FROM SOLFERINO TO SARAJEVO: A CONTINUING ROLE FOR INTERNATIONAL HUMANITARIAN LAW?*

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[This speech was delivered by Professor Timothy McCormack as his Inaugural Professorial Public Lecture at the law school, The University of Melbourne, on 28 April 1997. It was also the fifth lecture in the Solferino Lecture Series organised by the Victorian Branch of the Australian Red Cross. The author contrasts the Battle of Solferino in 1859, which was the catalyst for the establishment of the global Red Cross movement and the development of international humanitarian law, with contemporary armed conflict — notably in the former Yugoslavia — in order to question the ongoing utility of attempts to regulate the conduct of armed conflict. Two key areas of challenge are identified and discussed: (1) rapid technological developments have greatly increased the destructive firepower of weapons and general principles of international humanitarian law have only had limited effect on the deployment of these weapons; (2) contemporary conflicts tend to be internal and increasingly involve irregular armed forces which do not necessarily consider themselves bound by international humanitarian law. Despite these major challenges to the effective implementation of international humanitarian law, the author rejects despair as a valid reaction. Instead, he identifies a number of potentially significant multilateral initiatives, currently in progress which could contribute to improved efficacy of the legal principles.]

I INTRODUCTION

Solferino and Sarajevo are both southern European towns with significant connections to the development of international humanitarian law. Solferino is a small town in the Lombardy region of northern Italy, nondescript for many people but significant for its historical connection with the establishment of the International Red Cross movement. The Battle of Solferino, waged in June 1859 as part of the broader Franco-Austrian War,[1] proved to be the catalyst for Henri Dunant's eyewitness account, *Un Souvenir de Solferino,*[2] which he successfully used to convince the political leaders of Europe of the need for an international treaty for the alleviation of the suffering of victims of war.[3] Sarajevo, itself

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1 For an historical account of the conflict, see generally René Arnaud, *The Second Republic and Napoleon III* (1930).

2 Henri Dunant, *Un Souvenir de Solferino* (1862). All references in the present work are to the translation *A Memory of Solferino* (1986), the original of which was published by the American National Red Cross in 1939.

3 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, reprinted in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd ed, 1988) 279 ('Geneva Convention 1864').

historically connected to massive outbreaks of war,[4] is much better known than Solferino. As the capital of Bosnia-Herzegovina, Sarajevo stands as a symbol of the devastating conflict in the former Yugoslavia — 138 years after the Battle of Solferino. Solferino and Sarajevo are closer to each other than Adelaide and Melbourne[5] and yet, in the context of this lecture and despite their shared connections to international humanitarian law, these two towns are separated by a much greater gulf than their relative physical proximity might suggest.

My intention is not to provide a detailed overview of the development of the conduct of war or of the development of international humanitarian law between 1859 and the early 1990s. Rather, these two conflicts — a battle in a war in 1859 and a siege in a broader conflict in the 1990s — provide a stark contrast in examining how the nature of armed conflict has changed and how some of those changes pose complex challenges to the effective implementation of international humanitarian law. There has undoubtedly been significant progress in the development of international humanitarian law since 1859. However, the conflict in the former Yugoslavia is indicative of some of the changes to the contemporary conduct of armed conflict which expose weaknesses in the implementation of key principles of international humanitarian law.

I plan to concentrate on the international legal regulation of two particular aspects of changes to armed conflict: first, technological developments in the types of weapons deployed in armed conflict; and secondly, dramatic shifts in the nature of armed conflict away from international wars involving two or more sovereign independent states to internal armed conflict on ethnic, cultural or religious grounds. I will discuss the nature of the conflict in the Battle of Solferino and then contrast it with more contemporary conflict, particularly the conflict in the Balkans, to illustrate these two changes to armed conflict and to discuss the challenges posed to the implementation of international humanitarian law as we now know it.

First, though, some preliminary thoughts on the Solferino Lecture Series, the Faculty of Law at The University of Melbourne and the notion of international humanitarian law.

II The Solferino Lecture Series and The University of Melbourne

The Solferino Lecture Series was inaugurated by the Victorian Division of the Australian Red Cross Society in 1995 to promote awareness and understanding of international humanitarian law. The title 'Solferino Lecture Series' may well be meaningless to the uninitiated. However, it is a personal honour for me to be invited to participate in the Series. Part of one's association with a particular group or organisation involves some sense of connection to the origins of the group. This phenomenon is similar in some respects to our interest in our

[4] See, eg, Charles Messenger, *The Century of Warfare: Worldwide Conflict from 1900 to the Present Day* (1995) 6.

