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Louise Doswald-Beck

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ANY ATTEMPT TO LOOK INTO THE FUTURE is fraught with difficulty and the likelihood that much of it will be wrong. If someone in 1898 had tried to foresee issues relating to the implementation of the laws and customs of war in the twentieth century, it is highly unlikely that he could have foreseen many of the major developments that have characterized warfare in this century and, therefore, the difficulties of implementation that these created. At best, he could have based his attempt on trends, in particular the development of mechanization at that time. Today, putting aside the possibility of dramatic events like a catastrophic nuclear war, or unforeseeable fundamental changes in the nature of warfare or the organization of international society, the most one

Louise Doswald-Beck, Head of the Legal Division of the International Committee of the Red Cross (ICRC), has been working for the ICRC since January 1987. She was formerly a lecturer in international law at London University, with a particular specialization in international human rights law and the international law of armed conflict and the use of force. She has numerous publications on these topics.

Between 1989 and 1994 she coordinated the work leading to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* and its commentary and edited these documents. She also coordinated efforts which led to the adoption of Protocol IV banning blinding laser weapons and has been responsible as well for ICRC legal work in favor of a total ban on antipersonnel land mines. In this capacity she represented the ICRC at the United Nations Review Conference of the Convention on Certain Conventional Weapons, and for the Ottawa Treaty. Since 1995, she has been supervising a study on customary norms of international humanitarian law.

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can hope to do is extrapolate from present trends and see how these could affect the implementation of the law in the future. In so doing one may assume that human nature will not change, although the organization of society and of international relations could well do so.

International humanitarian law is implemented on three levels, namely, by the individual undertaking an act during an armed conflict, by the society for which he is acting, and finally by the efforts of the international community. Generally speaking, laws that reflect the values of a society, or at least the interests of those in a position to enforce the law, have a good chance of being implemented.

This article analyzes the main factors that help or hinder the implementation of international humanitarian law—that is, the likelihood that in a particular combat situation its regulations will be observed or its violation punished.[1] It first examines those factors that helped such law develop in customary practices and analyzes whether they continue to be present and what the prospects might be for the future based on present trends. The changes in international society that appear to be taking place and the effect these may have on implementation are then examined. Finally, the article considers certain mechanisms for implementation. In that respect, this author does not assume that we should speak of implementation of the law in the next century as it stands now but assumes that changes and developments will take place in order to reflect developments in technology, methods of warfare, and society. The article therefore considers implementation of the major principles of international humanitarian law that reflect its basic purpose as we understand it today—the limitation of means and methods of warfare, and the protection of persons in the power of hostile authorities, in order to limit the destructiveness and suffering of war.

Factors Historically Aiding Implementation

In past centuries, various circumstances have tended to favor the implementation* of humanitarian law restrictions on the conduct of warfare. First, since rules reflected existing general practice, their implementation was not particularly difficult, as efforts were limited to keeping in line the occasional individual who behaved differently from others in his society. It is noteworthy that prior to the attempts to codify the law in the late nineteenth century, the laws and

* For the purpose of this article, the term "implementation" includes all aspects of respect for international humanitarian law; it is therefore not limited to its narrow legal sense of national legislative measures or of national or international mechanisms used to apply the law. "Practice" is used in the sense of actual behavior on the battlefield, not in that given to it for the purpose of assessing customary international law (which would include statements by states).

customs of war were an articulation of the methods of warfare common to professional armies of that time. Nonprofessional groups were not expected to conform to this law, and they were therefore also not entitled to the privileges that were enjoyed by professional armies, especially prisoner-of-war status. The protection of the civilian population was assured largely by methods of combat rather than any strict rule. The lack of such regulation is evidenced by the fact that civilians did suffer greatly during sieges; they could even be forced back into the besieged city if they tried to escape.[2] On the other hand, by the eighteenth century the practice in the Middle Ages whereby a city's population could be punished for resisting capture was considered dishonorable and uncivilized.[3]

This brings us to the second factor of importance, the belief by combatants of the appropriateness of having certain rules in battle. Concepts of honor not only prevented the sacking of cities after capture but imposed a number of rules relating to the treatment of other combatants. Most important were the prohibitions on the use of poison, treachery, and attacking an enemy combatant once *hors de combat.* These values and the sense of responsibility that they entailed were clearly instilled by the societies in which professional soldiers were brought up and also by the armies themselves. The criminality of violations of the law flowed fairly naturally from this sense of appropriate and inappropriate behavior.

The extent to which reciprocity was important for this ethic is uncertain, for one must be careful not simply to project onto society of that age this concept as perceived today. There is no conclusive evidence that strict reciprocity was required for every action between "civilized" societies, as they saw themselves.[4] However, behavior in relation to "uncivilized" societies was conditioned by an incapacity, as it seems, to apply or appreciate such niceties with respect to those peoples. Evidence of this is to be found in the U.S. Lieber Code of 1863 and in the arguments of the British when they wanted to introduce the use of "dum-dum" (hollow-point) bullets.[5] However, another type of reciprocity did become important with the introduction of new rules in treaties—the international law rule that parties need to be bound by the treaties in question. This was particularly evident in the general participation clause of the Hague Conventions.[6]

A third factor which fostered implementation was ease in application. Inasmuch as law followed practice in the last century, inability to apply it was simply not a problem for professional armies. Any potential difficulty was met by allowing exceptions where considered expedient. The most obvious example of this was the rule that captured soldiers were not to be killed; exceptions were made if keeping them as prisoners of war was impossible.[7]

Fourthly, a lack of hatred for the enemy or of desire for personal vengeance clearly helped prevent atrocities of all kinds. The fact that, in the past, recourse

to war was not illegal or even unusual helped armies view each other as fellow professionals doing their job. The notorious cruelty of recent non-international armed conflicts is at least partly caused by the emotions involved (the other important aspect being the frequent involvement of nonprofessional combatants).

Finally, general mental healthiness among combatants helped prevent atrocities. Although many may argue that only a deranged person would want to go into battle, there can be no doubt that the short battles of the past and the sense of group cohesion in professional armies helped foster respect for the rules. On the other hand, prolonged and excessive stress has a very adverse effect on a soldier's capacity to abide by rules that require abstention from attack when he feels threatened.

The Twentieth Century: Difficulties and Prospects

In the present century, however, unprecedented phenomena and tendencies have arisen that bear upon each of these historical factors. In general, they militate against the observance and enforcement of humanitarian law restrictions on combat. Further, the trends seem adverse with respect to such implementation in the twenty-first century.

Methods of Warfare. The single most important factor in creating problems regarding the implementation of the law in the twentieth century has clearly been the dramatic changes in the technology of warfare. This may well continue to be a problem in the twenty-first century. Whereas war-making methods in the nineteenth century were not dramatically different from those of previous centuries, thus allowing the gradual development of customs which reflected such practice, in the twentieth century sudden and major changes plunged the world into disarray and resulted in the need for extensive changes in the law, by treaty.

From Law Reflecting Practice to Law Preventing Practice. The major motivation for Czar Nicholas II's call for the conferences at the end of the nineteenth century and the beginning of the twentieth was the weaponry development that he perceived was taking place. This was farsighted, for the extreme destructiveness of the new technologies was such that responsible politicians simply could not continue to let law reflect practice, which would have allowed whatever technology was capable of. However, this meant that the law became increasingly dictated by the need to curtail practice rather than reflect it, thereby creating tensions in the implementation of the law in the twentieth century. Successive changes in the law largely prohibited certain new practices (such as the use of chemical weapons and massive bombardments of cities), although those who engaged in such acts were of the opinion that they had military utility—a criterion that long had served as a principal determinant of legality. Other practices

continued to be allowed, despite attempts to outlaw them; they have been responsible for a great deal of destruction and suffering. Examples include submarine attack, aerial and missile bombardment, and mine warfare. These inconsistencies have meant that the moral foundations of the law of war have become quite unclear to both soldiers and civilians.

The law no longer takes the simple approach that all militarily useless cruelty is prohibited, with the rest in principle allowed; the sheer destructive nature of today's technical possibilities has required compromises for the sake of the survival of humanity. However, these compromises do not always appear very consistent to the average person. The fact that certain bullets are prohibited by international law but nuclear weapons have not been clearly and unambiguously prohibited creates scepticism regarding the seriousness of any part of the law of war.

