

Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons

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In dealing with issues of disarmament and weapons regulation, international jurists should be cautious not to rely on paper prohibitions and the pretense of law. International norms must be demonstrated, the author argues, by actual patterns of human expectation and behavior. But questioning and attempts at redefinition are nevertheless important in shaping alternatives and developing a new general consensus for control. Over the last thirty years, world citizens have received a great deal of protection through the development of general laws of armed conflict. The growing body of treaty and customary law which governs the legality and use of so-called "conventional" weapons may also be relevant in evaluating the legal status of nuclear weapons and the legality of their use. The author examines the international norms which presently outlaw or regulate the use of certain weapons, and defines two general modes of weapons regulation. Present efforts at disarmament and arms limitation are then examined in the light of the general methods of regulation. Concluding that general principles, when coupled with effective implementary efforts, are more effective than specific prohibitions, the author suggests various methods to encourage the development of general criteria for weapons regulation.

Les juristes internationaux doivent se garder d'aborder les questions relatives au désarmement et au contrôle des armes avec des considérations juridiques d'ordre technique. Selon l'auteur, les normes internationales se définissent à même les volontés et comportements humains existants. La remise en question et la reformulation des concepts est toutefois nécessaire pour trouver des alternatives et créer un nouveau consensus au sujet du problème. Les citoyens du monde ont bénéficié depuis les trente dernières années de la protection qui résulte du développement d'un droit des conflits armés. Les principes du droit des traités et du droit coutumier gouvernant la légalité et l'usage des armes dites "conventionnelles" peuvent servir de guides pertinents dans l'évaluation du statut légal des armes nucléaires et de leur utilisation. L'auteur examine les règles du droit international public qui prohibent ou limitent actuellement l'usage de certaines armes, et trace deux modes généraux de maîtrise des armements. Les tentatives de désarmement et de limitation contemporaines sont placées dans l'optique des méthodes générales de réglementation. Concluant que des principes généraux accompagnés d'efforts de mise en oeuvre efficaces sont plus utiles que des interdictions spécifiques, l'auteur suggère diverses méthodes pour encourager le développement de critères généraux du contrôle des armements.

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Synopsis

Introduction

- I. International Norms Outlawing or Regulating the Use of Certain Weapons
- II. Modes of Regulation and Control
- III. Toward More Effective Implementation

Conclusion

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Introduction

War, since the dawn of human history, has involved cruelty, suffering and atrocity. Similarly, weapons developed for the waging of war have too often been designed or used to produce inhumane death, injury and suffering. Even legally justifiable weaponry can cause death, suffering and destruction that concerned individuals find reprehensible and frightening.

It is not that this must always be, or that law cannot condition human attitudes and behavior to promote more humane forms of social violence and competitive destruction, but one should consider questions of disarmament and weapons regulation with measured caution. Law does limit permissible strategies and means of violence, but printed laws, in particular, are simply insufficient to assure implementation and protection.

It seems that the legally trained are especially prone to false comfort prompted by paper prohibitions and the pretense of law as illegality threatens, or even rages, just far enough away to be ignored. For the victims of war, the illusion of law can be far more perilous. Just as dangerous can be the passionate desires of lawyers to change aspiration into law by simply calling it law, that is, before such a change is demonstrated in actual patterns of human expectation and behavior.¹ It is a tragic irony that the very will to change the

¹ On the relationship between law and patterns of human expectation and behavior, see, e.g., Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice* (1980) 53 Temple L.Q. 226, and references cited therein [hereinafter *The Concept of Norm*]. On the utility of such a jurisprudential framework for more realistic and policy-serving inquiry concerning human rights and the law of armed conflict, see, e.g., M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order* [:] *The Basic Policies of an International Law of Human Dignity* (1980); M. McDougal & F. Feliciano, *Law and Minimum World Public Order* [:] *The Legal Regulation of International Coercion* (1961); Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation* (1981) 56 N.Y.U.L. Rev. 227, 245-56 [hereinafter *Human Rights*]. See also, M. McDougal, H. Lasswell & I. Vlasic, *Law and Public Order in Space* (1963) 482-502.

law, to make warfare more humane and to assure more adequate human protection, can contribute to a lulled sense of security and can help to perpetuate an unregulated process of cruelty, suffering and atrocity.

At the same time, efforts at redefinition, although often unrealistic and even hazardous, can, at times, be heroic and may produce results. The law of armed conflict is potentially no more static than any other form of legal ordering. The choice of content is surely ours,² and concerned individuals do play a useful role in questioning present approaches to legality, in shaping alternatives, and in formulating new demands, even a new general consensus, regarding the content of law.³

With regard to the regulation of nuclear weaponry and nuclear disarmament, these concerns are very much to the point. While our cities remain hostage to a balanced nuclear terror, few should be comforted by paper law that proscribes the use of weapons poised to annihilate much of human civilization in less than half an hour. Even less comforting are the efforts of concerned individuals, however noble, to create such law by proclamation. What is needed is the formation of a new consensus that can form the basis, not merely for newly drafted legal documents, but also for an effective prohibition of the use of strategic nuclear weapons. Paper prohibitions simply cannot protect us from ourselves, and although well-intentioned declarations of illegality can help to shape future human attitudes and behavior, a functional prohibition is not likely without the formation of a new pattern of community expectation, one that is shared generally and that is lasting.

I. International Norms Outlawing or Regulating the Use of Certain Weapons

Currently, such a new pattern of community expectation does not exist with regard to the use of nuclear weapons *per se*. As a concerned legal scholar rightly notes: "At present no treaty explicitly prohibits all use of nuclear weapons. It is also probably correct to say that, as yet, no rule of customary international law prohibits all use of nuclear weapons."⁴ He adds, however,

²See, Paust *The Concept of Norm*, *ibid.*, 227 and fn. 5, 228 and fn. 7, 256-60, 274-6, and 278-87. See also Paust, *Human Rights*, *ibid.*, 249 regarding the concept of authority.

³See, e.g., McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence* (1968) 8 Va J. Int'l L. 188, 189-93; Paust, *Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction* (1977) 12 Stanford J. Int'l Stud. 79, reprinted in A. Evans & J. Murphy, eds, *Legal Aspects of International Terrorism* (1978) 575. See also R. Falk, *A Study of Future Worlds* (1975).

⁴See Feinrider, *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons* (1982) 7 Nova L. J. 103, 113 (No. 1).

that "a rule of customary international law outlawing nuclear weapons *per se* is currently in the process of being created",⁵ and that "a variety of treaties, evidencing global disapprobation, explicitly outlaw or limit a significant number of nuclear weapon uses", including: "*deployment* or *use* in Antarctica, Latin America, earth orbit, outer space and on celestial bodies, and *deployment* on the seabed beyond the twelve-mile limit of national territorial seas."⁶

To this list of prohibitions, one should add the neutron warhead, a weapon system that is recognizably illegal under general principles of customary international law.⁷ But it is significant that most commentators are not prepared to recognize that all types and uses of nuclear weapons are illegal.⁸

⁵*Ibid.*, 115. See also Boyle, *Arms Control* [:] *Part II*, Chicago Daily L. Bull. (27 April 1982) 3.

