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INCENDIARY AND OTHER SPECIFIC CONVENTIONAL WEAPONS WHICH MAY BE
 THE SUBJECT OF PROHIBITIONS OR RESTRICTIONS OF USE FOR
 HUMANITARIAN REASONS

Report of the Secretary-General

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I. INTRODUCTION

1. By paragraph 3 of its resolution 31/64, the General Assembly requested the Secretary-General, who had been invited to attend the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, to report to the Assembly at its thirty-second session on the work of the fourth session of the Conference relevant to the resolution. The resolution dealt with the consideration by the Conference of the question of prohibiting or restricting, for humanitarian reasons, the use of incendiary and other specific conventional weapons, including those which might be deemed to be excessively injurious or to have indiscriminate effects.

2. The General Assembly, at its twenty-eighth, twenty-ninth and thirtieth sessions, had adopted resolutions 3076 (XXVIII), 3255 (XXIX) and 3464 (XXX) containing similar requests to the Secretary-General with regard to the first three sessions of the Diplomatic Conference, held at Geneva under the auspices of the Government of Switzerland, and aspects of those three sessions relevant to those resolutions were noted by the Secretary-General in his reports (A/9726, A/10222 and A/31/146 respectively). Aspects of the first and second sessions of the Conference of Government Experts on the Use of Certain Conventional Weapons, held at Lucerne in late 1974 and at Lugano in early 1976 were also noted in the second and third reports (A/10222 and A/31/146).

3. The present report, submitted pursuant to General Assembly resolution 31/64, is concerned solely with the fourth, and last, session of the Diplomatic Conference, since there were no other significant developments during the year relevant to the resolution.

II. FOURTH SESSION OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS

(held at Geneva from 17 March to 10 June 1977)

A. Organization of work

4. As at previous sessions, most of the work of the fourth session of the Diplomatic Conference having direct substantive relationship to the question of prohibiting or restricting the use of incendiary weapons and other specific conventional weapons was carried out in the Ad Hoc Committee on Conventional Weapons (sometimes referred to as Committee IV). At this session, the Committee first met on 19 April 1977 and held a total of seven plenary meetings from that date until 24 May 1977, when it approved its report (CCDH/IV/225, as amended, by CCDH/408) and adjourned. This year, however, a Working Group of the Committee was established for the first time and held nine meetings from 26 April to 19 May. The Conference chose a new Chairman for the Committee and the Committee elected a new Rapporteur, but the position of the two Vice-Chairmen remained unchanged. As a result, the following were chosen as officers of the Ad Hoc Committee:

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Chairman: Mr. Hector Charry Samper (Colombia)

Vice-Chairmen: Mr. Houchang Amir-Mokri (Iran)
Mr. Mustapha Chelbi (Tunisia)

Rapporteur: Mr. John G. Taylor (United Kingdom of Great Britain
and Northern Ireland)
Mr. Martin R. Eaton (United Kingdom of Great Britain
(up to 6 May) and Northern Ireland)

5. The Ad Hoc Committee adopted the following programme of work for the fourth session of the Conference (CDDH/IV/219/Rev.1):

1. Adoption of the programme of work,
2. Election of new Rapporteur,
3. Establishment of Working Group; election of Chairman of the Working Group,
4. Introduction of new proposals; work in the Working Group,
5. Consideration of the question of prohibition or restriction of use of specific categories of conventional weapons and, in this context, consideration of the report of the Working Group and of proposals,
6. Other questions.

6. The Working Group was established with the following terms of reference, or mandate (CDDH/IV/221):

(1) A Working Group of the Ad Hoc Committee is set up to consider in detail the various proposals relative to the prohibition or restriction of the use of certain conventional weapons introduced in the Ad Hoc Committee, such as mines and booby-traps, fragments not detectable by X-ray and incendiary weapons, with a view to defining the areas of agreement or disagreement with respect to each particular set of proposals.

(2) The Working Group will also consider proposals on other categories of conventional weapons.

(3) Furthermore, the Working Group will also consider the question of "follow-up" and submit it for further consideration to the Ad Hoc Committee.

(4) The sessions of the Working Group will be opened to all participants in the Conference.

7. In the discussion on the subject of the draft terms of reference of the Working Group (CDDH/IV/220), it was explained that reference was made to three

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specific categories of weapons because these were the categories on which the most progress had been achieved and on which detailed proposals had been submitted. It was pointed out that the mandate also provided for discussion of any other category of conventional weapons. It was also agreed that the Working Group need not discuss review mechanisms, as proposed in the draft, since they related mainly to agreements that had not been concluded up to that time, but that the Group should be empowered to discuss the possible follow-up, or possible action on the subject subsequent to the fourth session of the Diplomatic Conference, and to submit its recommendations on that matter for the consideration of the Committee.

8. The Rapporteur of the Committee, Mr. Taylor (United Kingdom), was elected Chairman of the Working Group and was represented by Mr. Eaton (United Kingdom) up to 6 May.

B. Work of the Working Group

9. Most of the discussions in the Working Group centred on the three specific categories of conventional weapons mentioned specifically in the terms of reference, namely (a) fragments not detectable by X-ray, (b) mines and booby-traps, and (c) incendiary weapons, including napalm. With regard to the Committee's mandate to define areas of agreement or disagreement on a subject, it was agreed that common positions should be sought as far as possible, but that the Group could only record disagreement if positions were clearly irreconcilable.

1. Fragments not detectable by X-ray

10. The Working Group first discussed the subject of fragments not detectable by X-ray, since there was only one proposal on the subject (CDDH/IV/210 and Add.1 and 2, submitted to the previous session of the Diplomatic Conference by Austria, Denmark, Mexico, Norway, Sweden, Switzerland and Yugoslavia and later also sponsored by Colombia and Spain) and since, in previous discussions, that proposal had been found to command widespread agreement. The proposal called for the prohibition of use of any weapon the primary effect of which was to injure by fragments which in the human body escaped detection by X-ray.