The principle of proportionality in attack (that the foreseeable harm caused to noncombatants be outweighed by the benefit expected to be achieved by the military action itself) is an excellent example of compromise between military and humanitarian needs, but the implementation of this rule is somewhat subjective and unclear, causing a certain degree of doubtfulness among those who hear it for the first time. The problem has been exacerbated by collateral damage that tends to occur after the actual attack—for example, water shortages and other highly negative effects of attacks on the power stations on which modern civilian society depends for survival—an issue that arose from the coalition attack on electrical power stations during the second Gulf war. The practical difficulties civilians face obtaining protection from the effects of hostilities have also created questions about the continued meaningfulness of laws to protect combatants from excessively cruel weapons.[8]

The Need for Practice Again to Reflect Law. The perceived incongruity between practice and law that has developed in this century has created a serious image problem for international humanitarian law. Law has to reflect practice at least to some degree in order to be taken seriously. Yet, for the reasons indicated above, it is not possible simply to allow the use of any given technological possibility. Therefore, what is needed is a means to make practice conform to the law, or at least its basic principles, so that law can again reflect values rather than primarily stopping certain practices. This is particularly important as there is evidence that we are, at the end of the twentieth century, on the brink of a major change in war-making capability that could be at least as important as the major changes that took place early in the twentieth century relative to the nineteenth.

The research taking place in directed-energy weapons could bring a major change in methods of warfare. At present, it is difficult to imagine the full impact of this change. The ability of high-power microwaves and electromagnetic-pulse weapons to incapacitate electronics has enormous potential for the destruction of the life-support systems of technologically developed

societies, which use such electronics for all kinds of purposes. The potential effect of acoustic beams and electromagnetic waves on persons is not yet fully known, nor is the extent to which they could be weaponized for antipersonnel purposes. Antimateriel laser beams are still being worked on, and one should not rule out the possibility of antipersonnel lasers that affect humans in ways different from the blinding laser weapons that have been recently banned.[9] Although the virtually instantaneous effect of these weapons, their invisibility, and their silence are bound to change methods of warfare in a major way, it would require a military analyst with imagination and foresight to indicate precisely how.

Other high-technology developments could be space-based weapons and various types of nuclear weapons. The original "star wars" (Strategic Defense Initiative) antimissile program ran into technical as well as legal difficulties, but it is not beyond possibility that such systems could be developed during the next century to hit targets within the atmosphere; currently it is prohibited only to deploy nuclear weapons in space. With regard to nuclear weapons, the Comprehensive Test Ban Treaty should in theory prevent further development, but there are indications that this is not the case in practice. Abstention in use is largely due to the weapons' radiation effects; therefore, any advances that substantially reduce or even eliminate these effects could tempt some to make use of their enormous blast capabilities.

Mention must be made of a potential new method of warfare that is already prohibited in law but that could have horrific effects if developed—genetic weapons. This specter and other new (if obviously preliminary) developments in biotechnology have already motivated states to begin negotiations on verification methods for a Biological Weapons Convention.[10]

Compared with these potential developments, present work on so-called "nonlethal" weapons seems insubstantial. However, any device that could cause permanent disability would certainly be no more desirable from a humanitarian point of view than more familiar conventional weapons, and it is not even clear that all are reliably nonlethal. Potential effects on the environment should also be considered.

This is not to suggest that there should be a stop to weapons development. Such a proposal would be totally unrealistic, and some new characteristics, such as increased accuracy or ways to render targets *hors de combat* while minimizing damaging effects, can be positive. However, it does mean that if we are to preserve certain notions of humanity, those in a position to direct weapons research and development requirements need to take their responsibilities seriously in this respect. In designing new weapons, the laws of war should be taken into account at the outset to ensure not only that weapons are capable of distinguishing between civilians and combatants but also that antipersonnel weapons cause neither inevitable death nor permanent incapacity.

Another factor of importance is the increasingly fragile environmental state of our planet. This is not something that weapons developers had to think much about in the past, but this factor must be taken seriously in the design of any new weapons, as a matter of the survival of us all. Given that much new weapons research these days is undertaken by companies seeking primarily to sell their products, it is essential that states make developers aware beforehand of which effects are contrary to the rules or principles of international humanitarian law.

Belief in the Appropriateness of the Rules. Conviction that humanitarian rules have a proper place is the single most important factor supporting effective implementation of the law. As already indicated, it has been dealt a severe blow in the twentieth century by the inappropriateness of law that primarily prevents practice rather than reflecting it.

The Crisis of the Twentieth Century. The extensive effects of modern warfare and the practice of conscription have put war outside the province of a few professionals. Also, the fact that war is no longer a lawful means of settling disputes may have contributed to a reduction in the professional respect between soldiers on opposing sides. More seriously, traditional notions of honor effectively died in this century, frequently leaving in their stead a cynicism toward, disbelief of, or plain ignorance about the fact that warfare is meant to have rules. The international community has tried to counter the increased destructiveness and cruelty of warfare in the twentieth century by more extensive and detailed treaty law. However, this law is for the most part not known, or where it is known is not sincerely believed in, and that has led to serious difficulty in getting much of it applied.

Some aspects of the law require interpretation by states—for example, the basic principles prohibiting weapons that are by nature indiscriminate or that cause superfluous injury or unnecessary suffering. A lack of genuine belief in the importance of these rules makes it easy to ignore them; generally speaking, states have not been willing to declare specific weapons illegal on the basis of these rules.[11] Treaty prohibitions and disuse in practice have resulted instead from public opinion.

Other rules are straightforward and detailed, in particular those in the 1949 Geneva Conventions, which require respectful treatment (in certain ways) of persons in the power of an enemy. It would be possible to apply most of these rules without much difficulty if combatants and states genuinely believed in their importance. However, a number of factors have prevented this, including ignorance, indifference, hatred of the enemy, and competing interests. It is clear that if soldiers are to abide by the rules, they must be convinced that their commanders take such rules seriously and that to ignore prescribed behavior will result in disciplinary action. There is evidence of improvement here, as more armies are beginning to teach the law of war seriously. (Particular efforts

have been made by the International Committee of the Red Cross, or ICRC, and the International Institute of Humanitarian Law.) However, the situation is far from perfect, and one gains the impression from speaking with military personnel from around the world that their instruction in the law has been patchy or nonexistent. Respect for the law in future wars will depend to a great degree on whether instruction on the pertinent rules is improved and whether the necessary sanctions are imposed, preferably by the soldier's own country, in case of violations.

The Need to Repress Violations of the Law. The fact that international humanitarian law has not been considered to be of major importance by states is reflected in their failure to prosecute war criminals: more than fifty years after the Geneva Conventions entered into force, most countries have still not carried out their obligation to provide for compulsory universal jurisdiction over grave breaches of those instruments. The present image is one of theoretical lip-service, or at most of double standards by which some are prosecuted and others not. Although there have been some war crimes trials, such as the recent Yugoslav and Rwanda tribunals, these have been the rare exception. The post–World War II Nuremburg and Tokyo trials are still seen by many as "victor's justice." There can be no doubt that the prosecution of such criminal behavior would go a long way toward convincing combatants of the seriousness of the law.

There is a good chance that an international criminal court will come into being in the next century, but whether this improves or diminishes the image of international humanitarian law will depend almost entirely on the court's jurisdiction. The United Nations draft statute contains two provisions that could seriously harm how it is perceived: that the Security Council could prevent the court from hearing a case if the Council is itself dealing with the conflict in question; and that consent is required of the nation holding the accused, the state where the act occurred, and the states of which the victims and accused are nationals—all in addition to ratification of the treaty.[12] These draft provisions would undermine the notions of universal jurisdiction for war crimes and of the rule of law, and they are likely to strengthen the image of double standards. In particular, requiring the consent of the accused's own state would offer war criminals a form of immunity; as the whole purpose of an international criminal court is to assure the prosecution of war criminals if they are not tried by their own courts or extradited for trial, it is essential that the international court have inherent jurisdiction for such crimes. Otherwise, in the next century implementation of the duty to repress war crimes will prove no better than now.