⁶Feinrider, *ibid.*, 113-4, citing the 1959 *Antarctic Treaty*, 12 U.S.T. 794, T.I.A.S. 4780, 402 U.N.T.S. 71 (ratified presently by twenty-six states); the 1967 *Treaty for the Prohibition of Nuclear Weapons in Latin America*, 634 U.N.T.S. 281 (ratified presently by twenty-four states, but not by Argentina or Cuba); the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*] (ratified presently by eighty-one states); and the 1971 *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*, 23 U.S.T. 701, T.I.A.S. 7337, reprinted in (1971) 10 I.L.M. 146 [hereinafter *Seabed Treaty*]. On weapons in outer space, see also Vlasic, *Disarmament Decade, Outer Space and International Law* (1981) 26 McGill L.J. 135; Zedalis & Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967* (1978) 8 Cal. West. Int'l L.J. 454 and references cited therein; Christol, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 47.

⁷See Paust, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 39, 43-5; cf. Rubin, letter, (1981) 21 Va J. Int'l L. 805, 808 and 811.

⁸See, e.g., Feinrider, *supra*, note 4; Cassese, *Weapons Causing Unnecessary Suffering: Are They Prohibited?* (1975) 58 Rivista di Diritto Int'l 12, 37 [hereinafter *Weapons Causing Unnecessary Suffering*] (but see 36 and fn. 61); Moore, remarks, (1983) 9 Brooklyn J. Int'l L. (forthcoming); Paust, *The Nuclear Decision in World War II — Truman's Ending and Avoidance of War* (1974) 8 Int'l Law. 160, 166 and fn. 24 [hereinafter *The Nuclear Decision*] (but see 164, fn. 13). See also Cassese, *The Contribution of Italy at the Diplomatic Conference on the Development of Humanitarian Law of Armed Conflicts (1974-1977)* (1977) 3 Italian Y.B. Int'l L. 217, 227. For contrary views, see, e.g., Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law* (1980) (Occasional Paper No. 10, Princeton World Order Studies Program), reprinted in (1980) 20 Indian J. Int'l L. 541; Fujita, *Reconsidération de l'affaire Shimoda — Analyse juridique du bombardement atomique de Hiroshima et Nagasaki* (1980) 19 R. de dr. pénal mil. et de dr. de la guerre 49; Fried, *Law and nuclear war* (1982) 38 Bull. Atom. Scientists 67-8 (June-July); Fried, *International Law Prohibits the First Use of Nuclear Weapons* (1981-82) 16 Rev. belge de dr. int. 33; and Margolick, *Law Panel Sees Atom Arms as Illegal*, The New York Times (7 June 1982) B 2. Certain United Nations General Assembly resolutions also would prohibit the use of nuclear weapons. See, e.g., *Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons*, United Nations G.A. Res. 1653, 16 U.N. GAOR, Supp. (No. 17) 4, U.N. Doc. A/5100 (1961); and *Declaration on*

Additionally, treaties limiting the use of nuclear weapons are not applicable where they would be most meaningful. Outside of Latin America,⁹ our earthbound population centers are still unprotected by such treaties; they are often targeted specifically for thermonuclear destruction, and even if not targeted, they would suffer from uncontrolled nuclear fallout.

Curiously, our citizens have received more specific protection through the development of general laws of armed conflict over the last thirty years than through any particular controls upon nuclear weapons. For this reason, it is important to examine the treaty law and customary international law governing the legality and use of so-called "conventional" weapons. Although the problems of controlling conventional weapons are often thought to be less pressing, norms developed in that context may have significant application when examining the legal status of nuclear weapons and the legality of their use.

Customary international law prohibiting attacks by *any* weapon system directly on civilians had lapsed in part from World War I until the 1950s,¹⁰ but has been vigorously reconstituted in the last half of the twentieth century as a fundamental and uniform prohibition. This peremptory norm is evident in earlier United States military manuals where, for example, it was stated that it is a "generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them".¹¹ Similarly, it was recognized that a distinction must be made at all times between combatants and non-combatants,¹² that non-combatants cannot be made the object of attack,¹³ and that such peremptory norms also prohibit the intentional terrorization of the civilian population or the intentional use of a strategy which produces terror that is not "incidental" to lawful combat operations.¹⁴

the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, United Nations G.A. Res. 2936, 27 U.N. GAOR, Supp. (No. 30) 5, U.N. Doc. A/8730 (1972).

⁹ See *Treaty for the Prohibition of Nuclear Weapons in Latin America*, *supra*, note 6.

¹⁰ See, e.g., Paust, *The Nuclear Decision*, *supra*, note 8, 162-3 and 165-9.

¹¹ United States Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956), para. 25 [hereinafter *F.M. 27-10*].

¹² See, e.g., Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility* (1972) 57 Mil. L. Rev. 99, 139-40, fn. 156 [hereinafter *My Lai and Vietnam*]; Paust, *The Nuclear Decision*, *supra*, note 8, 162 and fn. 7, 165, and 168-70; and Robblee, *The Legitimacy of Modern Conventional Weaponry* (1976) 71 Mil. L. Rev. 95, 102 and fn. 49.

¹³ See, e.g., sources cited *ibid*.

¹⁴ See Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action* (1975) 5 Ga J. Int'l & Comp. L. 431, 441-5. These norms are peremptory for several reasons. First, no exceptions are permitted. Second, the intensity and degree of shared expectation over a period of thirty years reaffirm the peremptory nature of

These customary prohibitions were reaffirmed in the 1960s at two important Red Cross conferences¹⁵ and in a 1968 United Nations General Assembly resolution that condemned indiscriminate warfare, prohibited attacks upon the civilian population, and required that a distinction be made between combatants and non-combatants.¹⁶ In the 1970s, the 1974-77 Geneva Diplomatic Conference on Humanitarian Law culminated with the adoption in 1977 of two Protocols to the *Geneva Conventions*¹⁷ which set forth in more detail the protected status of individual non-combatants, the civilian population and certain "civilian objects". For example, both Protocols contain the following humanitarian protections which must now govern the use of any strategy of warfare or weapon system:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules . . . shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.¹⁸

these norms. See *infra*, note 18 and accompanying text. Specifically, art. 51 of Protocol I to the *Geneva Conventions*, *infra*, note 17, applies "in all circumstances" (para. 1), "reprisals are prohibited" (para. 6), and violations by one party do "not release" others (para. 8). Additionally, obligations contained in the *Geneva Conventions* are owed to humankind, not to a particular state. See, e.g., Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience* (1978) 11 Vand. J. Trans. L. 1, 33-4, and sources cited therein.