11. In introducing the proposal to the Working Group, one of the sponsors noted that the reasoning behind it had been explained in depth at the Conference of Government Experts, held at Lugano in early 1976, ^{1/} where it was first introduced, and at the 1976 session of the Ad Hoc Committee. Briefly summarized, that reasoning was that fragments of the kind mentioned in the proposal caused unnecessary suffering, since they could not be extracted from the human body without great difficulty and delay because they were not detectable by the usual medical method of X-ray; the proposal did not, however, seek to prohibit the use of integral parts

^{1/} See Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session - Lugano, 28 January-26 February 1976), International Committee of the Red Cross, 1976 (made available to all Members of the United Nations at the thirty-first session of the General Assembly).

of a given weapon, such as plastic casings for mines or shells, unless the primary effect of the weapon was to injure by fragments of the prohibited type rather than by other effects, such as blast. After a brief discussion, the Working Group was unanimous in finding an area of agreement on the proposal.

2. Mines and booby-traps

12. On the category of mines and booby-traps, the Working Group gave parallel consideration to two proposals - one sponsored by Denmark, France, the Netherlands and the United Kingdom (CDDH/IV/213 and Add.1 and 2), first submitted to the Ad Hoc Committee at its 1976 session, and a second sponsored by Austria, Mexico, Sweden, Switzerland, Uruguay and Yugoslavia (CDDH/IV/222 and Add.1), introduced in the Ad Hoc Committee on 5 May 1977. The latter proposal superseded, as far as the sponsors were concerned, all previous documents on the subject (CDDH/IV/201, 209 and 211) sponsored by them.

13. Both proposals sought to require, in so far as possible, the recording of all minefields; to ban the use of mines delivered remotely (for example, by rocket or artillery shells from a distance of at least 1,000 metres) unless such mines were fitted with a neutralizing mechanism or unless the area in which they were delivered was marked in some distinctive manner; to ban the use of manually emplaced mines and devices in populated areas in which combat was not taking place unless precautions were taken to protect civilians from their effects; and to prohibit the use of explosive and non-explosive devices (for example booby-traps) as apparently harmless objects. However, the second proposal (CDDH/IV/222 and Add.1), according to its sponsors, gave greater emphasis to the protection of the civilian population against mines. After some initial discussion, broader agreement was reached on a common text, but with certain controversial points still remaining in brackets (CDDH/IV/GT/4, sponsored by Austria, Denmark, France, Mexico, the Netherlands, the United Kingdom, Spain, Sweden and Switzerland, a copy of which is contained in annex I below).

14. While all delegations welcomed the effort made by the sponsors to reach a common position and recognized that valuable progress had been made, several stressed that they were still not able to consider the proposed text fully acceptable. A number of delegations, including some of those that had sponsored the working paper, wished to have their specific reservations and doubts on particular points recorded in the Working Group's report. On the whole, however, those reservations did not appear to be of a fundamental nature and it was generally recognized that a wide measure of agreement existed on the proposals (CDDH/IV/GT/4, see annex I below).

3. Incendiaries

15. With regard to the third specified group of weapons, incendiaries, there were six proposals before the Working Group:

(1) The first proposal (CDDH/IV/Inf.220), which was submitted to the Diplomatic Conference at its second session by Afghanistan, Algeria, Austria, Egypt, Iran, the Ivory Coast, Lebanon, Lesotho, Mali, Mauritania, Mexico, Norway, Romania,

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the Sudan, Sweden, Switzerland, Tunisia, the United Republic of Tanzania, Venezuela, Yugoslavia and Zaire and later also sponsored by Kuwait, called for the prohibition of use of all incendiary weapons primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by a chemical reaction of a substance delivered to a target, including flame-throwers, incendiary shells, rockets, grenades, mines and bombs, but excluding those incendiary munitions which combined incendiary effects with penetration or fragmentation effects and which were specifically designed for use against aircraft, armoured vehicles and similar targets;

(2) The second proposal (CDDH/IV/217), which was sponsored by Mexico and submitted to the Diplomatic Conference at its third session, called for the prohibition of use of all weapons of the same general type as those to be prohibited in the previous proposal, but including penetrating weapons used against aircraft, armoured vehicles and similar targets;

(3) The third proposal (CDDH/IV/207), which was submitted to the Conference at a previous session by Norway, called for the prohibition of use of all incendiaries, defined as in the proposals under (1) and (2) above, against "personnel" and against military objectives not defined as such by article 47, paragraph 2, of draft Protocol I to the Geneva Conventions of 1949 ^{2/} or against any military objective located in a populated area unless combat between ground forces was taking place in that area;

(4) The fourth proposal (CDDH/IV/208), which was submitted to the Conference at a previous session by Sweden, contained some possible elements for a prohibition of all flame weapons;

(5) The fifth proposal (CDDH/IV/223), which was submitted to the Ad Hoc Committee at the present session by Indonesia, called for the prohibition of use of incendiary weapons other than illuminants, tracers and signal munitions in all circumstances except against military matériel, provided such objectives were not within or near civilian populated areas, and against military personnel holding positions in field fortifications, such as bunkers and pillboxes;

(6) The sixth proposal (CDDH/IV/206/Rev.1), which was submitted to the Ad Hoc Committee at the present session by Australia, Denmark and the Netherlands to replace a proposal (CDDH/IV/206) submitted at a previous session, called for a ban on making "any concentration of civilians", such as a city, town, village, camp or column of refugees, the "object of attack by means of incendiary munitions", but permitting attacks against specific military objectives situated within such a concentration if otherwise lawful and if all feasible precautions were taken to limit the incendiary effects to the military objective and if the objective was located in an area where combat between ground forces was taking place or appeared to be imminent.

^{2/} United Nations, Treaty Series, vol. 75, Nos. 970-973.