The Influence of Society in General. Both an effective international criminal court and respect for the rules by combatants during conflicts depend on a genuine and clear understanding of the importance of limits in warfare and of respect for adversaries under one's control. Detailed rules will inevitably vary

over time to accommodate changes in society and in methods of warfare, but it is important to preserve the basic values. If these were viewed as important by society in general, soldiers would perceive them as normal when taught them during military training. The most insidious problem is that many people assert that war should know no rules, that the only way to deal with adversaries is to be stronger and more prepared than they are, and that one should be willing to use any means to accomplish one's aims. Rooted in a belief that such means are necessary for personal and national survival, these views are what the new generation seems primarily to be taught through the media and war-play computer games. The same means could instill humanitarian law values, but unfortunately it is obvious that humanitarian law is either unknown or not believed in—or considered completely irrelevant—by those who produce these programs and games. This is a vicious circle that must be rectified somehow. Otherwise, we could face a situation in the next century where, with new weapons even more dangerous than those of this century, the rulers and combatants will be uninterested in upholding the values of international humanitarian law.

International Human Rights Law and Human Rights Organizations. In the second half of the twentieth century the driving factor in keeping alive notions of limits on behavior in wartime has been human rights law. Despite its totally unrelated origin—it was primarily motivated by a desire to render governments accountable for behavior toward their own citizens—the humanitarian, protective purpose of human rights law has influenced the views of certain parts of the international community. The horrors of the Second World War not only produced pressure to make the promotion of human rights a basic purpose of the United Nations (now embodied in Article 1 of its Charter) but also led to the creation of "crimes against humanity" as an international offence and to the 1948 Genocide Convention. Nor is it a coincidence that it was in 1949 that non-international armed conflicts were regulated by treaty for the first time (in common Article 3 of the Geneva Conventions).*

A major step was taken at the 1968 United Nations Human Rights Conference in Teheran, where a resolution titled "Human Rights in Armed Conflict" encouraged states to afford more respect to existing humanitarian conventions and to add further rules to protect "civilians, prisoners and combatants in all armed conflicts." The influence of human rights law can be clearly seen in the wording of the fair trial guarantees in the 1977 Protocol II Additional to the Geneva Conventions.[13]

In some respects, the influence of human rights law was inevitable, for much in the Geneva Conventions that is devoted to protecting individuals overlaps civil rights as well as economic and social ones. However, a major difference is that humanitarian law concerns itself with behavior by *all* parties to a conflict, a

* Articles 1, 2, and 3 are identical in all four Geneva Conventions.

concept particularly important in non-international armed conflicts and for which human rights law is not entirely suited.

Since the 1970s the United Nations has concerned itself with important aspects of international humanitarian law in human rights contexts, in particular in the Human Rights Commission and its Subcommission for the Elimination of Discrimination and the Protection of Minorities. The most dramatic recent example of this trend is the present negotiation of a Protocol Additional to the Convention on the Rights of the Child, which will be solely devoted to preventing the recruitment and participation of children in hostilities.[14]

There can be no doubt that most of the impetus for these developments comes from nongovernmental human rights organizations, which represent important segments of civil society. Resistance or protest from civil society has also had a major effect on limits on weaponry. The nonuse of nuclear weapons since the Second World War is largely due to such civil protest, as was the desire following the Vietnam War to prohibit the use of incendiary weapons—the political sensitivity of weapons like napalm has in practice virtually eliminated their use against personnel. The call for the ban on blinding laser weapons, although originated by the governments of Sweden and Switzerland and primarily pursued by the International Committee of the Red Cross, was boosted by the support it received from various human rights organizations (most notably the Human Rights Watch Arms Project).

A stunning development in this regard is the ban on antipersonnel mines adopted in Oslo in September 1997, agreed to in principle by all states and actively supported by over a hundred.[15] In just five years the initial call in 1992 by six nongovernmental organizations led to a coalition of about a thousand such, collectively known as the International Campaign to Ban Landmines (which in 1997 received the Nobel Peace Prize). Also, the decision by the International Committee of the Red Cross in February 1993 to support such a ban helped the process enormously.[16] The efforts were not entirely civilian; the original founder of this coalition was the Vietnam Veterans of America Foundation, and certain military personnel were also supportive, arguing that the harmful effects of antipersonnel mines outweigh any military utility they may have—a classic humanitarian law approach.[17] However, there can be no doubt that the trend at present is for civil society to push most actively for restraints in methods and means of warfare and for the protection of its victims.

What does this bode for the future? On the one hand, if it continues, this trend means that humanitarian law principles will be fought for by certain members of society; this should save at least some of the law. If this concern filters down to the average person so that potential combatants consider restraint in armed conflict natural, a positive development will have taken place. If on the other hand there continues to be a clash of interests, requiring civil society to make Herculean efforts to regulate one aspect of the law at a time, the

attempt could be overtaken by contrary military or technological developments; in that case the tension between legal principle and military practice will continue into the next century.

Ease in Application of the Law. As already indicated, in the days when law followed practice and warfare largely consisted of hand-to-hand fighting and sieges, there was no particular difficulty in applying the law. However, with the introduction of aerial bombardment and missile warfare, the rules limiting attacks to military objectives and requiring proportionality became more difficult to respect. First, accurate intelligence is necessary to ascertain which objects and persons are military objectives and where exactly they are. Secondly, correct identification of protected persons, vehicles, and buildings will be problematic until more sincere efforts than at present are made to take advantage of technological possibilities. Thirdly, extremely accurate weapons systems are still in the minority. Finally, any assessment of proportionality in attack has so substantial an element of subjectivity (the weighing of military benefit and civilian damage) that it is very difficult to gauge whether the law has been respected.

Faced with these difficulties, commanders and soldiers are likely to make mistakes, and it is not surprising that the number of civilian casualties has dramatically risen since the beginning of this century.[18] A study by two ICRC doctors has shown statistically what has always seemed common sense, that the more bombs and missiles are used as opposed to bullets, the greater the number of civilian casualties compared with military ones.[19] The extreme difficulty in applying Protocol II to the Convention on Certain Conventional Weapons to land mines, particularly as to limitation to military objectives and to marking and recording, led the international community to ban antipersonnel mines altogether as indiscriminate weapons. Fighting from a distance is said to affect adversely the concern of combatants about the nature of the targets, for they will not see the damage that is actually being done;[20] present trends, with increasing computerization, are likely to exacerbate this problem. Unless major efforts are made to improve the accuracy of identification and the precision of weapons generally available, implementation of the law may well become even more difficult.

Another aspect of concern is the complexity of the legal regime itself; the more complex the rules, the less likely it is that they will be followed accurately. This has been seen in the context of the law of naval warfare, where not only has there been no general treaty regulation since 1907, but the rather complex customary rules were extensively violated during the Second World War.[21] Even the Nuremberg Tribunal, in the cases of admirals Karl Dönitz and Erich Raeder, confused the separate notions of rescue after sinking a vessel and removal of personnel before sinking where capture is not possible.[22] For this

reason, during the drafting in 1994 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* this author argued for a simple rule prohibiting the attack and capture of passenger vessels carrying only civilians—rather than allowing capture and even destruction subject to certain rules, as is now permitted.[23]

The desire for simplicity can also be seen in the disappointment of many states with the complex rules for the use of antipersonnel mines in Protocol II Additional, as amended on 3 May 1996, to the Convention on Certain Conventional Weapons. Convinced that this would not really work in practice, they went on to adopt the straightforward ban on antipersonnel mines in Oslo, the ban embodied in the Ottawa Treaty in December 1997.

Attitude toward the Enemy. The prohibition of aggression, the rise in ideological wars, and the increasing intensity of non-international armed conflicts in the twentieth century have all had the effect of introducing additional personal hatred for the enemy. This is not always the case, of course; for example, the lack of such personal hatred aided the implementation of law in the 1982 South Atlantic conflict between the United Kingdom and Argentina.The murder of civilians is particularly acute in non-international armed conflicts. Unfortunately, there appears to be no downturn in this trend, and the problem could well become much worse in the next century, making implementation of the law more difficult, if not impossible in some situations. The present rise in fundamentalism and fanaticism is extremely perturbing in this regard. It is clear that in order to avoid the worst, the international community will need to make a particular effort to resolve certain tensions caused by ethnic rivalries or ideologies. It will also need to be more assiduous in punishing violations of the laws of war, including those in non-international armed conflicts. More serious efforts should also be made to limit the extent of proliferation of weapons, including small arms, to minimize the effects of such wars.