[5] 630 kilometres compared with 660 kilometres.

ancestral lineage — knowledge about where we have come from forms part of our personal sense of identity. For those involved in the global Red Cross movement, Solferino is particularly meaningful. Solferino reminds us of the *raison d'être* for the organisation and is commonly integral to the inspiration for personal commitment to the advancement of international humanitarian law. I was recently reminded of the special significance of Solferino while in Tasmania. A beautiful cypress tree beside the still waters of the Meander River in Deloraine commemorates the 50th anniversary of the Deloraine branch of the Tasmanian division of the Australian Red Cross Society. A commemorative plaque indicates that the tree is from Solferino and is planted in honour of past members of the branch. The plaque offers no explanation of the significance of the Italian source of the tree — any such explanation is superfluous for those involved in the Red Cross movement.

Henri Dunant witnessed the aftermath of the Battle of Solferino and was appalled at the carnage that he saw — particularly the very large numbers of wounded soldiers left to die or to suffer, often with horrendous injuries, without medical treatment and without food or water.[6] As Dunant tended to some of the victims of that particular battle, he was struck by the need for an organisation which could alleviate the suffering of these victims of the conflict. Without passing judgment on the particular merits of the battle or on the broader war that was being waged, Dunant recognised that injured soldiers on both sides of the conflict deserved at least minimum standards of humanitarian treatment to attend to their wounds and to their physical needs. He was unable to shrug off his experiences in the aftermath of the Battle of Solferino and, as a consequence, worked hard over the next few years to communicate a vision of an international organisation, independent and non-partisan, which would provide relief to victims of armed conflict. This vision, and Dunant's tireless efforts to convince political leaders in Europe of its desirability, resulted in the establishment in 1863 of the International Committee of the Red Cross ('ICRC')[7] and in 1864 led to the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[8]

At the same time as the Battle of Solferino, courses in law were offered at The University of Melbourne. As early as 1857, the study of law, which was initially taught in the Faculty of Arts at this university, included basic principles of international law. The reading guides from that period indicate that Vattel's *Law of Nations* was prescribed reading for the first students of law.[9] From as early as 1864, in the same year as the adoption of the Geneva Convention, international law was a compulsory subject for students at Melbourne in the Doctor of Laws (LLD) program.[10] It is similarly evident from the archival records that from 1874

6 Dunant's observations are graphically recounted in *A Memory of Solferino*, above n 2.

7 Hereafter abbreviated to 'ICRC'.

8 Geneva Convention 1864, above n 3.

9 Vattel's *Law of Nations* appears on undergraduate reading guides for law students in the Bachelor of Arts program in 1858: The University of Melbourne Calendar 1858–59.

10 Students were first admitted to study towards the LLD degree in 1864. The first LLD was conferred in 1869.

international law was also a compulsory subject in the Bachelor of Laws (LLB) program.[11] Even more intriguing, in the light of the subject of this lecture, is that the general international law course in the LLB program included a specific topic on international humanitarian law, entitled 'Rights and Duties of Nations in Times of War'.[12] Throughout the subsequent history of the Faculty of Law at The University of Melbourne, public international law has remained a teaching and research strength. It has been an enduring privilege of mine to have enjoyed an association with that distinguished history.

This lecture not only forms part of the Solferino Lecture Series but is also an Inaugural Public Professorial Lecture. When the Victorian division of the Australian Red Cross approached the law school about the possibility of endowing a chair in international humanitarian law, we in the law school were excited about the prospect. There are only two other externally funded chairs in this Faculty, both of them in commercial law.[13] I am sure that, like myself, most of my colleagues had assumed that new chairs would only ever be externally funded in commercial law. So the creation of a new chair in international humanitarian law was a particularly welcome initiative — especially given the historical commitment to the teaching of public international law to which I have referred. It is a deliberate, and an entirely appropriate, coincidence that this Inaugural Public Professorial Lecture also contributes to the Solferino Lecture Series.