¹⁵ See, e.g., Paust, *My Lai and Vietnam*, *supra*, note 12, 140.

¹⁶ See United Nations G.A. Res. 2444, 23 U.N. GAOR, Supp. (No. 18) 50, U.N. Doc. A/7218 (1968). See also discussion in Paust, *ibid.*, 139.

¹⁷ The two 1977 Geneva Protocols Additional are found at U.N. Doc. A/32/144, Annexes I & II and are reprinted in (1977) 16 I.L.M. 1391 and 1442.

¹⁸ Protocol I, *ibid.*, art. 51, paras 1-3; Protocol II, *ibid.*, art. 13, paras 1-3. Some have noted that many states are not sure whether these and related prohibitions in Protocol I apply to nuclear warfare. See Almond, remarks, (1980) 74 Proc. Am. Soc. Int'l L. 196. Some have argued that they do not. See Kalshoven, remarks, (1980) 74 Proc. Am. Soc. Int'l L. 203, fn. 8, citing United States and United Kingdom Statements of Understanding that "new rules" or "rules established by" Protocol I are "not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons". As noted *supra*, however, the prohibitions of attack on civilians as such, and the use of indiscriminate weapons or means of warfare are not "new" or "established by" Protocol I, but mirror or complement recaptured customary prohibitions. See *supra*, notes 10 to 17 and accompanying text as well as *infra*, notes 19 to 24 and accompanying text. See also Matheson, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 26, 29; and Delessert, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 36, 37, who state that the differentiation between civilians and military personnel is a fundamental distinction, a pillar of humanitarian law which is reaffirmed throughout the Protocols. Further, the United States has recognized this general prohibition. See *supra*, notes 11-3 and accompanying text. It also recognizes that the use of certain nuclear weapons can violate international law. See *supra*, note 7.

Recaptured custom and new treaties have thus merged to provide norms relevant to the use of weapons. More specifically, civilian starvation as a "weapon" is strictly prohibited by the Protocols¹⁹ and by relatively recent customary law.²⁰ Protocol I to the *Geneva Conventions*, applicable in times of armed conflict of an international nature,²¹ also provides a detailed elucidation of the prohibition against indiscriminate attacks while condemning the employment of any "method or means of combat which cannot be directed at a specific military objective" and any method or means "the effects of which cannot be limited as required . . . and consequently . . . [is] of a nature to strike military objectives and civilian or civilian objects without distinction".²² Protocol I requires additionally that the signators "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects"²³ — a provision that, if adequately implemented, must affect both the selection and the use of various weapons. Article 35 of Protocol I also reiterates the customary law of The Hague when declaring:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.²⁴

These developments were soon followed by the adoption, in 1980, of a United Nations sponsored *Convention on Prohibitions or Restrictions on the*

¹⁹ See Protocol I, *ibid.*, art. 54; Protocol II, *ibid.*, art. 14.

²⁰ See, e.g., Paust, remarks, (1975) 69 Proc. Am. Soc. Int'l L. 45-52, 57-8, 60-1 (on the right to food); Mudge, *Starvation as a Means of Warfare* (1970) 4 Int'l Law. 228. See also Aldrich, remarks, (1973) 67 Proc. Am. Soc. Int'l L. 141, 147-8; Blix, remarks, (1973) 67 Proc. Am. Soc. Int'l L. 149, 154.

²¹ For guidance concerning this threshold level of armed conflict and other stages of conflict, plus a discussion of the applicability of relevant legal norms, see, e.g., Paust & Blaustein, *supra*, note 14, 10-9 and 38, and sources cited therein. See also J. Bond, *The Rules of Riot: Internal Conflict and the Law of War* (1974).

²² Protocol I, *supra*, note 17, art. 51, paras 4-5. See also arts 48, 52-3, 57-8, and 85, para. 3.

²³ *Ibid.*, art. 57, sub-para. 2(a)(ii). See also arts 48, 51-3, 57, and 85, para. 3.

²⁴ *Ibid.* On this customary set of norms, see, e.g., Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law* (1977) 18 Harv. Int'l L.J. 19, 29-37 and sources cited therein [hereinafter *Illegal Weapons*]; Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent With Legal Norms?* (1974) 4 Den. J. Int'l L. & Pol. 229 [hereinafter *Weapons Regulation*]; Cassese, *Weapons Causing Unnecessary Suffering*, *supra*, note 8, 15-7, 23-9 and 40 (a useful, if somewhat pessimistic inquiry into trends, conditioning factors and alternatives); Blix, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 30, 32-3; and Delessert, *supra*, note 18, 37.

*Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.*²⁵ The more important portions of the 1980 *Convention* are contained in three Protocols, two of which, at least, must be accepted by signators to the *Convention*.²⁶ The Protocols, which mirror or supplement customary prohibitions, are as follows: (a) Protocol on Non-Detectable Fragments; (b) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices; and (c) Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons.²⁷ Although the Protocols form the major portion of the *Convention*, it is nonetheless significant that the preambular portion, which is as much a part of the *Convention* as any other,²⁸ reaffirms the customary law of The Hague which "prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".²⁹

The Preamble also reaffirms "the general principle of the protection of the civilian population against the effects of hostilities", a reaffirmation set forth more specifically in Protocols II and III of the 1980 *Convention*. For example, art. 3, para. 2 of Protocol II declares that mines, booby-traps or "other devices" which are covered by the Protocol cannot, in any circumstance, be directed, "either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians". Paragraphs 3 and 4 of art. 3, in a manner similar to Protocol I of the *Geneva Conventions*,³⁰ prohibit the indiscriminate use of mines, booby-traps and related devices³¹ and also require that all "feasible precautions" which are "practicable" under the circumstances be made "to protect civilians from the effects of such weapons".³² Other articles place further restrictions on certain booby-traps,

²⁵U.N. Doc. A/CONF. 95/15 (1980), reprinted in (1980) 19 I.L.M. 1523 [hereinafter *Conventional Weapons Convention*] (signed 10 April 1981).

²⁶See *ibid.*, art. 4, para. 3.

²⁷*Ibid.*, Protocols I-III. For further elucidation, see Committee on Armed Conflict, "Report on the 1980 Convention on Certain Conventional Weapons" in International Law Association, American Branch, *Proceedings and Committee Reports* (1982) 58-66 [hereinafter *I.L.A. Report*]. The *I.L.A. Report* included a recommendation, at 66, that the United States ratify the Convention and accept all three Protocols.

²⁸See *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF. 39/27, 289 (1969), art. 31(2), reprinted in (1969) 8 I.L.M. 679.