Mental Health of Combatants. The longer the period of tension, the more likely it is that combatants will suffer from combat stress disorder and the greater difficulty they will have maintaining the discipline necessary to respect the rules in threatening circumstances.[24] Suggestions on improving this situation include ensuring that weapon effects do not induce a sense of total helplessness, and giving soldiers leave on a regular basis. The difficulty in accurately identifying hostile objects from a distance is exacerbated by stressful situations, a fact clearly seen in the case of the USS *Vincennes*'s destruction of Iran Air Flight 655 in July 1988. Both the International Civil Aviation Organization report and that undertaken by the United States attribute the mistake to tension on board the *Vincennes* and the conviction among the crew that the ship could be attacked that day. This led a technician so to misread the information on his computer

screen that he believed the opposite of what it was indicating.[25] The mistake occurred in circumstances that did not amount to a full-scale conflict, so one can only assume that in intensive armed conflict such mistakes will be more frequent. Close ranges and a rapid approach of a hostile contact make tension particularly acute.

Unfortunately, the situation is likely to get worse in the future if major developments in directed-energy weapons proceed. This is primarily because the effects of such weapons are virtually instantaneous and can occur over large distances, thus increasing the feeling of inability to defend oneself. Inappropriate preemptive attacks may well result, leading to further attacks on protected or civilian persons or objects.

Changes in the Structure of International Society

The rules prohibiting the use of force by one state against another have had some effect, so that international wars are less frequent than internal ones. Internal armed conflicts may not actually be more numerous today than in the past; rather, we are more aware of what is going on in all parts of the world, and the level of weaponry now available in such conflicts means that they have a more serious effect on the population. The extent of political and commercial intercourse between nations also means that the effects of internal conflicts are far more serious in international relations than they used to be. Moreover, because interstate conflicts are in the minority, unless intrastate warfare is seriously addressed most of international humanitarian law is at risk of being perceived as largely irrelevant to modern realities.

International law is primarily aimed at regulating relations between nations, human rights law notwithstanding. Despite Article 3 common to the Geneva Conventions, and Additional Protocol II, the detailed rules of international humanitarian law have been largely developed for interstate armed conflicts; their easiest legal application is in the case of a classic professional war between two states. However, non-international armed conflicts and actions by various international peacekeeping or peace-enforcement groups are far more numerous than international armed conflicts.

Present trends suggest that this situation is likely to continue into the next century. We are witnessing not only the breakup of a number of nations and increased stress on local government but also an increasing trend toward supranational law, in the form of economic and political international organizations with extensive regulatory powers and increasing influence in international affairs. At the same time, force is increasingly being used by private groups of a financial or criminal nature, with effects that cannot be ignored. The challenge of the next century will be how to deal effectively with these developments. It will require a willingness to venture into legal regulation that does not rely on

classical definitions of "conflict," which at present can determine only whether a conflict is international or non-international.

Non-International Armed Conflicts. In practice, soldiers are not trained in two different ways; most military manuals do not present one set of rules for international armed conflicts and another for non-international ones. It is unfortunate that a number of states remain unwilling even to admit the formal applicability of more detailed rules for non-international armed conflict. Their view is that it would amount to interference in their internal affairs or could be seen as granting international recognition to opposing forces. The negotiation of Additional Protocol II illustrated the widely differing opinions on this important issue. There being no indication that non-international armed conflicts are lessening in number, we are likely to see a continuation of this problem in the next century. In principle, professionally trained soldiers should comply with the same regulations for international and non-international armed conflicts.

Application by Governmental Armed Forces. Government armed forces and other governmental institutions are in law bound by the wording of common Article 3 and Protocol II, where applicable, and relevant human rights law. As indicated above, willingness to regulate internal armed conflicts by treaty arose when international human rights law came into being. However, states that are not keen on human rights law tend also to resist further regulation of internal armed conflicts in international humanitarian law. The difficulties during the negotiation of Protocol II were such that the compromise which produced the definitive text came at the last minute, allowing very little discussion on the final wording. This resulted in an incongruous situation, in that some of the rules in Protocol II are more absolute in their protections than those to be found in Protocol I; reference to the equivalent articles in Protocol I will be necessary for their interpretation in practice.

A study being undertaken by the ICRC on international customary law may further elucidate the rules generally accepted as applicable in non-international armed conflicts. It likely will indicate points of weakness, where the international community could be encouraged to continue work toward greater specificity.

There is one area, however, where application of the rules by governmental armed forces is difficult—the distinction between the civilian population and others. Common Article 3 does not define what is meant by the "armed forces" of the other party, nor is there any definition of who are considered combatants. Civilians are referred to simply as persons who do not take an "active" part in the hostilities: does this mean that all other persons are combatants and can be attacked? What does "active" mean? Is it the same as the term "direct" found in Article 13 of Protocol II? Article 1 of Protocol II is better in this regard, as it

describes the type of dissident armed forces that need to exist for Protocol II to come into effect. One could assume that only persons belonging to such groups are combatants and that all other persons are civilians; however, Article 13, paragraph 3, speaks of the protection of civilians unless they take "a direct part in hostilities." This could be interpreted as meaning that all persons who do not take such a direct part are civilians, but that view could conflict with the concept of "armed forces" referred to in Article 1. It may well be that the reference to "direct" participation is only the equivalent of Article 51, paragraph 3, of Protocol I.

These issues are not academic but rather very practical matters that regularly arise when attempting to assess whether given attacks are lawful or not. It is common in internal armed conflicts that persons who mostly lead normal lives indulge in guerrilla activities from time to time. Can they be attacked at any time and in any place? We also find civilians armed and trained to fight, ostensibly for their own protection but also for the purposes of those who trained them. What is their status? What of children who are asked to deliver messages to guerrilla groups, especially messages that are important for intelligence purposes? A major effort should be made to find answers to these basic questions, so that the lawfulness of acts in non-international armed conflicts can be more readily assessed in the future.

Application by Nongovernmental Forces. As to the behavior of nongovernmental groups, there are both theoretical and practical problems. The application of international law to nongovernmental groups is still perceived by many governments as problematic, despite the existence of common Article 3 and the ratification of the Geneva Conventions by virtually all states. Recent attempts by the government of Colombia to stipulate that the new treaty banning antipersonnel mines applies to nonstate entities ran into difficulties when certain Western governments represented at the Oslo conference could not accept the proposition that such entities might have responsibilities under international law.[26] In the end, Colombia had to content itself with a paragraph in the preamble indicating that the rules of humanitarian law apply to all parties to a conflict, and with a statement at the closing session as to the importance of this point—a statement supported by the ICRC.

Another example of the same problem arose in the context of the negotiations for the Protocol to the Convention on the Rights of the Child. A number of states and the ICRC spoke in favour of a rule that would prohibit all parties to a non-international armed conflict from recruiting children under the age of eighteen years. Several states could not accept this, and the draft now indicates two possible methods of dealing with this issue, neither of which is satisfactory. Draft paragraph 2 states merely that the government is to ensure that children under eighteen are not recruited; draft "New Article A" would require governments to "take all appropriate measures to prevent recruitment of

persons under the age of 18 years by non-governmental armed groups involved in hostilities."[27] These proposals may be doctrinally pure in the minds of strict international lawyers, but they are hardly useful when it comes to the actual behavior of nongovernmental groups.

The application of human rights law concepts to nongovernmental forces is far more problematic than that of humanitarian law concepts. This is because human rights law is primarily conceived of as the obligations of the government towards its own population, not the other way around. (This was why a reference to the duties of nongovernmental groups was not accepted for the draft Protocol to the Convention on the Rights of the Child.) Humanitarian law, on the other hand, is meant to apply to both parties to a conflict; indeed, the very notion of equality of obligations is fundamental to the nature of this law. However, a major problem is that although nations wished these *obligations* to be made clear in common Article 3 and Additional Protocol II, they did not wish the corollary (the same *rights* for rebel forces) to be true.