III THE NOTION OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law purports to regulate the conduct of armed conflict in two key respects. First, it imposes minimum standards of protection for victims of armed conflict, whether they be injured combatants, prisoners of war, or civilians who happen to be caught up in the conduct of armed hostility. The key instruments dealing with this area of the law are the four Geneva Conventions of 1949,[14] which have among the highest number of states parties of all multilateral treaties.[15] The two Additional Protocols of 1977[16] extend the

11 The University of Melbourne Calendar 1874–75, 126.

12 Ibid.

13 CCH Research Chair in Taxation Law (funded by the commercial law publishers CCH) and the Harold Ford Chair of Commercial Law (funded by a consortium of major Melbourne commercial law firms).

14 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 ('Geneva Conventions 1949').

15 The Geneva Conventions 1949 currently have 188 states parties (http://www.icrc.org (international humanitarian law, States Party to the Geneva Conventions, Totals) (on 15 October 1997)). By comparison, the UN Convention on the Rights of the Child has 191 states parties (http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html (on 15 October 1997)), the Convention on the Elimination of All Forms of Discrimination Against Women has 161 states parties (http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html (on 15 October 1997)). The UN Charter has 185 states parties (http://www.un.org/Overview/unmember.html (on 15 October 1997)) and the Nuclear Non-Proliferation Treaty, below n 44, also has 185 states parties (http://www.acda.gov/treaties/npt3.txt (on 15 October 1997)).

measures of protection for victims of armed conflict contained in the Geneva Conventions 1949. Secondly, International Humanitarian Law restricts the permissible means and methods of warfare, including the types of weapons that can be deployed and the targets they can be deployed against, and limits the amount of force used to what is proportionate to the legitimate military necessity.

Given the nature and reality of warfare, it is reasonable to question the role of international law in attempting to impose limitations on the conduct of armed conflict.[17] It can be argued that because parties to a conflict use whatever force they are able to deploy, it is futile to speak of legal limitations on the conduct of armed conflict. In any case, acceptance of the body of rules and principles regulating the conduct of armed conflict can be perceived as condoning the resort to force — a position counter-productive to the notion of 'humanitarianism'. It has even been suggested that the so-called rules of international humanitarian law have actually legitimated particular forms of violence and resulted in a greater number of civilian deaths through war than may otherwise have been the case.[18]

There are clearly some major limitations to the efficacy of international humanitarian law, but do these criticisms substantiate a case against the existence of a body of rules purporting to regulate the conduct of armed hostility? The existence of recognised standards, even though they may be violated on a regular, almost daily, basis, provides some objective criteria for evaluating conduct and for characterising particular practices as lawful or not. When it comes to the prosecution of war crimes and other atrocities committed in the context of armed conflict, the existence of legal principles is crucial. Even in situations where no prosecutions occur and where individuals seem to act with impunity, the existence of the principles allows criticism of such behaviour and the evaluation of conduct. Without such principles, any evaluation of the conduct of armed conflict would necessarily be based on arbitrary and subjective criteria.

History also shows that the development of normative standards of conduct has influenced the behaviour of some actors in some armed conflicts.[19] It is a sustainable argument that the development of legal norms has helped alleviate the suffering of many victims of armed conflict and has also limited the way conflict

[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, 16 ILM 1391 ('Additional Protocol I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, 16 ILM 1442 ('Additional Protocol II').

[17] Michael Howard, 'Temperamenta Belli: Can War be Controlled?' in Michael Howard (ed), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 1, 1, cites Carl von Clausewitz, *On War* (1977) 75 as follows: 'War is an act of force to compel our enemy to do our will ... Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it ... To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity'. See also Jean Pictet, *Development and Principles of International Humanitarian Law* (1985) 80–1, where the author discusses Kant and other commentators on the so-called 'fundamental incompatibility' between war and law.

[18] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

[19] See generally Frits Kalshoven, *Constraints on the Waging of War* (2nd ed, 1991) 25–70; Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (1990) 2–21.

is conducted. I am certainly not of the view that the situation is ideal — far from it. But I do believe that what has been achieved in the development of legal principles has had a positive effect. The challenges I see for international humanitarian law lie, not so much in the development of the principles themselves, but in the lack of effective implementation of those principles. I turn now to the issues of controlling the weapons of war and the changing nature of conflict.