²⁹*Conventional Weapons Convention*, *supra*, note 25. See also Protocol II, art. 6, para. 2; *I.L.A. Report*, *supra*, note 27, 58, 60 and 62; and *supra*, note 24 and accompanying text.

³⁰*Supra*, note 17. See also *supra*, notes 22 and 23 and accompanying text; *I.L.A. Report*, *ibid.*, 62, quoting the United States Delegation Report.

³¹*Conventional Weapons Convention*, *supra*, note 25, Protocol II, art. 3, para. 3. See also *I.L.A. Report*, *ibid.*, 62.

³²*Conventional Weapons Convention*, *ibid.*, Protocol II, art. 3, para. 4. See also arts 4-9; *I.L.A. Report*, *ibid.*, 62-3.

on "remotely delivered" and on "other than remotely delivered" weapon systems within the ambit of the Protocol so that the same purposes are served.³³ As if to underscore the general customary law of The Hague, art. 6, para. 2 of Protocol II recognizes that "[i]t is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering".³⁴

Protocol III reaffirms the general principle of civilian protection by declaring: "It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons."³⁵ Nevertheless, incendiary weapons can be used, when necessary for legitimate military purposes, against combatants or military targets.³⁶ Other provisions in Protocol III delimit further the circumstances in which incendiary weapons may be used,³⁷ the primary purpose of such limitations being the desire to avoid unnecessary "loss of civilian life, injury to civilians and damage to civilian objects".³⁸ Thus, Protocol III has the effect of reaffirming the general customary prohibition against unnecessary death, injury and suffering while providing more detailed guidance concerning the illegal use of incendiary weapons under certain circumstances.³⁹

It is also useful to note that the 1980 *Convention*, in Protocol I, does outlaw specific weapon systems entirely, prohibiting the "use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by x-rays".⁴⁰ The prohibition is clearly of a humanitarian

³³ *Conventional Weapons Convention, ibid.*, Protocol II, arts 4-6. See also arts 7-9; *I.L.A. Report, ibid.*, 62-3.

³⁴ *Conventional Weapons Convention, ibid.*, Protocol II, art. 6, para. 2. See also *supra*, notes 24 and 29. As the U.S. Delegation Report states, this article "reaffirms that the existing prohibition on weapons causing unnecessary suffering applies to booby-traps". *I.L.A. Report, ibid.*, 63.

³⁵ *Supra*, note 25, Protocol III, art. 2, para. 1. See also *I.L.A. Report, ibid.*, 61.

³⁶ See, e.g., *I.L.A. Report, ibid.*, 60-1; Robblee, *supra*, note 12, 128-33; *F.M. 27-10, supra*, note 11, para. 36; Aldrich, *supra*, note 20, 148 and 168; Paust, remarks, (1973) 67 Proc. Am. Soc. Int'l L., 162-3; Kalshoven, remarks, (1973) 67 Proc. Am. Soc. Int'l L. 160. See also Matheson, remarks, (1979) 73 Proc. Am. Soc. Int'l L. 157-8; and Matheson, *supra*, note 18; A. Trooboff & A. Goldberg, eds, *Law and Responsibility in Warfare — The Vietnam Experience* 156-8, 164-5, 174, and 177; Blix, *supra*, note 24, 30-1, 34 and 46; Han, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 49.

³⁷ *Conventional Weapons Convention, supra*, note 25, Protocol III, art. 2, paras 2-4. See also art. 1 and *I.L.A. Report, ibid.*, 61.

³⁸ *Conventional Weapons Convention, ibid.*, Protocol III, art. 2, para. 3. See generally Protocol III, art. 2; *I.L.A. Report, ibid.*, 61.

³⁹ See *I.L.A. Report, ibid.*, 61. On the more general prohibition of unnecessary death, injury or suffering, see, e.g., sources cited *supra*, note 24.

⁴⁰ *Supra*, note 25, Protocol I. This statement is the entire prohibition contained in the Protocol.

nature and is designed to assure that no non-detectable fragments lodge in the human body because such fragments are nearly impossible to remove without exploratory surgery that may lead to greater injury and suffering. As a recent International Law Association report notes: “[S]uch weapons are likely to complicate or preclude effective medical treatment for no legitimate military purpose.”⁴¹ The report adds: “[T]he use of such weapons would clearly cause unnecessary suffering and would violate the complementary principles of military necessity and humanity underlying the law of armed conflict.”⁴²

Both the 1980 *Convention*⁴³ and Protocol I to the *Geneva Conventions*⁴⁴ contain a prohibition against the use of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”. Protocol III to the 1980 *Convention* declares further:

It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.⁴⁵

This prohibition and its exceptions clearly grew out of concern about United States bombing practices in the Vietnam War, but the destruction of “the natural environment” was not then,⁴⁶ nor is it now, prohibited in all circumstances. Perhaps more suspect now, however, would be the use of chemical defoliants that serve military objectives but nonetheless produce “long-term and severe damage”.⁴⁷ Especially prohibited should be the use of chemical weapon systems which are known or should be known to produce long-term, severe human suffering unrelated to military objectives. Here, one has in mind certain cancer-causing agents, but others may be impermissible under the general proscription of unnecessary death, injury or suffering. The Soviet Union, for example, has been accused of using such weapons in its war in Afghanistan, in particular, chemical weapons that destroy human skin and produce other forms of unnecessary injury and suffering.⁴⁸

⁴¹*I.L.A. Report, supra*, note 27, 62. See also Cassese, *Weapons Causing Unnecessary Suffering, supra*, note 8, 12; Matheson, *supra*, note 36, 157.

⁴²*I.L.A. Report, ibid.*

⁴³*Supra*, note 25, Preamble.

⁴⁴*Supra*, note 17, art. 35, para. 3.

⁴⁵*Supra*, note 25, Protocol III, art. 2, para. 4.

⁴⁶See, e.g., Paust, *My Lai and Vietnam, supra*, note 12, 152; Trooboff & Goldberg, *supra*, note 36, 158-60, 165-6, 168-9, 177, and 179-80.

⁴⁷Actually, such destructive consequences may be impermissible, depending upon the circumstances, under customary prohibitions of unnecessary destruction. See generally *F.M. 27-10, supra*, note 11, paras 3, 41 and 56; Paust, *Weapons Regulation, supra*, note 24, 232.

⁴⁸See, e.g., Weinraub, *U.S. Assails Soviet for Reported Use of Toxin Weapons*, *The New York Times* (30 November 1982) A 1; *Chemical War in Afghanistan*, *The New York Times* (5

Other treaties exist to ban or regulate gaseous, biological and toxic weapons,⁴⁹ some of which will be discussed by other contributors to this special issue. Treaty and customary law also prohibit the use of poison or poisoned weapons,⁵⁰ as well as explosive or incendiary projectiles weighing less than 400 grams.⁵¹ Customary international law has, moreover, prohibited the use of irregularly shaped bullets and bullets which expand or flatten easily in the human body to produce excessive wound injury.⁵² A few other weapon systems are illegal *per se* under international law,⁵³ but the regulation of most weapons continues to take place under general principles of customary law and certain norms of human rights law.⁵⁴ Such principles include, of course, the customary law of The Hague mentioned above.⁵⁵

II. Modes of Regulation and Control

From this brief survey of international law outlawing or regulating the use of weapons, it is evident that international norms already play a signifi-

December 1982) E 2. These articles also report accusations that the Soviet Union has violated international law by using poison and poison gas in Afghanistan.