The most important motivating factor for respect toward humanitarian law is the right to the status of prisoner of war, which means the certainty of not being punished if one has not violated the rules of international humanitarian law. This does not obtain in internal armed conflicts; what then is there to encourage nonstate entities to abide by international law? They can hope to gain respect, perhaps, and there is also the recommendation in Article 6, paragraph 5, of Protocol II that the broadest possible amnesty be granted at the end of hostilities. It is assumed, although not specifically indicated, that such amnesty should not apply to those who have violated humanitarian law, at least in any serious way; however, this does not seem to be very persuasive, and another motivation will need to be found for abiding by the rules of international law.

In this regard, one could consider both a carrot and a stick. The carrot could be, for example, allowing respect of international law to be used in mitigation of sentence for trials in national courts. The stick could be more rigor in trying violators of the law before international tribunals, such as that created for Rwanda, the statute of which specifically lists crimes that are violations of international humanitarian law applicable in non-international armed conflicts.[28] For this reason, we may hope that the new Statute of the International Criminal Court will include such crimes.

Since many persons using force in non-international armed conflicts have not been members of an official state army, it is not surprising that they are quite unaware of even the existence of rules applicable to such situations, let alone their content. The ICRC tries to teach some of these rules to such forces and has had some success, but its approach has certainly not always worked.[29] The only way to give such forces some idea of these rules is to make the civilian population as a whole aware of them. This is certainly not the case at present, and most governments have made no particular effort to remedy this situation. In light of

the increasingly destructive and destabilizing nature of non-international armed conflicts, a determined and serious effort in this regard must be made in the next century. However, it should be realized that knowledge of such rules does not mean that they will be perfectly respected, even if supported by nongovernmental groups. As indicated above, some of the rules relating to the conduct of hostilities are quite sophisticated. Therefore, the goal must be to reduce the incidence of direct attacks on civilians, torture, and other acts from which forces could abstain if so inclined.

The Problem of Weapons Availability. The final element of particular importance in relation to such conflicts is the ready availability of weapons. The end of the Cold War and relaxation in regulations relating to arms transfers led to significantly increased availability. The ICRC has been asked by the twenty-sixth International Conference of the Red Cross and Red Crescent to submit a report as to whether there is a direct link between this availability and violations of the law. One suspects that there is an analogy to the connection between smoking and cancer: proof is difficult but common sense dictates that it must be so. The more persons without instruction or special training use force and have firearms, the more violations there are likely to be. This situation will get worse in the next century unless the international community finds the political will to stem such arms flows. That will require not only clear guidelines for transfers but also a means to verify their implementation.

The Use of Armed Force by Private Persons or Groups. The armed forces of private entities can take the form of mercenaries (a phenomenon that, though not new, has caused particular problems at the end of this century), security companies (hired by private industry), or criminal groups with extensive organizational and warmaking ability.

The use of mercenaries is an ancient practice that shows no indication of ceasing. In the past, mercenaries simply had the same status, and were entitled to the same treatment, as the group for which they were fighting, which in turn depended on whether the conflict was international or non-international. However, since 1977 a significant segment of the international community has tried to eliminate this practice by, among other things, refusing such persons prisoner-of-war status.[30] So long as mercenaries continue to exist, the problem of how to motivate them to abide by the rules of international humanitarian law will remain. In this regard, the carrot-and-stick approach suggested for nongovernmental groups in non-international armed conflicts could prove useful.

A relatively new phenomenon is private security companies who offer their services to governments or private industries, particularly in unstable areas where the government's police force cannot provide adequate protection. The best-known example is Executive Outcome, a security company that operates extensively in Africa; a number of others are active in a variety of contexts.[31]

Although such companies are frequently referred to as "mercenaries" in the media, they do not fall within the traditional understanding of the term, nor do they easily fit the legal definition found in Article 47 of Additional Protocol I. However, they do use military methods and consist primarily of ex-soldiers.

Whether security companies are bound by any international rules is a major issue. When used by governments in the context of an internal armed conflict, it is arguable that they form part of the government's forces and thus are bound by the rules of non-international armed conflict. However, they are not officially part of the government's army. Moreover, the concept of mercenaries in Article 47 of Protocol I applies only in international armed conflicts. Multinational or other industries who use such companies ought to be accountable in some way for their behavior; yet these clients are neither states nor parties to an internal armed conflict in any traditional sense of the word. The security companies concerned are in principle bound by the law of the state in which they function; in reality, this will not have much effect if they actually engage in hostilities, which press reports say they have done in some instances. Given the increasing influence of private industry and the growing importance of multinational companies, the international community is going to have to face this issue and decide whether the use of force by such companies against armed groups should be subject to international rules. If so, a departure will have to be made from the traditional application of international humanitarian law to governments and armed rebel groups.

Criminal groups engaging in armed conflict include the Mafia and various "drug lords," whose activities are extensive not only internally but internationally. On the one hand, it seems abhorrent to suggest that they should be bound by international humanitarian law; on the other, it is difficult in law to justify any distinction, inasmuch as even traditional rebel groups in non-international armed conflicts are considered common criminals by the authorities they oppose. The term "armed groups" in common Article 3 is perhaps general enough to cover criminal groups, but one generally assumes that humanitarian law has in mind groups fighting for a political purpose. This assumption derives from the historical context of the development of the law, though it is written nowhere. An added complication is that some rebel groups, including a number in Colombia, ostensibly have some political purpose (albeit often obscure), though they use straightforwardly criminal methods and drug money. The lack of clarity as to whether international law is applicable in these situations makes its implementation very difficult.

Even if one assumes that a group should possess some political purpose if humanitarian law is to be applicable, there remains the problem of determining the facts. Doing so can be extremely difficult in unstable, internal-conflict situations. A tragic example of this was the murder of six ICRC employees on 17 December 1996 in Novye-Atagy, Chechnya. Although an official enquiry has

opened, we are at this writing no nearer to establishing who was responsible, or even whether the attack clearly amounted to a violation of international humanitarian law, given that the various groups active in that highly volatile situation included both criminal and armed political groups.[32]

Unfortunately, there is every indication that this type of unstable situation is likely to continue or even worsen in the next century. It becomes even more acute when state structures have broken down. At the moment, international law does not really have an answer. In particular, international humanitarian law, which is supposed to regulate the use of force, does not in its present form provide concrete and practical answers as to how the law can be applied to and implemented in such situations.

Use of Force by Multinational and Supranational Entities. The use of force by the United Nations was foreseen in Chapter VII of the Charter, which also assumed that the troops would be UN forces as such. However, only fairly recently has the question of whether the United Nations is itself bound by international humanitarian law been addressed in any serious way. The issue is not limited to the UN; multilateral forces acting under the umbrella of a regional security organization such as Nato or as ad hoc coalitions also face a quandary as to which law applies to them. This issue is at present largely considered from the perspective of compatibility. The increasing financial and political interdependence of nations is also leading to a situation where supranational actors could be increasingly active in armed conflict issues, the most obvious example being the new European Union's Treaty of Amsterdam. This trend means that international humanitarian law can no longer be limited to the behavior of individual nations; otherwise, the defense policies of such organizations and their uses of force will not be formally bound by any hard humanitarian law.

The issue of which law binds United Nations forces is not a purely academic one—there have been allegations, particularly in the case of operations in Somalia, that UN forces have murdered noncombatants or detained them without allowing contact with lawyers or families.[33] Through participation agreements, personnel contributed by states fall formally under the command of the UN Secretary-General; further, the United Nations is an international person in international law. Therefore, although one could argue that each contingent is still bound by the humanitarian law that binds its flag state, this conclusion is not at all satisfactory from either a legal or a practical point of view. The area of practice is actually rather confused: the UN commander is in theory responsible, but heads of national contingents retain a certain control. The name given to a mission should be irrelevant; the question of applicability of humanitarian law should arise when hostilities actually occur, whether the contingent was meant to be a peacekeeping force in the traditional sense or had a more active role.[34]

The difficulty at present is that apart from cases of clear enforcement action, UN forces are not to be seen as belligerents. Humanitarian law applies to "parties to a conflict"; the normal role of peacekeeping forces does not easily fit this description. The fact that the United Nations is not a party to humanitarian law treaties compounds the problem. In past operations, agreements indicated that such forces were bound by the principles of humanitarian law but not by specific rules.[35] The current UN model agreement provides that such forces are to "observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel."[36] The ICRC has tried through meetings of experts (governmental, academic, and UN personnel, all acting in their personal capacities) to establish which rules are applicable to such forces, both when they intervene in non-international situations and during international armed conflicts. Given the difficulty (which this author believes is insuperable, because the law simply does not envision the situation) of finding an answer, the experts concerned drafted a document entitled "Guidelines for UN Forces Regarding Respect for International Humanitarian Law." The fate of this work is not clear, as these guidelines have not been officially adopted. However, personnel at the UN Secretariat are aware that it is an issue that needs resolving.