IV THE NATURE OF ARMED CONFLICT IN 1859

As mentioned, the Battle of Solferino on 24 June 1859 was part of the broader Franco-Austrian War in which the army of Napoleon III and his Italian and other allies fought to liberate Italy from the occupation of the Emperor of Austria. Although both parties to the conflict relied on armed contingents from various states and colonies, each side had a clear chain of unified command and all combatants in both forces were clearly identifiable by uniforms, banners and standards. The battle was waged across lines stretching for 24 kilometres and involved over 300,000 men and around 900 pieces of artillery.[20] Much of the battle was conducted in open terrain or in vineyards in the vicinity of the town of Solferino. Those stages of the battle fought in surrounding towns and villages were only waged after the civilian inhabitants had been evacuated or at least warned of the conflict in time for them to take refuge.

The casualty figures from 15 hours of fighting are breathtaking — more than 40,000 dead or wounded at the close of battle and a further 40,000 dead or hospitalised within two months of the fighting from inadequately treated injuries sustained in battle.[21] Despite this staggering toll, the overwhelming proportion of casualties in that particular battle were military, not civilian. The predominance of military casualties was indicative of the relative proportions of military to civilian casualties prevailing in wars at this time of the 19th century. The majority of casualties in armed conflict continued to be combatants until the outbreak of World War II. In World War II, with new technological developments in weapons, the international community witnessed the relative proportions beginning to change with a much greater incidence of civilian casualties.

The weapons that were used at Solferino were relatively rudimentary. Despite the very large number of casualties, injuries or death were inflicted by horse-drawn artillery, single shot rifles or muskets, or bayonets or swords in hand-to-hand combat. The artillery that was used was limited both in range and accuracy. Again, one of the consequences of the actual weapons deployed in the mid-19th century was that the overwhelming majority of casualties in conflict were combatants. Armies *en route* to the sites of battle did engage in the pillage of towns and against civilian populations, but the injuries and fatalities caused by the conflict itself were virtually exclusively limited to the armed forces of the parties participating in battle.

[20] Dunant, above n 2, 14–16.
[21] Ibid 106.

Dunant rightly characterised the Battle of Solferino as a 'European catastrophe'.[22] He was able to convince the political leaders of Europe that binding legal obligations to provide minimum standards of treatment and protection to victims of armed conflict were essential. However, in almost 140 years since then, armed conflict has changed dramatically. Now, the overwhelming proportion of victims of armed conflict are civilians — the majority of them women and children. Despite the laudable gains in the initial development of international humanitarian law, it is becoming increasingly difficult to implement the body of rules so laboriously negotiated.

V CONTROLLING THE WEAPONS OF WAR

One obvious challenge to the effective implementation of international humanitarian law is in the area of arms control and disarmament. A cursory reflection on 'technological developments' in weapons and their delivery systems since the Battle of Solferino is telling. In 1859, there were no weapons of mass destruction (no chemical, biological or nuclear weapons), no aircraft (no bombers, jet fighters or helicopter gunships), no machine-powered ships (no battleships, destroyers, aircraft carriers or submarines), no missiles (no intercontinental ballistic missiles, long-range missiles, surface-to-air missiles or air-to-air missiles), no long-range or machine-driven artillery (no tanks, no rocket launchers, no big artillery guns, no large conventional bombs), no machine guns, no rocket-propelled grenades and no anti-personnel landmines.

It must be said that these modern weapons are not required to inflict a staggering loss of life — 80,000 dead or wounded (25% of all combatants) at the Battle of Solferino is clear testimony to that. So too is the incredible number of fatalities from the genocidal activities inflicted by the Hutu and Tutsi communities in the African Great Lakes region. Conservative estimates suggest that as many as 500,000 people have been killed[23] — most of them with 'primitive' weapons such as machetes, hatchets, rocks or blocks of wood. But what sort of damage could 300,000 men with M-16s or AK-47s have done to each other in 15 hours? Today is, coincidentally, the first anniversary of the Port Arthur massacre. It has been reported that Martin Bryant was able to kill 20 people in less than 60 seconds in the Broad Arrow Café because of the weapons he had at his disposal.[24] Of course, the way conflict is conducted has changed with the development of weapons systems. Armies no longer simply face each other on either side of the battlefield waiting to be shot at with contemporary weapons. Now,

[22] Ibid.

