cit., p. 169; Wengler, op. cit., p. 1396 (but only as to the use of tracer ammunition against human targets); Knackstedt, "Kampfmittel, Verbotene", loc. cit., p. 187; Accioly, op. cit., p. 310.

459/ Berber, op. cit., p. 169; Accioly, op. cit., p. 310; Castrén, op. cit., p. 189; Rousseau, op. cit., p. 559; Wengler, op. cit., p. 1396; von der Heydte, Völkerrecht, vol. 2, p. 245.

460/ Castrén, op. cit., p. 190 (if used against civilians); Berber, op. cit., p. 169; Czesany, op. cit., pp. 115-116; Oppenheim, op. cit., p. 340, note 3. Spetzler would have the legality of use depend on the target and would not consider the use of incendiaries against military personnel as unlawful. Op. cit., pp. 98-101.

461/ Wengler, op. cit., p. 1396; Rousseau, op. cit., p. 559; von der Heydte, Völkerrecht, vol. 2, p. 245; Greenspan, op. cit., p. 353 (as to placing on a projectile a substance to infect the wound).

462/ Wengler, op. cit., p. 1396; von der Heydte, Völkerrecht, vol. 2, p. 245; Accioly, op. cit., p. 310. Spetzler considers that the military utility of chemical warfare means that it is not prohibited by article 23 (e) but expressed the view that bacteriological warfare, because of its uncontrollable effects, would violate article 23 (e). Op. cit., pp. 97 and 100.

463/ Castrén, op. cit., p. 189.

464/ Ibid.; Oppenheim, op. cit., p. 340; Greenspan, op. cit., p. 353.

465/ Spetzler, op. cit., p. 97.

/...

military utility in the form of destruction of the enemy's combat strength violates the "principle of humanity", which is the rule against weapons causing unnecessary suffering in another form. 466/

(2) The infliction of inhumane wounds and inhumane ways of bringing about death are sometimes referred to. 467/ Nuclear and incendiary weapons are condemned, for example, because they cause a slow painful death, because they have a hereditary effect, because their effect may not be felt for many years, or because of the pain resulting from exposure to radiation. 468/ These criteria are expressly rejected by others. 469/

(3) The weapon could be constructed in such a way as to put the enemy out of action with less harm to him. 470/ On the other hand, some scepticism is shown by several writers about condemning a weapon as unlawful because it makes death inevitable. 471/

(4) If there is a choice of weapons to achieve a certain military purpose, the failure to choose that causing the least harm may constitute resort to a weapon causing unnecessary suffering. 472/

(5) The weapon is such as to cause suffering for the sake of suffering. 473/

(6) The rule is one of proportionality. As put by McDougal and Feliciano, "... /I/t is rather the needlessness, the superfluity of harm, the gross imbalance between the military result and the incidental injury that is commonly regarded as decisive of illegitimacy". 474/

466/ Von der Heydte, Völkerrecht, vol. 2, p. 243.

467/ Lubrano-Lavadera, Les lois de la guerre et l'occupation militaire (1956), p. 28.

468/ Euler, op. cit., p. 151; Randermann, op. cit., p. 144; Czesany, op. cit., p. 168. Spaight, op. cit., p. 275; Wilhelm, "Les conventions de Genève et la guerre aérienne", Revue Internationale de la Croix-Rouge, vol. 34 (1952), p. 4, note 1.

469/ Schwarzenberger, op. cit., p. 49; Spetzler, op. cit., pp. 98-99 (as to incendiaries).

470/ Wengler, op. cit., p. 1395.

471/ O'Brien, "Biological/Chemical Warfare and the International Law of War", loc. cit., p. 18; Spetzler, op. cit., p. 91.

472/ Brungs, loc. cit., p. 22.

473/ Spetzler, op. cit., p. 97, n. 63.

474/ Op. cit., p. 616, citing Spaight, War Rights on Land 76-77 (1911); Hall, International Law, 8th ed., (1924), pp. 836-837; Hyde, op. cit., p. 1814; and Oppenheim, op. cit., p. 340.

SECTION 14. WEAPONS WITH INDISCRIMINATE EFFECTS

204. The theme of the illegality of weapons because they affect military personnel and objectives and civilians and the civilian population indiscriminately has already been considered in connexion with the State practice and doctrine relating to the following categories of weapons:

Chemical and Bacteriological Weapons

Incendiary Weapons

Nuclear Weapons

Conventional Aerial Bombardment

Fragmentation Bombs

Land Mines and Booby-Traps

Missiles

Delayed Action Weapons

Naval Weapons

Therefore, it does not appear necessary to repeat that discussion here.

SECTION 15. WEAPONS THAT KILL TREACHEROUSLY

A. State practice

205. Article 23 (b) of the Hague Regulations 475/ forbids the treacherous killing of individuals belonging to the hostile nation or army.

206. Only in the manuals of Austria and the Federal Republic of Germany, amongst those examined, is there any reference to weapons (as distinguished from people) that kill treacherously. In the Austrian manuals, poison and poisoned weapons, bacteriological and chemical weapons and booby-traps, such as the placing of explosives in pens and tows, are characterized as unlawful on that account. 476/ The German manuals refer to similar attractive objects containing explosives or caustic or inflammable substances, which may be dropped by air or left behind by withdrawing troops. 477/

475/ Scott, op. cit., p. 219. See chapter I supra.

476/ Bundesministerium für Landesverteidigung, op. cit., p. 252; Krivinyi, op. cit., p. 10.

477/ Kriegsvölkerrecht: Leitsätze für die allgemeine Ausbildung, op. cit., p. 31; Völkerrechtliche Grundsätze der Landkrießführung, op. cit., p. 16.

B. Doctrine

207. The authorities have occasionally referred to the use of one type of weapon or another as perfidious. The invisible gamma rays emitted by the atomic bombs dropped on Hiroshima and Nagasaki have been called an instance of perfidious killing. 478/ Certain types of aerial attacks have also been so characterized. 479/

208. It has more often been asserted that the use of delayed action weapons and mines falls afoul of the prohibition on the treacherous killing of individuals. 480/

209. One author remarks that if "there is no implicit or explicit relationship of trust between the belligerents, it is difficult to see a justification for applying the notion of perfidy to the means of destruction". 481/

478/ Czesany, op. cit., p. 166.

479/ Ibid., p. 24. Examples are not supplied.

480/ See section 10, supra.

481/ O'Brien, "Biological/Chemical Warfare and the International Law of War", loc. cit., p. 39.