It is highly likely that such forces will continue to be used in the next century, and it is simply not acceptable to allow it to remain unclear which international legal rules govern UN forces. The international community needs to accept and address the fact that the traditional scope of humanitarian law treaties prevents the proper implementation of suitable rules for UN forces.

Additionally, multinational forces can be specifically authorized by the United Nations, either for an enforcement action, as with the coalition effort against Iraq in 1991, or to conduct a humanitarian mission, such as in Albania in 1997. In principle humanitarian law applies to such forces, by virtue of the international law obligations undertaken by each state. However, with that official authorization, the question arises as to whether such forces should as groups make themselves subject to specific rules of humanitarian law. Not all nations will be parties to the same treaties, and therefore problems of interoperability arise. This is true for forces of a regional organization such as Nato, or ad hoc forces like the multinational forces in Beirut in 1982–1984 or Liberia in 1990.[37] Because it is likely that multinational forces will be used in the next century, proper implementation of humanitarian law requires greater clarity as to the rules under which they will operate and how those rules will be carried out in practice.

Although purist international lawyers argue that there is no such thing as "supranational" law, the fact remains that there are arrangements whereby states have given non-national organs powers that go well beyond the usual functions of international organizations. The most obvious example is the European

Union. The Treaty of Amsterdam, adopted in 1997, contains provisions in Title V on a "common foreign and security policy." Article J.3 states, "The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications." More specifically, Article J.7 provides that

> the common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy . . . which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their constitutional requirements.
>
> The Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability. . . . It supports the Union in framing the defence aspects of the common foreign and security policy as set out in this Article. The Union shall accordingly foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide. . . .
>
> The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by co-operation between them in the field of armaments.
>
> Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacekeeping.
>
> The Union will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications.

Although the provision does not mean that the European Union will have its own army, it comes close. More importantly, the Union is to have its own policies relating to armed conflict situations, whether for its own defense or in relation to other armed conflicts. The European Union as such is not a party to humanitarian law treaties, but the question arises of whether it is bound by them. Does customary law bind it? These are fundamental questions for the implementation of humanitarian law.

The ICRC attempted to persuade members of the European Union to include references to international humanitarian law in the sections of the treaty dealing with foreign and security policy. Other parts of the treaty make reference to the importance of respecting human rights law; a mention of humanitarian law in the relevant sections would have been appropriate. These efforts were unsuccessful, an extremely unfortunate outcome in this author's opinion. States cannot continue simply to assume that the present scope of application of humanitarian law treaties suffices. What if the European Union uses the WEU in an internal armed conflict in a way that involves fighting? Does all law apply, or only that law applicable to internal armed conflicts? What of the duty of nations in common Article 1 of the Geneva Conventions to respect them and

ensure their respect? Does the obligation also apply to policies of the European Union as such? Which body will implement whatever is supposed to be the applicable law? the European Court of Justice? even though there is no mention of humanitarian law in any of the European Union treaties? Do the general references to human rights in the Maastricht and Amsterdam treaties suffice? Such issues will have to be faced in the future, although it would be better to do so before becoming involved in a difficult situation.

Implementation Mechanisms

It may seem strange in an article about implementation to refer to implementation mechanisms only rather briefly, in closing. However, the preceding issues are more fundamental to the problems of implementation than are procedures. Mechanisms will only be efficient if the will exists to make them so, and that depends on the factors outlined above. Therefore, this section does not explore existing and potential implementation mechanisms in detail;[38] rather, it looks at factors relevant for such mechanisms in the future.

National Mechanisms. Obviously, if the implementation mechanisms already foreseen for the national level had been carried out, we would be in a much better situation than we are now. In the face of the enormous challenge of rectifying the present situation, the ICRC's new Advisory Service has had to set priorities. It has therefore decided to try to create a snowball effect by encouraging the creation of national commissions responsible for national implementation of humanitarian law.[39] It is also making particular efforts to induce states to comply with their duty under the Geneva Conventions to provide for universal jurisdiction for grave breaches. In this regard there can be no doubt that if nations could arrange for the direct applicability of the treaty provisions, a great deal would be gained. This could perhaps ultimately make national courts able not only to try war criminals more effectively but also to award reparation to victims of violations. At present, the latter possibility is being explored by the Human Rights Commission, and individuals are bringing cases before national courts asking for reparations for violations committed during the Second World War.[40] Success would almost certainly motivate governmental and nongovernmental bodies to abide by their obligations with greater care.

Some imagination and determination will also be needed to make sure that the civilian population as a whole is aware, at least at the most basic level, of certain rules of armed conflict. In formal teaching, the topic could be introduced into a number of traditional school courses, probably together with some notions of human rights. However, other methods will also be necessary. In particular, efforts should be made to curtail teaching that encourages violations

of the law. For example, behaviors that should not be exhibited in computer games could be made known to game creators, along with desirable actions (for instance, instead of shooting a surrendering soldier, the game figure could indicate that the captive will not be harmed). It has already been suggested that industries developing new weapons should respect certain international rules. They have at least one strong motivation for taking the rules seriously—the money they would waste should they develop a weapon that is then formally prohibited.

International Mechanisms. Reference has already been made to the importance of an effective international criminal court, and to the conditions necessary for one. Provision for commissions of inquiry already exists;[41] some investigation has occurred on an ad hoc basis, such as into violations of the law in the former Yugoslavia and Rwanda. Assessing violations of methods of warfare will remain particularly difficult, because factors relating to the assessment of military objectives and proportionality have an important subjective element. However, such inquiry remains a useful mechanism, and we may hope that it will be used more in the future.

It remains to be seen whether other mechanisms could be introduced that would encourage better implementation of humanitarian law in future wars. A system has been suggested by which states could report the measures they have taken to implement humanitarian law.[42] Similar mechanisms are being used in other contexts, with mixed results (determined by a number of factors). In the context of humanitarian law, such a system would have more likelihood of acceptance and success once states have taken more effective national measures, which will presumably be the fruit of the Advisory Service's efforts and of the fuller understanding being gained about the importance of this aspect of law.

One area that should certainly be improved is the evaluation, at the research stage, of the likely lawfulness of weapons.[43] At present, evaluations are made either at the national level or at the international level, if a particular weapon is called into question. In the latter case, assessments are hampered by the classification of information. The case of blinding laser weapons was somewhat special, because there had been extensive use of lasers by ophthalmologists for eye surgery and by the military for lawful purposes; this enabled experts to extrapolate the likely features and effects of the proposed weapons. In most cases, however, a weapon has to appear on the battlefield and even be generally available before an evaluation can occur. Obviously, there will be resistance to legal evaluation at this stage, given the investment that will already have gone into its development. Over the last hundred years, no head of state has shown the altruism that the czar of Russia did when he convened an international conference to ban a weapon developed by his own scientists.[44]

This issue is highly sensitive, but given the crisis in the implementation of humanitarian law created by the totally new weapons of the twentieth century, and also the need for practice to be in conformity with law rather than in constant tension with it, evaluation of the foreseeable effects of contemplated new weapons is the only way to implement this area of law effectively. Such an evaluation cannot be left to a totally national mechanism but must include unbiased and neutral persons. The rapid pace of technological and biotechnological developments will make this crucial for the twenty-first century. This process would be helped by more objective data and criteria for evaluating whether weapons present problems in relation to the rules prohibiting inherent indiscriminateness, superfluous injury, or unnecessary suffering. A way must also be found to protect sensitive material; if the political will were present, it would be possible to find one. Such a mechanism could also study the likely effects on the environment of weapons and methods of warfare.[45] The relative novelty of this problem makes it difficult to foresee the extent and permanence of environmental damage. However, all the elements of future disaster are looming: the degree of present environmental degradation, ever-increasing population, and forecasts of water shortages. These factors are likely to cause wars in the next century, and the problem will be exacerbated if warfare itself causes further environmental damage.