[23] *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935* (1994) (annexed to *Letter dated 1 October 1994 from the Secretary-General to the President of the Security Council*, UN Doc S/1994/1125 (1994)) [43]. Some reliable estimates put the number of dead at close to one million: *Report on the Situation of Human Rights in Rwanda submitted by Mr R Degui-Sequi, Special Rapporteur of the Commission on Human Rights*, UN Doc E/CN.4/1995/7 (1994) [24].

[24] '33 Slain in Our Worst Massacre', *The Australian* (Canberra), 29 April 1996, 1; '33 Die in Massacre', *The Age* (Melbourne), 29 April 1996, 1.

unfortunately, civilians are increasingly caught up in the context of armed conflict and the incidence of civilian casualties has risen dramatically.

Great financial resources and an enormous amount of human expertise have been dedicated to the development of much greater levels of sophistication in both defensive weapons systems and offensive fire power and capabilities. With this sophistication has come the capacity to inflict much greater levels of damage. Henri Dunant's conclusion to *A Memory of Solferino* shows great prescience and foresight:

> If the new and frightful weapons of destruction which are now at the disposal of the nations, seem destined to abridge the duration of future wars, it appears likely, on the other hand, that future battles will only become more and more murderous. Moreover, in this age when surprise plays so important a part, is it not possible that wars may arise, from one quarter or another, in the most sudden and unexpected fashion? And do not these considerations alone constitute more than adequate reason for taking precautions against surprise?[25]

One wonders how Henri Dunant would really feel about the realities of the sophistication of the weapons of war over the last 140 years. One of the effects of developments in technology is that the impact of modern weapons has been, and continues to be, most largely felt by civilian populations — particularly women and children.[26] Modern technological developments have tended to sanitise the impact of the deployment of particular weapons, because it is now possible for the person who pulls the trigger or releases the weapon to do so without viewing the injuries that the weapon causes. The release of bombs, the firing of missiles, the aiming and firing of long range artillery, the sowing of mines, can all be undertaken from a safe distance, which affords the individuals involved the relative comfort of not witnessing the effect of the deployment of the weapons.[27]

A *General Principles Versus Specific Prohibitions*

Throughout this development in technology, international law has been playing a discouraging game of catch-up. The process is discouraging because, while military scientists take a relatively short time to develop new categories of weapons, the international community deliberates for years, often for decades, about agreements on limitations for the deployment of such weapons. As early as 1868, just a few years after the creation of the International Committee of the Red Cross following Henri Dunant's successful endeavours in Europe, the international community agreed to the St Petersburg Declaration.[28] This rela-

[25] Dunant, above n 2, 128.

[26] See, eg, Christopher Lamb, 'The Land Commander and the Laws of Armed Conflict' in Hugh Smith (ed), *The Force of Law: International Law and the Land Commander* (1994) 14, citing United Nations Development Program, *Human Development Report 1994* (1994) 47.

[27] See generally Kenneth Macksey, *Technology in War: the Impact of Science on Weapon Development and Modern Battle* (1986); K Perkins, *Weapons and Warfare: Conventional Weapons and Their Roles in Battle* (1987).

[28] St Petersburg Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, 138 ConTS 297, (1907) 1 *American Journal of International Law (Supplement)* 95 ('St Petersburg Declaration').

tively short instrument encapsulates a key problem for international law in responding to, or attempting to impose limits on, the weapons of war. The Declaration includes an agreement to restrict the use of a specific weapon, in this particular case a projectile of weight below 400 grams, which is either explosive or charged with fulminating or inflammable substances. But the Declaration does more than simply attempt to impose a restriction on a specific weapons type. The Declaration also includes the statement of a general principle that the means and methods of warfare are not unlimited — that armies are only entitled to use the minimum amount of force necessary to achieve a legitimate military objective, and that weapons which are unnecessary for the achievement of this objective are prohibited.[29]

The problems inherent in the St Petersburg Declaration have persisted throughout the entire history, since 1868, of the attempts by the international community to impose limitations and restrictions on the deployment of weapons of war. Although there was agreement by the international community to include a general principle of prohibition in the 1868 Declaration, as well as the specific prohibition of a particular weapons type, and despite the fact that there have been successive attempts to develop those general prohibitions concurrently with efforts to impose limitations on specific weapons types, the reality is that only the specific prohibitions and restrictions have been consistently applied. The international community has found it relatively easy to verbalise a commitment to general principles but there has always been a gap between the articulation of these general principles and their effective application to specific weapons categories.