16. In addition, the delegation of Sweden, one of the sponsors of a document submitted to the Diplomatic Conference at its second session proposing a ban on the use of all incendiary weapons (CDDH/IV/201), held that the Group should be working towards a total ban, since the Fifth Conference of Heads of State or Government of Non-Aligned Countries, held at Colombo in 1976, had endorsed such an approach (see A/31/197, annex IV, resolution 12), as had the General Assembly of the United Nations in its resolution 31/19, adopted by consensus. In the opinion of Sweden, the medical reasons for banning all incendiaries, as put forward at the Conference of Government Experts at Lugano in early 1976, were compelling. The delegation also stressed that its proposal (CDDH/IV/208, see para. 15 (4) above) was a complete ban, effectively ruling out the use of incendiaries against personnel, and maintained that partial restrictions were unsatisfactory because they tended to break down under the strain of actual combat. The general views of Sweden were supported by a number of other delegations.

17. The delegations sponsoring the sixth proposal (CDDH/IV/206/Rev.1, see para. 15 (6) above) maintained that a total ban was unrealistic under existing conditions and therefore unacceptable to many States, whereas their proposal offered a real measure of protection to civilians against flame weapons in time of war. A number of other delegations also supported that general position.

18. The delegation of Indonesia, as sponsor of the fifth proposal (CDDH/IV/223, see para. 15 (5) above), stressed that the proposal limited the use of flame weapons to military matériel situated outside civilian areas, whereas the sixth proposal (CDDH/IV/206/Rev.1) permitted use against all military matériel. The delegation did not believe that incendiaries should be used at all in civilian areas, since the fire they caused inevitably spread and could not be contained. A sponsor of the sixth proposal observed that the prohibition of any attack on military objectives could lead to the deliberate siting of such objectives in civilian areas to shield them against attack. The delegation of Indonesia replied that such objectives could be attacked by other types of weapons and that, under draft Protocol I to the Geneva Conventions of 1949, States would be enjoined, to the maximum extent possible, from siting such objectives in populated areas.

19. One delegation stressed that it was not prepared to discuss any proposal that was cast in the form of a protocol or that assumed the adoption of a protocol on weapon restrictions.

20. While there was general agreement that the sixth proposal (CDDH/IV/206/Rev.1) did not go too far and that, if offered a useful basis for discussion, a number of delegations believed that it did not go far enough, the delegations of Canada and the United Kingdom suggested an amendment (CDDH/IV/GT/7) designed to limit the possibility of incendiary attacks against military objectives in "an area in which combat between ground forces is taking place or appears to be imminent" to "a combat area", maintaining that the inclusion of areas where combat appeared to be imminent gave an advantage to the aggressor and that the term "combat area" had been defined by the Conference. Some delegations thought the proposed substitution might be useful, but that it required further study, while one delegation observed that the term "combat area" had already been rejected in another context as too imprecise.

21. Various ideas for making further progress on the prohibition of incendiary weapons were explored, including the setting up of a small working group to consider the subject with a view to reconciling the differences between the various proposals, but support for such suggestions proved to be insufficient.

22. Summing up its impression of the discussion on the subject of incendiaries, the delegation of Sweden regretted that there had not been more debate, since it believed it should have been possible to discuss the subject analytically and thoroughly, drawing on all the various proposals. In the opinion of the delegation, all these proposals were valuable, offered hope that further and fuller studies would produce useful results and should all be taken into account as a basis for any further discussion on the subject.

4. Other types of weapons

23. Of the other types of conventional weapons, only fuel-air explosives (FAEs) and small-calibre arms were the subject of specific proposals in the Working Group. On FAEs, Sweden and Switzerland submitted a proposal (CDDH/IV/GT/5) which suggested that States should agree to abstain from the use of munitions which relied for their effects on shock waves caused by the detonation of a cloud created by a substance spread in the air, except when the aim was exclusively to destroy material objects, such as the clearance of minefields. Noting that they had submitted a similar proposal to the Conference at its previous session (CDDH/IV/215), the sponsoring delegations held that FAEs were objectionable because they produced one of the most atrocious forms of death, with a probability of death close to 100 per cent for those involved in the vapour cloud of such weapons, as based on recent experiments with animals. The delegation of the United States stated, on the other hand, that the facts did not justify a prohibition or restriction on those weapons and that the delegation could not accept the Swedish proposal and would present counter-arguments in the Ad Hoc Committee.

24. A proposal in a working paper on small-calibre arms (CDDH/IV/GT/6) was also submitted by Sweden, which suggested that States should agree: (a) to abstain from producing projectiles causing more severe injuries than the currently most common calibre of 7.62 mm; (b) to avoid bullets that tumbled easily, deformed or broke up when penetrating a human body, or bullets with excessive velocities; (c) to continue research and testing, both on a national and an international basis, in the field of wound ballistics; and (d) to continue work aiming at a future agreement banning the use of small-calibre projectiles which might cause superfluous injury in armed conflicts, taking into account the proposals to, and the work carried out by, the Diplomatic Conference and by the Conference of Government Experts held under the auspices of the International Committee of the Red Cross. The proposal was not discussed in any considerable detail in the Working Group, but the delegation of the United States indicated that it disagreed with it.

5. Report of the Working Group

25. In the absence of any specific agreement in the Working Group, the question of future action to be taken in the matter of prohibiting the use of various conventional weapons for humanitarian reasons, generally referred to as the follow-up

to the work of the Diplomatic Conference, assumed considerable importance. Late in its work, however, the Working Group decided, at the suggestion of its Chairman, that it would not take up the question of follow-up, since related matters were the subject of active negotiation elsewhere in the Conference. It was understood, however, that comments on the general subject could be made in the plenary of the Ad Hoc Committee, and those comments are noted below.

26. Developments concerning the follow-up occurring outside the Ad Hoc Committee are reported in the two sections on that subject below.