In addition, the possibility of nuclear war remains. Despite all efforts to stem proliferation, a state or group may decide to use these weapons without fearing or caring about retaliation. All existing mechanisms to prevent such an occurrence need to continue; in addition, now that the Cold War has ended, more serious attention should be given to the Advisory Opinion of the International Court of Justice that there is an obligation to achieve "nuclear disarmament in all its aspects under strict and effective international control" through bona fide negotiation.[46]

We have noted the need to find better means to implement humanitarian law in non-interstate conflicts. Specific mechanisms should also be considered by international and "supranational" bodies for reparations to victims of violations and for punishment of offenders. The implementation of the law in non-international armed conflicts and in so-called "internationalized" ones would benefit from an independent and impartial assessment as to whether particular uses of force or outbreaks of violence qualify as "armed conflict," subject to law. The ICRC frequently does not do this publicly, because of possible implications for its field work. The ideal situation, of course, would be for an independent court to undertake this task, but it could also be given to an independent commission. The experience with human rights law shows that individual petition is particularly successful in ensuring that issues are addressed. In this way, cases relating to situations which may qualify as armed conflicts have been brought under the European Convention on Human Rights, but the

Commission or Court does not have to make such a qualification, as it is unnecessary for the application of human rights law.

Finally, it is worth addressing the particular role of civil society, in particular nongovernmental organizations. Until now the implementation of humanitarian law has been largely left to governments. The only official nongovernmental role has been that given to the ICRC, in particular through its visits to prisoners of war and civilian internees and its Central Tracing Agency in international armed conflicts. Various parts of the Conventions also make reference to national Red Cross or Red Crescent societies. The recognized role of the ICRC in fostering the development of humanitarian law gives it observer status at diplomatic conferences relating to international humanitarian law. In this context it is regularly requested to prepare documentation and allowed to make statements and proposals.

Until now, no other organizations have had any such formal role. Therefore it was a significant development when the Norwegian government decided to accord the International Campaign to Ban Landmines the same observer status as the ICRC during the diplomatic conference that led to the adoption of the antipersonnel mine treaty in September 1997. The organization's contribution is specifically mentioned in the preamble to the treaty, which makes a point of "*stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of antipersonnel mines and recognising the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organisations around the world."[47] Thus the "Ottawa process," which culminated in signature by many states of the treaty banning antipersonnel mines in Ottawa in December 1997, specifically recognized the importance of civil society monitoring the implementation of humanitarian law and involving itself in its development where appropriate. Nations that did not participate in this process cannot be said to approve this practice, and therefore one cannot say that it is universally accepted. However, it does reflect the already existing practice of human rights bodies giving a recognized role to nongovernmental organizations (for example, with active observer status at the UN Human Rights Commission). The next century may well see, therefore, an important development in this direction for humanitarian law.

* * *

The twenty-first century could easily witness a catastrophic lack of humanitarian law implementation, arising in part from a view that much of it is irrelevant because the vast majority of conflicts are not classic interstate ones.

Dangerous new means and methods of warfare, ideological conflicts, and further rampant arms proliferation, all taking place in the context of an increasingly disturbing environmental situation, could easily spell disaster. Political will could prevent such a scenario, but to do so requires a willingness to depart from the usual way of thinking. Efforts should be made to establish how the law can be applied to nontraditional situations, and to put effective mechanisms in place. Whether this *will* be done depends on how important the regulation of armed conflict is considered to be when balanced against competing interests. It also depends on whether one is willing to be farsighted about our long-term interest in preserving the values of humanitarian law—an application of enlightened self-interest.

A realist will not expect this to happen by itself. However, certain tendencies do give hope. Humanitarian law is more talked of these days than it was even a few years ago, and some mechanisms are beginning to work—albeit for the time being in an uneven fashion. The further involvement of civil society has been important for this development, and there is no obvious reason why it should weaken in the future. Therefore, it may well be that the implementation of humanitarian law, whatever its exact content needs to be in the next century, will improve. One can try to be an optimist!

Notes

1. *International humanitarian law* and *international human rights law* (or simply "human rights") are "complementary. Both seek to protect the individual, though they do so in different circumstances and in different ways. Humanitarian law applies in situations of armed conflict, . . . whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. While the purpose of humanitarian law is to protect victims by endeavouring to limit the suffering caused by war, human rights seek to protect the individual and further his development. Humanitarian law is primarily concerned with the treatment of persons who have fallen into the hand of the adverse party, and with the manner in which hostilities are conducted, whereas by limiting the power of the State over individuals, human rights essentially seek to prevent arbitrary behaviour. It is not the aim of human rights to regulate the ways in which military operations are conducted." *International Humanitarian Law: Answers to Your Questions* (Geneva: International Committee of the Red Cross [hereafter ICRC], 1998), p. 41.

2. L. Oppenheim, *International Law: Disputes, War and Neutrality*, vol. 2, 7th ed. (by H. Lauterpacht) (London: Longmans, Green, 1952), para. 157.

3. See James Molony Spaight, *Air Power and War Rights*, 2nd ed. (London: Longmans, Green, 1933), p. 240.

4. For example, the rule requiring the giving of quarter to those who surrendered or were *hors de combat* was probably respected by a soldier who took his reputation and honor seriously whether the opposing side fully respected the rule or not.

5. General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 24 April 1863 [hereafter Lieber Code], art. 23, reprinted in *The Laws of Armed Conflict*, 3d ed., D. Schindler and J. Toman (Dordrecht: M. Nijhoff; Geneva: Henry Dunant Institute, 1988), p. 3. The British delegate to the 1899 Hague Conference argued that "savages" did not stop when shot, as "civilized" soldiers did.

6. Convention Respecting the Laws and Customs of War on Land, 13 October 1907 [hereafter Hague IV], art. 2, (36 Stat. 2277, 205 Consol. T.S. 277), reprinted in Schindler and Toman, eds., p. 63.

7. Lieber Code, art. 60.

8. The difficulty in getting blinding laser weapons prohibited was outlined by this author in "Obstacles to Regulating New Weaponry: Battlefield Laser Weapons," in *Armed Conflict and the New Law: Effecting*

Compliance, ed. H. Fox and M. A. Meyer (London: British Institute of International and Comparative Law, 1993), p. 107.

9. Protocol IV on Blinding Laser Weapons, 13 October 1995 (35 I.L.M. 1218 [1996]), annexed to the Convention on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, 10 October 1980 [hereafter Conventional Weapons Convention] (19 I.L.M. 1524 [1980]). The Protocol is reprinted in Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons," *International Review of the Red Cross*, no. 312, 1996, at annex.

10. A series of articles on the Biological Weapons Convention and present negotiations for strengthening its implementation appear in *International Review of the Red Cross*, no. 318, 1997, pp. 251–307.

11. The International Court of Justice in its advisory opinion on nuclear weapons confirmed that these rules mean that certain weapons are illegal whether a specific treaty prohibits them or not. *Legality of the Threat Or Use of Nuclear Weapons* [hereafter *Nuclear Weapons*], General List No. 95 (Advisory Opinion of the International Court of Justice, 8 July 1996), paras. 78–9 (35 I.L.M. 809 [1996]). For background on the opinion, see Michael N. Schmitt, "The International Court of Justice and the Use of Nuclear Weapons," *Naval War College Review*, Spring 1998, pp. 91–116.

12. Draft as it appeared at the August 1997 working session of the preparatory committee; UN Doc. A/AC.249/1997/WG.3/CRP.1/Rev. 1, draft art. 23, para. 3, and draft art. 21, para. 1.

13. Ironically, humanitarian law could have usefully influenced human rights law at that time. The European Convention of Human Rights and the United Nations Covenants failed to make nonderogable judicial guarantees as there are in the Geneva Conventions; practice has since shown that this was a mistake. The ICRC was not then as careful as it is now to ensure that human rights treaties give at least as much protection as humanitarian law ones.

14. Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts [hereafter Report of the Working Group], UN Doc. No. E/CN.4/1997/96.

15. Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997 [hereafter Mine Convention] (36 I.L.M. 1607 [1997]), and Draft UN General Assembly 1st Committee Resolution A/C.1/52/L.1, 22 October 1997, inviting all states to sign and then ratify this convention. For agreement in principle, General Assembly Resolution 51/45S, 10 December 1996.

16. The ICRC was particularly active in this regard, with the considerable help of other components of the Red Cross and Red Crescent Movement. It made more use of the media in this effort than for any other issue.

17. See, for example, the conclusions of the ICRC-mandated military study "Anti-Personnel Landmines: Friend or Foe" (1996) and the open letter to the same effect signed by fifteen retired United States generals (including Norman Schwarzkopf) to President William Clinton in April 1996.

18. The attacks on the Ameriyya air raid shelter by U.S. forces during the second Gulf war and on the Qana UN compound by Israeli forces are commonly attributed to mistakes.

19. Coupland and Samnegaard, "Development and Transfer of Conventional Weapons: The Implications for Civilian Casualties," unpublished manuscript (on file with the author).

20. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Boston: Little, Brown, 1995).

21. The London Declaration of 1909 did not come into force, and the London Procès-Verbal of 1936 only dealt, and rather imperfectly, with one aspect of submarine warfare.

22. Judgment of the International Military Tribunal for the Trial of German War Criminals (London CMD 6946, 1946), p. 109.

23. Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (with explanation) (Cambridge: Cambridge University Press, 1995). See esp. paras. 136–40 and pp. 206–10.

24. A general analysis of combat stress disorder and its effects was made in the context of the Second Group of Experts, convened by the ICRC in November 1990 as one of four meetings of experts relating to battlefield laser weapons. See Louise Doswald-Beck, ed., *Blinding Weapons: Reports of the Meetings of Experts Convened by the International Committee of the Red Cross on Battlefield Laser Weapons* (Geneva: International Committee of the Red Cross, 1995), in particular the report by Dr. A. Shalev, "Emotional Health Problems Arising from Battle Situations and Injuries Suffered in Battle," pp. 272-6. In addition, a thorough analysis of stress factors on soldiers and measures to be taken to reduce excessive and debilitating combat stress has been made by a military officer: Elmar Dinter, *Hero Or Coward: Pressures Facing the Soldier in Battle* (London and Totowa, N.J.: Frank Cass, 1985).

25. ICAO Doc. C-2 P/8708; and report dated 28 July 1988 from RAdm. William M. Fogarty, USN, to Commander in Chief, U.S. Central Command, endorsed 5 August 1988 by USCINCCENT and on 18 August 1988 by the Chairman of the Joint Chiefs of Staff, pp. E-59–60, E–62.

26. Colombian proposal of 3 September 1997, Doc. APL/CW.46. Another complication was that the conference wanted no language that could give the impression that the scope of application was other than in all circumstances.

27. Report of the Working Group, annex.

28. Statute for the International Tribunal for Rwanda (35 I.L.M. 1598 [1996]).

29. For example, Afghan rebels were persuaded not to kill enemy soldiers when captured, and quite a major change in the behavior of rebel forces in El Salvador was also achieved. See, for example, R. Hammer, *Developing a Humanitarian Awareness: A Case-Study of El Salvador in the 1980's* (Geneva: Henry Dunant Institute, 1987). However, it does not always work. For example, a rebel group in Colombia specifically declined to apply common Article 3, because it wished to continue to take hostages.

30. In particular, in art. 47 of Additional Protocol I, Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, UN Doc. A/32/144 (16 I.L.M. 1391).

31. See, for example, "Broker of War and Death," *Mail and Guardian*, 28 February–16 March 1997, p. 12. Executive Outcome states that it works only for recognized governments.

32. During a statement on 18 December 1996 to the Permanent Missions of States in Geneva, the President of the ICRC alluded to this difficulty. He questioned whether one could speak directly of violations of international humanitarian law or one had rather to speak more generally of "values" of the international community. He specifically mentioned the need to find a way to assure in practice respect toward medical personnel, hospitals, and the Red Cross protective emblem. Statement in the compilation of public statements of the ICRC relating to its activities in Chechnya and the northern Caucasus, July 1993–10 January 1997, LG 1997/013.

33. See, among others, Brian D. Tittemore, "Belligerents in Blue Helmets: Applying Interuational Humanitarian Law to United Nations Peace Operations," *Stanford Journal of International Law*, vol. 33, no. 61, 1997, pp. 89–90. See also Canadian Govt., *Dishonoured Legacy: The Lessons of the Somalia Affair* (Ottawa: Minister of Public Works and Government Services, 1998).

34. Peacekeeping forces were first involved in combat in the Congo, but since then problems have occurred elsewhere, particularly when their mandate and instructions were not entirely clear. At present there are fifteen UN peacekeeping operations active around the world (a figure which can be updated at http://www.un.org/Depts/DPKO/c_miss.htm).

35. Tittemore, pp. 87–9.

36. Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations, Report of the Secretary-General, para. 28, UN Doc. A/46/185 (1991).

37. The issue of how to use an organization's own peacekeeping forces has also arisen in the context of the Organization for Security and Cooperation in Europe. Its forces have not yet been used, although there was a long negotiation in 1993–1994 about their possible employment in Nagorno-Karabakh (an Armenian-populated region of Azerbaijan). The precise nature of such forces has not yet been established, and accordingly they could face the same kind of difficulty as those of the United Nations; for how such operations could work, see V.-G. Ghebali, *L'OSCE dans l'Europe post-communiste, 1990–1996* (Brussels: Bruylant, 1996), pp. 243–5. The Beirut force consisted of U.S., British, French, and Italian contingents; see R. W. Nelson, "Multinational Peacekeeping in the Middle East and the United Nations Model," *International Affairs*, 1984/5, pp. 67, 71–80. The ECOWAS Monitoring Group in Liberia was set up by a summit of African states in Banjul, The Gambia; see J. M. Balencie and A. de la Grange, *Mondes rebelles: Acteur, conflits et violences politiques*, vol. 1, *Ameriques, Afrique* (Paris: Michalon, 1996), p. 284.

38. For a more extensive look at implementation mechanisms, see A. Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts," *Duke Journal of Comparative and International Law*, vol. 6, no. 11, 1995, p. 11.

39. A report of meeting of experts on this issue was published as Ch. Pellandini, ed., *Committees Or Other National Bodies for International Humanitarian Law* (Geneva: ICRC, 1997).

40. For example, cases heard by the Tokyo district court relating to ill treatment of Dutch prisoners of war and the abuse of so-called "comfort women." Professor Frits Kalshoven was asked to render his opinion as an expert witness as to whether victims were entitled to reparations by Article 3 of Hague Convention IV of 1907; his opinion was in the affirmative.

41. In particular, the International Fact-Finding Commission, established under Article 90 of Additional Protocol I, but which has not yet been used.

42. The proposal was made by the Netherlands and endorsed by several states, but it did not command sufficient support to be included in the meeting of the Intergovernmental Group of Experts for the Protection of War Victims in January 1995.

43. Article 36 of Protocol I obliges states to make such an evaluation, but this provision is only an articulation of what they are bound to do as part of bona fide implementation of humanitarian law.

44. Bullets that explode on contact with the human body, thereafter banned by the St. Petersburg Declaration of 1868. The 1947 Baruch Plan to place nuclear weapons under international control never progressed beyond the proposal stage.

45. As a result of expert meetings, the ICRC drafted "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflicts," 1994, pursuant to General Assembly Resolution A/RES/48/30, 9 December 1993. However, these guidelines merely indicated the present content of humanitarian law protecting the environment; the problem of how to make the scientific evaluation remains. Also worth noting is the Advisory Opinion of the International Court of Justice, which indicated the general requirements of states in this regard under customary law; see *Nuclear Weapons,* paras. 29–30.

46. *Nuclear Weapons,* para. 105 F.

47. Mine Convention, 8th preambular para.

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