Following the adoption of the St Petersburg Declaration in 1868, the international community attempted to develop more comprehensive limitations on the conduct of war. In particular, the Hague Conventions of 1899 and 1907 incorporated both general principles and specific prohibitions. For example, the Hague Declaration of 1899 Concerning the Prohibition of the Use of Bullets Which Can Easily Expand or Change Their Form Inside the Human Body[30] addressed a specific category of weapons and attempted to impose a comprehensive prohibition on their deployment. Subsequently, in 1907, the Hague Convention Respecting the Laws and Customs of War on Land, *inter alia,* imposed a prohibition

[29] Ibid:

> [The] Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity ... declare as follows:
>
> Considering ...
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity

[30] Declaration Concerning the Prohibition of the Use of Bullets Which Can Easily Expand or Change Their Form Inside the Human Body, 29 July 1899, 187 ConTS 459, (1907) 1 *American Journal of International Law (Supplement)* 155.

on the deployment of weapons containing poison.[31] The various 1907 Hague Conventions also incorporated general principles which influenced the subsequent development of international humanitarian law on the means and methods of warfare.

Two key general principles have emerged since the early development of the international regulation of the conduct of armed conflict. The first is the principle of 'distinction', that civilians and non-combatants must be protected from the conflict and are not to be the specific target of the deployment of weapons.[32] Weapons which are incapable of discriminating between military and civilian targets are prohibited. This general principle has led to euphemistic phrases like 'collateral damage' to justify the use or deployment of weapons against a military target which happens to have incidental effects on the civilian population.[33] The international community accepts the general proposition that civilians are not to be the targets of the deployment of weapons, but it is clear from the proportion of civilian casualties in armed conflict that this often remains the effect of the deployment of the modern weapons of war.

The second general principle limiting the deployment of weapons is that weapons must not cause superfluous injury and unnecessary suffering.[34] While the general principle enjoys widespread support, 'superfluous injury and unnecessary suffering' has never been defined. The international community has simply characterised some weapons as 'abhorrent' without ever articulating criteria for that determination.[35] International humanitarian law accepts that force can be deployed for legitimate military objectives, determined by what constitutes *military necessity*. Force, or the particular deployment of weapons, must be limited to causing only the levels of injury that are justified by the military necessity and causing no more suffering than is necessary to achieve that objective.

At various stages since 1868, the international community has been able to agree that certain weapons types fall within the general prohibition against weapons which cause superfluous injury and unnecessary suffering. However,

[31] Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, 205 ConTS 289, (1908) 2 *American Journal of International Law (Supplement)* 97, art 23 (annexed to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 205 ConTS 277, (1908) 2 *American Journal of International Law (Supplement)* 90).

[32] See Additional Protocol I, above n 16, art 51(4), (5).

[33] For example, on the United States bombing of Tripoli, Libya, in 1986, see the statement of Mr Walters, the US Ambassador to the United Nations in UN Doc S/PV.2674 (1986) 14–15: 'In carrying out this action, the United States took every possible precaution to avoid civilian casualties and to limit collateral damage'. This statement can be contrasted with Robert Fisk, 'Myth of "Surgical Bombing"', *The Times* (London, England), 16 April 1986, 1: 'There was blood across the steps of the bungalow opposite the French Embassy and, on a stretcher down the road, lay part of a baby's body. They had already dug two corpses out of the wreckage of Mohamed Mashirgir's home.' 100 people were believed to have died in the attack: Robert Fisk, 'Gadaffi's Adopted Baby Daughter Dies', *The Times* (London, England), 16 April 1986, 1. On the tensions between proportionality and military necessity in the Gulf War, see Judith Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391, 408–10.

[34] See, eg, Additional Protocol I, above n 16, art 35(2).

[35] Robin Coupland, 'The Effects of Weapons: Defining Superfluous Injury and Unnecessary Suffering' [1996] *Medicine and Global Survival* 3.

despite virtually universal agreement on this principle, the only weapons types actually prohibited are those which have been subjected to specifically agreed prohibitions. In other words, the existence of the general prohibition itself has never resulted in the prohibition of a specific weapons type. The principle reason for the failure to apply the general prohibition *per se* is that specific weapons are prohibited because their military utility is questionable and not because of their deleterious humanitarian consequences. Perhaps some examples will illustrate this argument more effectively.