27. The Working Group adopted its report (CDDH/IV/224/Rev.1) by consensus on 19 May.

C. Follow-up to the work of the Diplomatic Conference on specific conventional weapons (Committee I)

28. While the work of the Working Group was in progress, the delegations of Ecuador, Guatemala, Honduras, Iran, Mexico, Nicaragua, Nigeria, Panama, the Philippines and Spain raised the subject of the follow-up to the work of the Diplomatic Conference on specific conventional weapons in Working Group C of Committee I in the form of a proposal (CDDH/I/340) for a new article 86 bis to draft Protocol I to the Geneva Conventions of 1949 (article 86 dealt with the process for amending the Protocol). In essence, the proposal provided for the establishment of a committee of 31 States parties to the Protocol or to the Conventions to consider and adopt recommendations regarding any proposal that one or more of the States parties might submit "on the basis of article 33" (dealing with the prohibition of use of weapons of a nature to cause superfluous injury or unnecessary suffering) for the prohibition of use of certain conventional weapons. The proposal, as subsequently adopted in Committee I, further provided that the committee would be elected for three years on the basis of equitable geographical distribution by means of "notifications" addressed to the depositary Government by States parties, or that the depositary might convene a meeting of the States parties for the purpose of electing the committee, that the committee should meet whenever one third of the members so requested and should make its recommendations by majority; that the International Committee of the Red Cross should participate in the committee's work and provide the necessary secretarial facilities; and, most importantly, that on the basis of the committee's recommendations the depositary might convene a special conference, in consultation with any State party to the Protocol or to the Conventions that might wish to invite such a conference, with a view to adopting agreements implementing the principle that the parties to a conflict did not have an unlimited right of choice of means of warfare.

29. In an addendum to the report of Working Group C of Committee I (CDDH/I/350/Rev.1/Add.1/Rev.1), it was reported that the debate in the Working Group had shown that, while the humanitarian motivations of the co-sponsors of draft article 86 bis were unanimously welcomed and while it appeared necessary to pursue efforts to achieve the prohibition or restriction of conventional arms deemed to cause superfluous injury or to have indiscriminate effects, there were two divergent views on how the desired purpose should be accomplished. One group

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believed that the proposed committee would be neither useful nor appropriate, particularly since a special session of the General Assembly of the United Nations would soon meet to consider problems of disarmament, including the questions raised in the proposal, and since the convening of a world disarmament conference was still possible. It further believed that a resolution could be adopted by the Diplomatic Conference that would accomplish the desired purpose of convening a special conference to consider limitations on the use of certain conventional weapons without the expense of creating the proposed committee.

30. Delegations supporting the proposed new article 86 bis, however, held that, without underestimating the usefulness of the work achieved by the Diplomatic Conference in determining areas of agreement, it was necessary to establish a juridical link between any possible limitations on the use of conventional weapons deemed to cause superfluous injury or to have indiscriminate effects and the relevant principles contained in draft Protocol I. It was therefore necessary to create a special mechanism to develop and apply the pertinent provisions of draft Protocol I, whatever the follow-up to the work of the Ad Hoc Committee might be. The group also believed that while the adoption of a resolution by the Conference might be necessary as a short-term solution to the problem of follow-up, the adoption of an article based on the principles contained in the proposed new article 86 bis would be desirable for seeking long-term solutions to the problem in the framework of international humanitarian law in armed conflicts. Moreover, this group maintained, since other actions and the work of the Ad Hoc Committee had not made a notable contribution in the matter, the proposal for a new article 86 bis was the only solution to the problem. In any case, it added, the approach in the proposal was a purely humanitarian one falling within the exclusive competence of the Diplomatic Conference, which was not related to other bodies dealing with disarmament from its political and economic aspects.

31. On 16 May 1977, the delegations of Canada, Denmark, the Federal Republic of Germany and the United Kingdom submitted a draft resolution (CDDH/Inf.240) for the consideration of the plenary of the Diplomatic Conference which, in its operative part, would: (a) take note of the report of the Ad Hoc Committee on Conventional Weapons and the proposals annexed thereto; (b) send the report and proposals to Governments of States represented at the Conference and to the Secretary-General of the United Nations; (c) request Governments and the Secretary-General to give early consideration to those documents and to the previous resolutions on the subject adopted by the General Assembly and to the reports of the first 3/ and second 4/ sessions of the Conference of Government Experts held at Lucerne and Lugano respectively; (d) recommend that a conference be convoked, with the least possible delay and with careful preparation, to carry on the search for restrictions or prohibitions on the use of specific conventional weapons; (e) request the

3/ For the report of the first session, see Conference of Government Experts on the Use of Certain Conventional Weapons (International Committee of the Red Cross, Geneva, 1975).

4/ For the report of the second session, see Conference of Government Experts on the Use of Certain Conventional Weapons (International Committee of the Red Cross, Geneva, 1976).

Secretary-General to consult Governments as a matter of urgency in order to establish the most appropriate forum for such a conference, including the possibility of a special conference convoked by an individual State; and (f) recommend that the proposed conference should continue the search for agreements on limiting the use of specific conventional weapons, taking into account the proposals made in the Ad Hoc Committee, and for agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further agreements.

32. At this point, some delegations sought to have a discussion of the question of follow-up in the Ad Hoc Committee on Conventional Weapons, but the delegations supporting draft article 86 bis maintained that the article could not be discussed in the Ad Hoc Committee because it had been submitted to Committee I only and was solely within that Committee's competence. They agreed, however, that they would not press their objection to a vote if the comments in the Ad Hoc Committee were of a general nature, although they would not participate in the debate.