⁴⁹ See, e.g., *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* 26 U.S.T. 583, T.I.A.S. 8062, reprinted in (1972) 11 I.L.M. 310 [hereinafter *Convention on Bacteriological (Biological) and Toxin Weapons*]; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) 94 L.N.T.S. 65, reprinted in (1975) 14 I.L.M. 49. See generally, Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis* (1972) 58 Va L. Rev. 419; United Kingdom, *Manual of Military Law* (1958), Pt III — *The Laws of War on Land*, 175 [hereinafter *U.K. Manual*] (items r and s prohibiting use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, and bacteriological methods of warfare); The Responsibilities Commission of the Paris Peace Conference, *List of War Crimes* (1919), item 26 [hereinafter *List of War Crimes*].

⁵⁰ See, e.g., Robblee, *supra*, note 12, 98, 100, fn. 94 and 150, fn. 202; *F.M. 27-10, supra*, note 11, para. 37. With regard to "poisoned" nuclear weapons, see Paust, *The Nuclear Decision, supra*, note 8, 164, fn. 13; Paust, *supra*, note 7, 44-5.

⁵¹ See, e.g., Robblee, *ibid.*, 110, fn. 94; Cassese, *Weapons Causing Unnecessary Suffering, supra*, note 8, 14; Paust, *Illegal Weapons, supra*, note 24, 32-3.

⁵² See, e.g., Cassese, *ibid.*, 14, 17 and 21-4; Paust, *ibid.*, 31-7; Robblee, *ibid.*, 104-5, 110 and fn. 94; *U.K. Manual, supra*, note 49, 175, item g; *List of War Crimes, supra*, note 49, item 27. See also United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons, *Resolution on Small-Calibre Weapon Systems*, 23 September 1979, U.N. Doc. A/CONF. 95/15, Appendix E, reprinted in (1980) 19 I.L.M. 1536.

⁵³ For limited examples, see, e.g., Cassese, *ibid.*, 14; Paust, *ibid.*, 31-2; Robblee, *ibid.*, 110 and fn. 94. It should be noted here once again that "weapons of mass destruction" (both nuclear and non-nuclear) are prohibited in outer space or on celestial bodies other than the earth, in the Antarctic, and their emplacement is not permitted on the seabed, ocean floor or subsoil thereof. See the treaties cited *supra*, note 6.

⁵⁴ See generally, Paust, *ibid.*, 29-37. Cf. Cassese, *ibid.*, *passim*.

⁵⁵ See *supra*, notes 24, 29, 34, 38-9, 42 and accompanying text.

cant role in an ongoing process of arms limitation, especially with regard to the control and use of certain conventional weapons. There are basically two types of regulation: (a) the outlawing of specific weapons, weapons characteristics or weapons effects (a so-called *per se* prohibition applicable in all circumstances);⁵⁶ and (b) the prohibition of certain uses of weapons that are otherwise lawful.⁵⁷ Obviously, the regulation of general strategies and prohibitions of certain forms of targeting also affect the selection and use of certain weapon systems in various circumstances— for example, the prohibitions against attacks on civilians and the use of any weapon system that will predictably produce indiscriminate or excessive death, injury, suffering, or destruction.

Each of these forms of direct or indirect regulation can be based on treaty or customary law, or, as is often the case, on a combination of the two, as well as on general principles of law recognized by “civilized” nations.⁵⁸ This necessary interrelation is exemplified by art. 1, para. 2 of Protocol I to the *Geneva Conventions*:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.⁵⁹

Indeed, in weapons regulation, as in any matter of international or domestic law, it is necessary to consider all relevant legal policies at stake for a realistic, comprehensive and policy-serving inquiry to result.⁶⁰ For example, as noted above, the regulation of an otherwise legitimate weapon system should be considered in relation to specific use prohibitions contained in treaties such as the 1977 Protocols to the *Geneva Conventions* and the 1980 *Convention on Certain Conventional Weapons*, more general norms contained in the customary laws of armed conflict and norms which form a part of human rights law applicable in all circumstances of peace or war.

The interrelationship between such norms of international law and continuing efforts at disarmament can be seen in relevant disarmament documents. A 1973 General Assembly resolution recognizes such an interconnection when noting:

[T]he widespread use of many weapons and the emergence of new methods of warfare that may cause unnecessary suffering or are indiscriminate call urgently for efforts by Govern-

⁵⁶See, e.g., sources cited *supra*, note 24.

⁵⁷See *ibid.*

⁵⁸See, e.g., *Statute of the International Court of Justice*, art. 38(1).

⁵⁹*Supra*, note 17. On the similar nature of the Martens Clause in the *Hague Convention*, see Paust, *Illegal Weapons*, *supra*, note 24, 31. Cf. Kalshoven, *supra*, note 18, 204.

⁶⁰See, e.g., sources cited *supra*, notes 1 and 3.

ments to seek through possible legal means the prohibition or restriction 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 weapons that are especially cruel or indiscriminate.⁶¹

In 1978, the *Final Document* of the United Nations General Assembly First Special Session on Disarmament⁶² also reaffirmed the customary law of The Hague while calling for more specific prohibitions of conventional weapon systems that are "excessively injurious, cause unnecessary suffering or have indiscriminate effects."⁶³ The General Assembly noted, in particular, the forthcoming Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons⁶⁴ and, as part of the United Nations Programme of Action, set priorities in disarmament negotiations as follows:

Priorities in disarmament negotiations shall be: nuclear weapons; other weapons of mass destruction, including chemical weapons; conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects; and reduction of armed forces.⁶⁵

The 1978 *Final Document* on Disarmament also noted that the 1972 *Convention on Bacteriological (Biological) and Toxin Weapons*,⁶⁶ among others, had "been important in limiting certain weapons or eliminating them altogether", but added: "These partial measures have done little to bring the world closer to the goal of general and complete disarmament."⁶⁷ For the future, the *Final Document* stressed that "an agreement on elimination of all chemical weapons should be concluded as a matter of high priority"⁶⁸ (including a prohibition on the development, production and stockpiling of all chemical weapons);⁶⁹ that a convention should eliminate all "radiological"

⁶¹ United Nations G.A. Res. 3076, 28 U.N. GOAR, Supp. (No. 30) 15, U.N. Doc. A/9030 (1973). See also Obradovic, *Disarmament and the Law of Armed Conflicts — A Thorny Problem*, paper presented at Fifth Round Table on Current Problems of International Humanitarian Law, San Remo, Italy (6-9 September 1978); Ramcharan, *Human Rights, Humanitarian Law and Disarmament — Recent Trends in United Nations Human Rights Organs*, paper presented at Fifth Round Table on Current Problems of International Humanitarian Law, San Remo, Italy (6-9 September 1978).