33. Several delegations opposing the draft article spoke in favour of a continuation of the Ad Hoc Committee's work in other forums, holding that part of the results of that work would be the establishment of a carefully conceived review mechanism for any agreements in the field. They did not, however, regard it as desirable to set up a rival mechanism such as that proposed in draft article 86 bis or to link it exclusively to draft Protocol I, as that would tend to concentrate further efforts on legal criteria and exclude other relevant factors such as political, economic and military considerations. Some delegations referred to other disarmament forums and suggested that the matter might be referred to them; others drew attention to the study of review mechanisms that had already been carried out at the Conference of Government Experts at Lugano and hoped Committee I would take account of the alternative solutions proposed there. One delegation considered draft article 86 bis to be entirely outside the competence of the Diplomatic Conference and felt that its introduction had had an extremely negative influence on the work of the Ad Hoc Committee on a possible follow-up. Several of these delegations, however, expressed willingness to consider a compromise solution.

34. In the discussion of the matter in Committee I on 18 May, the sponsors of the draft resolution (CDDH/Inf.240) stressed that the resolution constituted an alternative text to the proposed article 86 bis, that its objective was to provide concrete and methodical guidance for a conference that might be given the task of continuing the search for relevant agreements and that it recommended, in particular, the setting up of a mechanism for the review of any such agreements. They also maintained that it was highly desirable to have recourse to an impartial and pre-eminent institution such as the United Nations and that the Secretary-General, better than anyone else, could obtain the support of all Governments in the search for a way of achieving the common goal. Another delegation pointed out, however, that the question of the draft resolution was not on the Committee's agenda.

35. The supporters of draft article 86 bis, most notably Mexico, presented arguments along the lines of those advanced in the Working Group, as summarized above. The delegation of Mexico also announced that it intended to submit a draft

resolution requesting immediate continuation of the work on the subject of the limitation of use of specific categories of conventional weapons.

36. After agreement on the exact language of draft article 86 bis, Committee I adopted it by a vote of 50 to 27, with 13 abstentions (CDDH/I/SR.77). It was also decided that the question of whether the proposed new article might more appropriately be included in draft Protocol I as a new article 33 bis (dealing with a ban on weapons causing superfluous injury) or a new article 7 bis (dealing with the question of convening a conference on humanitarian law) should be left to the Drafting Committee.

D. Consideration by the Ad Hoc Committee on Conventional Weapons at its plenary meetings

37. The Ad Hoc Committee on Conventional Weapons met briefly in plenary meetings prior to the establishment of the Working Group and the statements were concerned largely with introducing new proposals on various subjects and the general reaction to them. Most of the comments of significance were repeated in the Working Group and have been noted above.

38. From the comments on the work of the Working Group on the various categories of weapons, the following points may be highlighted:

(a) Fragments non-detectable by X-ray

Many delegations welcomed the fact that the Working Group had been unanimous in finding an area of agreement in the proposal on the subject (CDDH/IV/210 and Add.1 and 2).

(b) Mines and booby-traps

Many delegations welcomed the progress that had been made in the Working Group towards agreement on the subject. Some delegations pointed out that the satisfactory result had been made possible mainly through the willingness of various groups of delegations holding differing views to meet informally and seek to resolve their differences in a spirit of goodwill. They hoped that example could be followed in other fields.

(c) Incendiary weapons

In introducing the report of the Working Group (CDDH/IV/224/Rev.1), the Rapporteur commented that there had in fact been no success in reconciling the many proposals on the subject of incendiaries, embodying as they did differing approaches to the whole question of limiting the use of such weapons. With regard to the statement in the Working Group's report that it had been agreed that the sixth proposal on the subject (CDDH/IV/206/Rev.1, see para. 15 (6) above) sponsored by Australia, Denmark and the Netherlands, offered a useful basis for further discussion, the Rapporteur explained that it had subsequently become clear that there was a difference of opinion even on that point, namely that some

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delegations considered all the proposals submitted to be a useful basis for future discussions, while others thought it would be more useful in future work to concentrate initially on a more modest proposal, such as the sixth.

The sponsors of the sixth proposal expressed the hope that their proposal, which had been supported by a number of delegations, would serve as a basis for agreement on the subject in the near future; in the meantime, they added, they would study the implications of the amendment (CDDH/IV/GT/7) to their proposal (see para. 20 above).

Several delegations stressed, however, that the sixth proposal (CDDH/IV/206/Rev.1) did not go far enough and that the only satisfactory solution would be a total ban on the use of incendiary weapons, subject to only a few exceptions, such as the ban proposed in CDDH/IV/201, 208 and 223 (see sect. B above). All those proposals, they maintained, must be considered carefully in future forums if the appeal of the Fifth Conference of Heads of State or Government of the Non-Aligned Countries held at Colombo (see A/31/197, annex IV, resolution 12), and the requests of the General Assembly of the United Nations to accelerate work towards a ban on the use of incendiaries were to be properly heeded. In their view, civilians and combatants alike were insufficiently protected by proposals involving only restrictions on the use of incendiaries.

(d) Fuel-air explosives (FAEs)

The delegation of the United States, as it had indicated in the Working Group, gave further details on its position in opposition to the proposal of Sweden and Switzerland, contained in a working paper (CDDH/IV/GT/5), that States should abstain from the use of weapons such as fuel-air explosives except for destroying material objects, such as minefields. The delegation of the United States maintained that tests carried out in the United States on monkeys and sheep, which they considered to be a better subject of comparison with man than the smaller animals used in experiments described by the sponsors of the proposal, had indicated that the lethality of FAEs was virtually the same as that of a comparable high explosive shell, that is, near 100 per cent, except on the outer edge of the burst centre. In fact, the delegation continued, high explosives caused more suffering because of their fragmentary effects and yet no one sought to ban them. The delegation questioned the assertion of the sponsors of the proposal that death from FAEs would be more atrocious, holding that their evidence suggested it would be a quick one.

The delegation of Sweden did not agree that the small animals used in its various test series were poor models for man after widely recognized formulae for comparison were applied. They continued to consider the blast characteristics of FAEs to be different from those of high explosives and that death from FAEs was often a prolonged and painful one.

Some other delegations expressed appreciation for the technical information provided by the various delegations on the subject and expressed the hope that further studies and exchanges would lead to greater agreement.

(e) Small-calibre projectiles

Two information papers on the subject of small-calibre projectiles were submitted to the Ad Hoc Committee: (a) a joint paper of Austria, Sweden and Switzerland (CDDH/IV/Inf.237) describing co-ordinated experiments conducted in the three countries; and (b) a paper of Sweden (CDDH/IV/Inf.242) describing some test series in greater detail. Sweden also submitted a proposal in a paper to the Working Group (CDDH/IV/GT/6) recommending certain restrictions on the use of small-calibre projectiles (see para. 24 above). In introducing the proposal, the delegation of Sweden stressed that the results of the tests tended to show the importance of tumbling, break-up and high impact velocity in determining the extent of a wound from a projectile. Hence, the delegation had submitted a proposal to the Working Group calling for restraint in the development, production and use of projectiles with those characteristics.

At the final meeting of the Ad Hoc Committee, the delegation of the United States criticized in considerable detail the scientific methods and procedures employed in the tests described by the delegation of Sweden and expressed grave doubts that their results could in any way support the conclusions drawn and the recommendation based on those conclusions in its paper (CDDH/IV/GT/6). The delegation could agree only that further extensive study on the subject was required.

In reply, the delegation of Sweden defended its scientific methods and pointed out that its proposal was modelled on the Declaration of 1899 5/ prohibiting the use of expanding bullets, since it considered the characteristics of certain projectiles now in use to be similar to those of "dum dum" bullets. It urged that further study be carried out in co-operation before the next generation of small arms was put into production, which could be in a few years.

Discussion of the subject of the follow-up to the work of the Diplomatic Conference on conventional weapons was also resumed at the final three plenary meetings of the Ad Hoc Committee after draft article 86 bis had been adopted in Committee I (see para. 36 above). Some of the delegations that had already spoken in the earlier debate in the Ad Hoc Committee spoke again along similar lines. The delegation of the United Kingdom, one of the four sponsors of a draft resolution on the subject (CDDH/Inf.240), regretted the adoption of article 86 bis and held that, so long as it remained, it appeared to pre-empt any meaningful discussion on the follow-up problem. The delegation stressed that the sponsors of the proposed resolution were prepared to discuss and negotiate on their proposal but did not see how that could be done unless article 86 bis was rejected by the plenary of the Conference. They urged that a consensus be sought and that one point of view should not be imposed by means of a vote.

Some delegations not sponsoring article 86 bis, but which had voted for it, spoke in its defence. One held that the divergence of opinion concerning that article reflected the basic divergence that had become apparent throughout all the discussions on the subject in the Conference, that is, whether limitations on

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

the use of conventional weapons should be reached within the framework of humanitarian law, as the delegations believed, or whether they should be sought in other forums. The delegations noted, in this connexion, that the draft resolution (CDDH/Inf.240) referred to disarmament and general agreement, or consensus, and held that in the view of a number of delegations, that approach was not producing results and it was necessary to adopt a democratic approach within the framework of humanitarian law. Another delegation which had voted for article 86 bis considered the article to be complementary to a resolution on the subject, since it dealt with a long-term review of the matter; however, it hoped to find some middle ground acceptable to all, because it believed that consensus, despite its disadvantages, was the right policy. Another supporter of article 86 bis expressed similar views and suggested that the United Nations might convene a follow-up conference, but on the same basis as the Diplomatic Conference, with participation open to all States.

39. On 24 May 1977, the Ad Hoc Committee approved its draft report (CDDH/IV/225, as amended by CDDH/408) by consensus.

E. Consideration by the Diplomatic Conference at
its fourth session

40. On 24 May 1977, the Diplomatic Conference considered and approved the report of the Ad Hoc Committee (CDDH/IV/225, as amended by CDDH/408) by consensus. No direct substantive discussion on the limitation of use of conventional weapons took place in the plenary, but the subject of the future action to be taken on the matter, or follow-up, was extensively considered.

41. A proposal by the Philippines to include the use of "dum dum" bullets, as well as chemical and biological weapons, among the actions listed among breaches of draft Protocol I to the Geneva Conventions of 1949 for which military personnel would be held responsible (draft article 74) was also discussed and rejected. These two subjects are discussed below in the chronological order of their consideration in the plenary.

1. Philippine initiative on "dum dum" bullets

42. On 26 May 1977, the delegation of the Philippines submitted to the plenary a draft amendment to draft article 74 of draft Protocol I (dealing with the repression of certain breaches of the Geneva Conventions of 1949 and the Protocol) designed to add to the list of breaches for which military personnel themselves would be considered responsible "the use of weapons prohibited by international Convention, namely: bullets which expand or flatten easily in the human body; asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and bacteriological methods of warfare" (CDDH/IV/418). The Philippine delegation pointed out that the language used in the proposal was drawn either from The Hague Declaration of 1899 6/ prohibiting the use of expanding bullets or from

6/ Ibid.

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 in 1925 ^{7/} (which are not relevant to this report, since they are not considered to be conventional weapons). The Philippine delegation had previously put forward a similar proposal in Committee I, but had withdrawn it, according to the delegation, with a view to seeking a later consensus on the matter in the plenary.

43. In the discussion in plenary, however, it was revealed that the delegations of a number of militarily advanced countries, while recognizing the international agreements on which the proposal was based, were opposed to listing the use of these weapons as grave breaches, primarily because the weapons were vaguely defined and because the amendment would prohibit retaliatory action otherwise permitted. In that situation, other delegations held that they could not support a provision of the Protocol that did not enjoy broad agreement. After considerable discussion, the proposal was defeated by a roll-call vote of 41 in favour to 25 against, with 25 abstentions.