⁶² United Nations G.A. Res. S-10/2, 10 (Special) U.N. GAOR, Supp. (No. 4) 3, U.N. Doc. A/S-10/2 (1978), reprinted in (1978) 17 I.L.M. 1016 [hereinafter *Final Document*].

⁶³ *Ibid.*, para. 23. See also *Conventional Weapons Convention*, *supra*, note 25, Preamble (which recognizes the importance of pursuing every effort which may contribute to disarmament).

⁶⁴ See *Final Document*, *ibid.*, para. 86.

⁶⁵ *Ibid.*, para. 45.

⁶⁶ *Supra*, note 49.

⁶⁷ *Final Document*, *supra*, note 62, para. 17. See also paras 72-3.

⁶⁸ *Ibid.*, para. 21. See also paras 45 and 75; Obradovic, *supra*, note 61.

⁶⁹ See *Final Document*, *ibid.*, para. 75.

weapons;⁷⁰ and that the Committee on Disarmament "should keep under review the need for a further prohibition of military or any other hostile use of environmental modification techniques".⁷¹ These developments, should they occur, would be of undoubted help in limiting needless cruelty and in protecting, to a limited extent, our natural resources.

When discussion turns to the control of specific weapon systems, it is apparent that the United States is not interested in the banning of laser weapons⁷² which actually could provide more directed and proportionate weapons capabilities. Most unfortunately, the United States risks violating existing international law if it ever uses neutron warheads that are presently being developed for deployment abroad.⁷³ The United States is keenly interested, however, in a convention eliminating all chemical weapons. Both the United States and the Canadian Governments recently submitted reports to the United Nations voicing their outrage over the illegal use of chemical weapons in Southeast Asia and Afghanistan.⁷⁴ As Eugene Rostow, the United States Representative to the First Committee, stated:

Ending the use of these horrible weapons should be given the highest priority by the international community. Violations of existing legal constraints have a negative impact on the entire arms control atmosphere.⁷⁵

For these reasons, the United States supports the continued efforts of the United Nations Committee on Disarmament to develop a chemical weapons

⁷⁰ See *ibid.*, para. 76. On the present illegality of radiation weapons, see Paust, *supra*, note 7, 44.

⁷¹ *Final Document, ibid.*, para. 78. See also *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* cited in Vlasic, *supra*, note 6, 140.

⁷² See *I.L.A. Report, supra*, note 27, 61 (where the United States Delegation Report notes that laser weapons are not covered by the 1977 Geneva Protocols Additional). It also seems that the 1967 *Outer Space Treaty, supra*, note 6, art. 4, does not prohibit the use of laser weapons in outer space unless they possess the characteristics of prohibited "weapons of mass destruction". See also Matheson, *supra*, note 18, 47. The use of the "moon and other celestial bodies", however, must be "exclusively for peaceful purposes". See *Outer Space Treaty, supra*, note 6, arts 1 and 3. See also Vlasic, *ibid.*, 163-7; and Christol, *supra*, note 6, 47. The use of lasers would also seem not to be prohibited by the 1971 *Seabed Treaty, supra*, note 6, art. 1. Laser guidance systems can even produce more humane results. See Matheson, *supra*, note 18, 30; and Paust, *My Lai and Vietnam, supra*, note 12, 149.

⁷³ See *supra*, note 7 and accompanying text.

⁷⁴ See, e.g., sources cited *supra*, note 48 and *infra*, note 75.

⁷⁵ Rostow, Statement to the 37th Session of the United Nations General Assembly in the First Committee (27 October 1982) 28, U.N. Doc. A/C1/37/PV. 13. But see Almond, *supra*, note 18, 199-200 (arguing for chemical reprisal capability); Miles, remarks, (1980) 74 Proc. Am. Soc. Int'l L. 211; Solf, remarks, (1978) 72 Proc. Am. Soc. Int'l L. 47-8; and Blix, *supra*, note 24, 48. On the illegality of such reprisals, see Paust, *supra*, note 7, 48.

convention with effective verification procedures, including "systematic international on-site inspection".⁷⁶ Subsequent to the publication of the Canadian and American reports, new evidence of the egregious effects produced by Soviet-made chemical weapons in Africa has underlined the urgent need for effective mechanisms to prohibit such weapons and, indeed, all chemical weapons.⁷⁷

Yet, are new treaties needed to govern each specific weapon system? I still think not,⁷⁸ although it is evident that specific treaty prohibitions complement general proscriptions contained in both treaty and customary law. As noted previously, effective implementation of present law is far more important than the drafting of new rules of an *ad hoc* nature prohibiting specific types of weapons.⁷⁹ This conclusion is especially compelling in view of the fact that specific weapon prohibitions are frequently rendered obsolete by rapid technological developments, with the result that the effort to ban specific weapons is often an effort geared to the past, not an effort to serve human needs and to regulate the battlefields of the future.⁸⁰ After recognizing the cogency of this argument, Professor Cassese nevertheless rightly has added the following admonition:

It seems therefore that in order to obviate these shortcomings at least to some extent, the drawing up of lists of specific weapons whose use is forbidden should go hand in hand with the elaboration of a general standard "geared to the future" that is to say a principle capable of covering at least the most blatant cases of inhuman weapons that States are likely to devise.⁸¹

He also recommended that a "comparison" test be built into the general principle approach in order to cover new weapons.⁸²

⁷⁶Rostow, *ibid.*, 28.

⁷⁷See *U.S. Raises Issue of Ethiopian Toxic Arms in U.N.*, *The New York Times* (9 December 1982) A 11. See also sources cited *supra*, note 48.

⁷⁸See Paust, *supra*, note 36, 162-4.

⁷⁹See Paust, *ibid.*, 163-4. See also Aldrich, *supra*, note 20, 143, 146 and 148; Rubin, remarks, (1973) 67 *Proc. Am. Soc. Int'l L.* 165; Matheson, *supra*, note 18, 29; Almond, *supra*, note 18, 199. *Cf.* Kalshoven, *supra*, note 36, 159-61. But see Blix, *supra*, note 20, 167; and Blix, *supra*, note 24, 34.

⁸⁰See Paust, *ibid.*, 163; Cassese, *Weapons Causing Unnecessary Suffering*, *supra*, note 8, 39. But see Blix, *supra*, note 20, 167: "It is no argument that a list of specifically banned weapons will be obsolete in a few years. As new weapons will be developed, we may revise the list."