2. Question of follow-up

44. Prior to the consideration of proposed draft article 86 bis by the plenary of the Diplomatic Conference, two additional draft resolutions concerning future action with regard to limiting the use of conventional weapons were submitted for the consideration of the plenary - one (CDDH/IV/411) sponsored by a group of States which supported draft article 86 bis (Algeria, Austria, Colombia, Egypt, Kuwait, Mexico, Nicaragua, Nigeria, Romania, Sweden, Switzerland and Yugoslavia) and which considered the proposed resolution to be complementary to the draft article, and the other (CDDH/IV/423) sponsored by the German Democratic Republic, Poland, the USSR, and the United States, which the sponsors considered to be a more acceptable alternative to article 86 bis. The first draft resolution, like that previously submitted by Canada, Denmark, the Federal Republic of Germany and the United Kingdom (CDDH/Inf.240, subsequently issued as CDDH/428), tended to seek a follow-up through the General Assembly of the United Nations, but was more specific in urging a follow-up conference by 1979 at the latest. The four-Power draft, on the other hand, sought such a conference only through consultations among States but recommended that it be held at an early date, and urged all States to take joint decisions in the matter during the next six months, with a view to an early conclusion of an agreement or agreements.

45. In the extensive debate in the plenary on article 86 bis, all the arguments put forward previously in Committee I were reiterated. Those opposing the article put additional stress on their view that a resolution could more effectively achieve the desired purpose and that the imposition of article 86 bis against their opposition would make further consideration of such a resolution virtually impossible. The delegations of France and the Union of Soviet Socialist Republics made statements to the effect that, if draft article 86 bis were approved, they would not consider themselves bound by it.

^{7/} League of Nations, Treaty Series, vol. XCIV (1929), No. 2138, p. 65.

46. In the roll-call vote to decide the issue, draft article 86 bis received 59 votes in favour and 32 against, with 10 abstentions. Having failed to receive the required two-thirds majority, the draft article was not adopted.

47. In the light of the rejection of draft article 86 bis, extensive consultations were held among the delegations sponsoring the three draft resolutions dealing with the follow-up question, and broad agreement was finally reached on a draft resolution embodying certain elements of each of those resolutions. All other draft resolutions on the subject were withdrawn. The sponsors of the new draft resolution submitted to the plenary on 7 June 1977 (CDDH/441 and Add.1) were Austria, Canada, Denmark, Egypt, Finland, Greece, Kuwait, Mexico, the Netherlands, Nigeria, Norway, Pakistan, Romania, Sweden, Switzerland, the United Kingdom, the United States, Venezuela and Yugoslavia.

48. After a minor oral amendment to the preamble, to which the sponsors agreed, the draft resolution was adopted on 9 June by consensus, to be attached to the Final Act of the Conference as resolution 22 (IV). 8/

49. By its resolution 22 (IV), the Diplomatic Conference resolved to send the report of the Ad Hoc Committee (CDDH/IV/225, as amended by CCDH/408) and the proposals submitted to that Committee (see CDDH/IV/218) to the Governments of States represented at the Conference and to the Secretary-General of the United Nations; requested that serious and early consideration be given to those documents and other pertinent reports; recommended that a Conference of Governments should be convened not later than 1979 with a view to reaching agreements on the limitation of use of certain specific conventional weapons and on a mechanism for the review of any such agreement and consideration of further agreements; urged that consultations be undertaken to that end, prior to consideration of the question by the General Assembly at its thirty-second session, for the purpose of reaching agreement on the preparation for the Conference; recommended that a consultative meeting of all interested Governments should be convened during September/October 1977 for that purpose; further recommended that States participating in the consultations should consider the establishment of a preparatory committee for the Conference; and invited the General Assembly at its thirty-second session, in the light of the results of the recommended consultations, to take any further action that might be necessary for the holding of the Conference in 1979.

50. In introducing the draft resolution (CCDH/441 and Add.1), the delegation of Sweden expressed disappointment that no decision had been taken by the Diplomatic Conference to limit the use of certain specific conventional weapons and maintained that the disappointment was shared by most countries outside the two principal military alliances. It pointed out, however, that the resolution offered the possibility that the progress made at the Diplomatic Conference could be carried forward in the near future. The delegations of Mexico and Spain expressed similar views. The delegation of Sri Lanka hoped that the proposed consultative meeting in late 1977 would be held in New York at United Nations Headquarters.

8/ For the text of resolution 22 (IV), see annex II below.

51. In statements made after the adoption of the resolution by consensus, a number of countries, including Brazil, France and the USSR, stressed that, in a spirit of co-operation, they had not opposed the consensus on the resolution but that they would have abstained if it had been put to a vote. The delegations of Brazil and France maintained that the resolution prejudged the manner in which future decisions would be taken in the matter. The delegation of the USSR stated that it had particular objections to paragraph 3 of the resolution recommending that a Conference should be convened by 1979 with stated objectives in mind and to paragraph 7 inviting the General Assembly to take any further required action at its thirty-second session; the delegation also reiterated its basic position that the question of limiting the use of weapons could only be decided in the general framework of disarmament and in an appropriate forum established for that purpose.

ANNEX I

Working Group of the Ad Hoc Committee on Conventional Weapons: proposals submitted by Austria, Denmark, France, Mexico, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, Spain, Sweden and Switzerland relating to mines and booby-traps

1. Scope of application

These proposals relate to the use in armed conflict on land of the mines and other devices defined therein. They do not apply to the use of anti-ship mines at sea or in inland waterways, but do apply to mines laid to interdict beaches, waterway crossings or river crossings.

2. Definitions

For the purpose of these proposals:

- (1) "Mine" means an explosive or incendiary munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the direct action, presence or proximity of a person or vehicle;
- (2) "Explosive and non-explosive devices" mean manually-emplaced devices which are specifically designed and constructed to kill or injure when a person disturbs or approaches an apparently harmless object or performs an apparently safe act;
- (3) "Remotely delivered mine" means any mine delivered by artillery, rocket, mortar or similar means at a range of over 1,000 metres or dropped from an aircraft;
- (4) "Military objective" means, so far as objects are concerned, any object which by its own nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.