⁸¹See Cassese, *ibid.*, 39. See also Kalshoven, *supra*, note 36, 161. For an older example of the United States quest for general prohibitions and a Russian effort to seek specific prohibitions, see Cassese, *ibid.*, 21-2 (at the 1899 Hague Conference). See also Paust, *Illegal Weapons*, *supra*, note 24, 32-3.

⁸²See Cassese, *ibid.*, 41-2. Of course, general principles always have the "comparison" advantage.

General principles, coupled with effective implementary efforts, will often serve better than specific prohibitions to control the development and use of weapons. Yet, early efforts to control such weapons as burning arrows, the crossbow, muskets, and projectiles dropped from balloons demonstrate how futile either approach can be if technological change and new patterns of social expectation dictate contrary results.⁸³ Additionally, as was noted above, paper prohibitions are far less desirable than the effective implementation of norms that are based upon patterns of widely-shared legal expectation. In any event, an important question remains: How might we develop such patterns of expectation further and, more generally, how might we provide better implementation of international norms proscribing certain weapons or uses of weapons?

III. Toward More Effective Implementation

Obviously, any method for the better implementation of international law and, more specifically, of human rights law can help. The United Nations General Assembly has recognized already certain interconnections between several legal policies at stake (*e.g.*, those relating to peace, security, human survival, self-determination, economic and social development, the rational use of finite earth resources), and the need for disarmament and arms limitation. The General Assembly has failed however to perceive adequately the broader implications of the present state-oriented system and the oppression of authority, self-determination and human rights perpetuated by far too many of the elites who, jointly or separately, control much of the weaponry under consideration.⁸⁴

In sharp contrast, McDougal, Lasswell and Chen have noted in another context that, although a focus on interconnected legal policies is generally apt,

human institutions and practices are, geographically, too state-centered and, functionally, too tradition-bound to make timely responses and adjustments to the accelerating pace and dimensions of change generated by the universalization of science and technology and the ever-increasing global interdependences [of persons everywhere]... . The quality of

⁸³With regard to such early attempts at prohibition, see, *e.g.*, Paust, *My Lai and Vietnam*, *supra*, note 12, 109-10; Paust, *The Nuclear Decision*, *supra*, note 8, 165 and fn. 17; and Robblee, *supra*, note 12, 98-100. See generally, Rubin, remarks, (1973) 67 Proc. Am. Soc. Int'l L. 164-5.

⁸⁴This lack of perception is evident in the *Final Document* of the United Nations General Assembly First Special Session on Disarmament, *supra*, note 62. *Cf.* Ramcharan, *supra*, note 61, 6, citing U.N. Doc. A/AC.197/84, paras 19-21 (statement of Costa Rica before subcommission).

transnational interaction has largely been shaped by the pattern of cooperation and coercion among elites representing states of varying sizes, capabilities and orientations.⁸⁵

Further, as stated in a previous study,⁸⁶ these authors allege that the unnecessary and inhibiting dominance of state-oriented power processes and of elites controlling such processes, as well as "a bias in favor of perceiving advantages and disadvantages in terms of the individual nation-state", have contributed to "excessive" notions of state sovereignty and power, diverting attention from important issues of authority, human dignity, common interests, complexities of various power processes (including the role of individuals and groups in such processes), and from the design and growth of more useful constitutive processes.⁸⁷ If they are even partly correct, the implications of such a recognition for disarmament and arms limitation could prove to be profound. A redirected attention could have a significant impact upon the spiralling tragedy of social violence in an interdependent world. As others, such as Professor Falk, might suggest, a redirected focus might be our only hope.

On a more mundane level, there is still much to be done. One can recognize the need for further agreement on general criteria concerning prohibited weapon uses and effects, and the need for far greater efforts at education, both of the general populace and of potential military combatants.⁸⁸ Indeed, certain educational efforts are obligatory for the signatories of many of these conventions,⁸⁹ and education should prove to be a valuable part of a general sanction process.⁹⁰ Still useful as well, is the

⁸⁵ McDougal, Lasswell & Chen, *supra*, note 1, 44. These authors pursue a similar analysis at 118, 183-4 and 369-70. For general background, see McDougal, Lasswell & Chen's formulation of "The Global Constitutive Process of Authoritative Decision", commencing at 161, and the discussions at 179 and 431.

⁸⁶ See Paust, *Human Rights*, *supra*, note 1, 248-9.

⁸⁷ See McDougal, Lasswell & Chen, *supra*, note 1, 44. See also their discussion at xxi, 17-20, 47, 49, 130-2, 181, 438-9, and 443.

⁸⁸ See generally, the *Final Document* of the United Nations General Assembly First Special Session on Disarmament, *supra*, note 62, paras 15 and 99-108 (setting forth the need for and the various types of implementary responses); *Conventional Weapons Convention*, *supra*, note 25, art. 6; Protocol I to the *Geneva Conventions*, *supra*, note 17, art. 19.

⁸⁹ See sources cited *ibid.* On the need for education, see generally, the Symposium on *Coping With International Conflicts* (1982) 13 Ga J. Int'l & Comp. L.; Draper, *The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978* (1979) 164 *Recueil des cours* 9, 23 and 29; Draper, *The Ethical and Juridical Status of Constraints in War* (1972) 55 *Mil. L. Rev.* 169, 183-4; Levie, remarks, (1980) 74 *Proc. Am. Soc. Int'l L.* 148-9; Parks, remarks, (1980) 74 *Proc. Am. Soc. Int'l L.* 149-50; Walker, remarks, (1980) 74 *Proc. Am. Soc. Int'l L.* 151; and Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis* (1974) 1 *Yale Stud. World Pub. Ord.* 148, 169, 181, 193, 201-2, and 204.

⁹⁰ See sources cited *ibid.*; and Paust, *supra*, note 14, 445-8.

development by various military organizations of "rules of engagement" and of training programs designed to aid in education and to assure greater compliance with relevant rules of international law in actual battle conditions.⁹¹

A greater effort must also be made to study the wound effects and lethality of certain weapon systems and to extract needed information from private industries in the United States and elsewhere.⁹² As part of such an effort, there is a need to share information and to develop national⁹³ and international⁹⁴ testing services that engage in a complete testing of governmental weapon systems as well as weapons and ammunition sought to be marketed by private industries in the country of manufacture or abroad. Article 36 of Protocol I to the *Geneva Conventions* actually compels the creation or continuation of a national testing service by providing:

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

The last clause of the article is obviously important for integrated studies of weapon effects and relevant norms of human rights, laws of armed conflict and other international law. The same Protocol provides further for the creation of an International Fact-Finding Commission that could prove to be highly beneficial in promoting the control and humane use of weapons.⁹⁵

The Protocol also provides for nation state monetary responsibility that can serve as a useful catalyst for future litigation and, thus, for more direct involvement of private individuals and groups in the overall regulation of illegal weapons and the illegal use of weapons.⁹⁶ Of course, such responsibil-

⁹¹ See, e.g., sources cited *supra*, note 89; Paust, *supra*, note 36, 162; and Protocol I to the *Geneva Conventions*, *supra*, note 17, art. 82 (use of legal advisors for advice and instruction).