3. Recording of the location of minefields and other devices

- (1) The Parties to a conflict shall record the location of:
 - (a) All pre-planned minefields laid by them; and
 - (b) All areas in which they have made large-scale and pre-planned use of explosive or non-explosive devices.

/...

(2) The Parties shall endeavour to ensure the recording of the location of all other minefields, mines and explosive and non-explosive devices which they have laid or placed in position.

(3) All such records shall be retained by the Parties and the location of all recorded minefields, mines and explosive or non-explosive devices remaining in territory controlled by an adverse Party shall be made public after the cessation of active hostilities.

4. Restrictions on the use of remotely-delivered mines

The use of remotely-delivered mines is prohibited unless:

(a) Each such mine is fitted with an effective neutralizing mechanism, that is to say a self-actuating or remotely-controlled mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position; or

(b) The area in which they are delivered is marked in some definite manner in order to warn the civilian population,

and, in either case, they are only used within an area containing military objectives.

5. Restrictions on the use of mines and other devices in populated areas

(1) This proposal applies to mines (other than remotely-delivered /anti-tank/ mines), explosive and non-explosive devices, and other manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

(2) It is prohibited to use any object to which this proposal applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

(a) They are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse Party; or

(b) Effective precautions are taken to protect civilians from their effects.

/...

6. Prohibitions on the use of certain explosive and non-explosive devices

(1) It is prohibited in any circumstances to use:

(a) Any apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached; /or

(b) Any non-explosive device or any material which is designed to kill or cause serious injury in circumstances involving superfluous injury or unnecessary suffering, for example by stabbing, impaling, crushing, strangling, infecting or poisoning the victim and which functions when a person disturbs or approaches an apparently harmless object or performs an apparently safe act/.

(2) It is prohibited in any circumstances to use explosive and non-explosive devices which are in any way attached to or associated with:

(a) Internationally recognized protective emblems, signs or signals;

(b) Sick, wounded or dead persons;

(c) Burial or cremation sites or graves;

(d) Medical facilities, medical equipment, medical supplies or medical transport;

(e) Children's toys;

/(f) Food and drink;/ or

(g) Objects clearly of a religious nature.

ANNEX II

Resolution 22 (IV) of the Diplomatic Conference on follow-up
regarding prohibition or restriction of use of certain
conventional weapons

The Diplomatic Conference on the Reaffirmation and Development of International
Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Having met at Geneva for four sessions, in 1974, 1975, 1976 and 1977, and having adopted new humanitarian rules relating to armed conflicts and methods and means of warfare,

Convinced that the suffering of the civilian population and combatants could be significantly reduced if agreements can be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects,

Recalling that the issue of prohibitions or restrictions for humanitarian reasons of the use of specific conventional weapons has been the subject of substantive discussion in the Ad Hoc Committee on Conventional Weapons at all four sessions of the Diplomatic Conference, and at the Conference of Government Experts on the Use of Certain Conventional Weapons held, under the auspices of the International Committee of the Red Cross, at Lucerne in 1974 a/ and at Lugano in 1976, b/

Recalling, in this connexion, discussions and relevant resolutions of the General Assembly of the United Nations and appeals made by several Heads of State and Government,

Having concluded, from these discussions, that agreement exists on the desirability of prohibiting the use of conventional weapons, the primary effect of which is to injure by fragments not detectable by X-ray, and that there is a wide area of agreement with regard to landmines and booby-traps,

Having also devoted efforts to the further narrowing-down of divergent views on the desirability of prohibiting or restricting the use of incendiary weapons including napalm,

a/ For the report of the first session, see Conference of Government Experts on the Use of Certain Conventional Weapons (International Committee of the Red Cross, Geneva, 1975).

b/ For the report of the second session, see Conference of Government Experts on the Use of Certain Conventional Weapons (International Committee of the Red Cross, Geneva, 1976).

Having also considered the effects of the use of other conventional weapons, such as small-calibre projectiles and certain blast and fragmentation weapons, and having begun the consideration of the possibility of prohibiting or restricting the use of such weapons,

Recognizing that it is important that this work continue and be pursued with the urgency required by evident humanitarian considerations,

Believing that further work should both build upon the areas of agreement thus far identified and include the search for further areas of agreement and should, in each case, seek the broadest possible agreement,

1. Resolves to send the report of the Ad Hoc Committee on Conventional Weapons c/ and the proposals presented in that Committee d/ to the Governments of States represented at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts and to the Secretary-General of the United Nations;

2. Requests that serious and early consideration be given to these documents and to the reports of the Conference of Government Experts on the Use of Certain Conventional Weapons held at Lucerne and Lugano;

3. Recommends that a Conference of Governments should be convened not later than 1979 with a view to reaching:

(a) Agreements on prohibitions or restrictions on the use of specific conventional weapons, including those which may be deemed to be excessively injurious or have indiscriminate effects, taking into account humanitarian and military considerations;

(b) Agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further such agreements;

4. Urges that consultations be undertaken prior to the consideration of this question by the General Assembly of the United Nations at its thirty-second session for the purpose of reaching agreement on the steps to be taken in preparation for the Conference;

5. Recommends that a consultative meeting of all interested Governments be convened during September/October 1977 for this purpose;

c/ CCDH/IV/225, as amended by CCDH/408.

d/ See CDDH/IV/218.

6. Recommends further that the States participating in these consultations should consider, inter alia, the establishment of a preparatory committee which would seek to establish the best possible basis for the achievement at the Conference of agreements as envisaged in this resolution;

7. Invites the General Assembly of the United Nations at its thirty-second session, in the light of the results of the consultations undertaken pursuant to paragraph 4 of this resolution, to take any further action that may be necessary for the holding of the Conference of Governments by 1979.