⁹² See Paust, *supra*, note 7, 41-3; and Paust, *Illegal Weapons*, *supra*, note 24, 26 and fn. 24, 23-9, 37, and 54. See also Paust, *Dumdum Bullets and "Objective" Scientific Research—The Need for a Configurative Approach to Decision* (1978) 18 *Jurimetrics J.* 268.

⁹³ See Paust, *supra*, note 7, 41-2. See also Blix, *supra*, note 24, 33; Matheson, *supra*, note 18, 27; Matheson, *supra*, note 36, 156; and Robblee, *supra*, note 12, 108.

⁹⁴ See Paust, *ibid.*, 42-3. See also Blix, *supra*, note 20, 156; Delessert, *supra*, note 18, 37; Cassese, *Weapons Causing Unnecessary Suffering*, *supra*, note 8, 37; *I.L.A. Report*, *supra*, note 27, 63 (noting the 1979 Conference Resolution calling for further national and international research); and Paust, *supra*, note 89, 192-3, 195 and 216.

⁹⁵ See Protocol I to the *Geneva Conventions*, *supra*, note 17, art. 90. See also Kalshoven, *supra*, note 18, 147-8; and Paust, *supra*, note 89, 196-200.

⁹⁶ See Protocol I, *ibid.*, art. 91. See also Paust, *supra*, note 7, 41 and 45-6; Paust, *Human Rights*, *supra*, note 1, 243, fn. 79; and Paust, *Litigating Human Rights: A Commentary on the Comments* (1981) 4 *Hous. J. Int'l L.* 81. See generally, Paust, *ibid.*, 197-200 and 218.

ity can also lead to governmental suits or claims before the International Court of Justice, regional human rights courts and domestic courts. State-to-state claims, resulting in arbitration or commission decisions may also be pressed. If a foreign government or official violating international law is sued in the courts of the United States, the otherwise inhibiting doctrines of sovereign immunity and act of state should provide no defense.⁹⁷

Additionally, the Geneva Protocol, like so many other humanitarian treaties and like customary international law, provides for criminal sanctions. Thus, the use of illegal weapons or ammunition and the illegal use of weapons in time of armed conflict is a war crime, punishable like any other international crime.⁹⁸ To carry out treaty responsibilities concerning such criminal activity, nation states should also assure that domestic criminal sanctions are possible under relevant domestic statutes.⁹⁹ Further, all states should create similar criminal restraints on the use of illegal weapons or ammunition and the illegal use of weapons in times of relative peace. In some cases, such a criminal prosecution is already possible under existing domestic legislation designed to secure civil and human rights¹⁰⁰ and to prevent certain strategies of terrorism.

More generally, there is an urgent need for all states to prohibit the manufacture,¹⁰¹ sale, exportation,¹⁰² importation, distribution, and use of any weapons and ammunition that are illegal under international law. As noted in a previous discussion,

it seems highly desirable for . . . government[s] to serve both . . . [their] arms control and human rights policies by banning the development, sale and use of weapons that are illegal per se under international law and by suspending the development, sale and use of weapons of questionable legality until appropriate determinations can be made as to their legality.

International human rights law also provides for such state responsibility, including the responsibility to take reasonable corrective actions to avoid serious violations of human rights.

⁹⁷ See, e.g., Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity of Foreign Violators of International Law Under the FSIA and the Act of State Doctrine* (1983) 23 Va J. Int'l L. 191; and Paust, *Human Rights*, *supra*, note 1, 242-4.

⁹⁸ See, e.g., Protocol I to the *Geneva Conventions*, *supra*, note 17, arts 85-7; Paust & Blaustein, *supra*, note 14, 20-31; D. Zillman, A. Blaustein, et al., eds, *The Military in American Society — Cases and Materials* (1978); and Rubin, remarks, (1980) 74 Proc. Am. Soc. Int'l L. 192, 194. See generally, Paust, *supra*, note 7, 43.

⁹⁹ See generally, Paust & Blaustein, *ibid.*, 22-30.

¹⁰⁰ See Paust, *supra*, note 7, 43.

¹⁰¹ See Robblee, *supra*, note 12, 118, 148; Paust, *Illegal Weapons*, *supra*, note 24, 35-6 and 54.

¹⁰² See *Final Document* of the United Nations General Assembly First Special Session on Disarmament, *supra*, note 62, paras 22, 85 and 88; and Paust, *supra*, note 7, 39-48. On possible export restraints in the U.S., see Tarr, *Human Rights and Arms Transfer Policy* (1979) 8 Den. J. Int'l L. & Pol. 573.

Such an approach seems most rational whether or not human rights are at stake in time of relative peace or in time of armed conflict. Not only can weapons developed and sold for one context (*e.g.*, war) be used by purchasers in another context (*e.g.*, a domestic riot or in ordinary police operations), but weapons could be resold or stolen and used in numerous contexts. . . .¹⁰³

Any government that does not ban the manufacture, sale, exportation, importation, distribution, or use of weapon systems that already violate international law is certainly not acting in a responsible manner to control or limit arms, to serve international law generally or to serve human rights and eliminate cruel, inhumane and unnecessary death, injury or suffering. As suggested above, a failure to take reasonable corrective action can also lead to unwanted lawsuits or international claims,¹⁰⁴ and to reproach by the international community.

Conclusion

To summarize, there are numerous direct and indirect international legal prohibitions governing conventional weapon systems or their improper use. Nonetheless, there is an urgent need for nation states to take additional steps to assure that illegal weapons will not be used against human beings. A rational first step in further arms limitation would require each state to ban domestic manufacture, sale, exportation, importation, distribution, and use of weapons and ammunition that violate international law. States must also assure that civil and criminal sanctions for weapons infractions are possible under their domestic law. Additionally, there is a need for greater sanction effort through civilian and military educational programs, for further research into wound injury and related effects of weapons, for the sharing of information about weapons effects, and for other implementary measures.

For individuals as well as states, there is a need to participate more effectively in attempts to end the development and use of illegal weapon systems. Helpful, of course, will be appropriate efforts to serve peace and to promote basic human rights for all persons. As proclaimed in the *United Nations Charter*,¹⁰⁵ we must continue to seek both.

¹⁰³ Paust, *ibid.*, 41.

¹⁰⁴ See *supra*, notes 97-8 and accompanying text.

¹⁰⁵ See the Preamble to the *United Nations Charter* as well as arts 1, 2, 13, 39, and 55-6.