B *Chemical Weapons*

Chemical weapons were first used on an extensive scale in World War I.[36] It is estimated that in World War I there were 1,300,000 casualties, more than 100,000 of them fatal, from exposure to chemical weapons.[37] After the war there was a substantial outcry against chemical weapons, which led to the adoption of the 1925 Geneva Protocol prohibiting the use of chemical and bacteriological weapons in warfare.[38] That Protocol had three major limitations: first, it only prohibited the *use* of chemical (and bacteriological) weapons — not their production, stockpiling, testing and development; second, the prohibition was only against the use of chemical weapons *in warfare* and not in measures short of war;[39] and third, quite a few states parties to the Geneva Protocol reserved the right to retaliate with chemical weapons against a party to a conflict that first deployed chemical weapons. The consequence of these three limitations was that the Geneva Protocol was not an entirely effective instrument in controlling the continued production and potential threat of chemical weapons.

Chemical weapons have been used at various times since World War I in conflicts, most notably in the 1980s by Iraq against Iranian soldiers and against Kurds in northern Iraqi villages.[40] In the years since World War I, the military utility of chemical weapons has diminished. States have developed effective protective equipment against chemical weapon attack and other weapons have been developed which are less dependent upon favourable climatic conditions such as wind speed and direction and the absence of rain.[41] Many states had reached the conclusion that chemical weapons were not indispensable to their strategic military capabilities. Additionally, the Iraqi use of chemical weapons against unprotected civilians demonstrated the dangers of the increasing proliferation of chemical weapons. The diminished military utility of chemical

[36] Joseph Kelly, 'Gas Warfare in International Law' (1960) 9 *Military Law Review* 1, 3.

[37] (1986) 11 *United Nations Disarmament Yearbook* 241.

[38] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 LNTS 65 ('Geneva Protocol').

[39] Timothy McCormack, 'International Law and the Use of Chemical Weapons in the Gulf War', (1990–91) 21 *California Western International Law Journal* 1, 6–8.

[40] Ibid 10–16.

[41] Thomas Stock, 'Chemical and Biological Weapons: Developments and Proliferation' in [1993] *SIPRI Yearbook: World Armaments and Disarmament* 278, 285–6. (SIPRI is the Stockholm International Peace Research Institute.)

weapons combined with the dangers of unrestrained horizontal proliferation facilitated a greater level of multilateral agreement than had been possible hitherto.

Although the process of negotiation for a comprehensive treaty prohibition of chemical weapons was a protracted one, the conclusion of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons[42] in 1992 (and the entry into force of that Convention on 29 April 1997) was a major achievement in arms control and disarmament law. The Convention sets a precedent by imposing a total prohibition of chemical weapons (including the production, stockpiling, testing, transfer and use of such weapons) and includes the most intrusive verification regime of any arms control agreement to date. Once the Convention was concluded, many members of the international community made statements about the terrible consequences of chemical weapons and how this category of weapons causes superfluous injury and unnecessary suffering to those unfortunate enough to be exposed to such weapons.[43] While many of these sentiments were undoubtedly genuine, the principal motivation for the conclusion of the Convention had less to do with the deleterious humanitarian consequences of the weapons and more to do with strategic security factors.

C *Nuclear Weapons*

If chemical weapons cause superfluous injury and unnecessary suffering and, therefore, should be prohibited, how much more is this true of virtually every category of nuclear weapons? In contrast to the situation with chemical weapons, though, there is still no agreement on a general prohibition on nuclear weapons. By participating in the Nuclear Non-Proliferation Treaty,[44] 180 of the 185 states parties, an overwhelming majority of sovereign states, have agreed to a prohibition on the acquisition, production, stockpiling, development and use of nuclear weapons. However, the five permanent members of the Security Council enjoy an exclusive status under the Treaty as nuclear weapon states parties retaining the

[42] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, UN Doc CD/1170 (1992); [1997] ATS 3, 32 ILM 800 (in force 29 April 1997) ('Chemical Weapons Convention', 'CWC').

[43] The opening remarks by the UN Secretary-General, Kofi Annan, at the First Conference of the States Parties to the Chemical Weapons Convention (The Hague, 6 May 1997). Press Release SG/SM/6232 DC/2585 is indicative of the sentiments expressed by many ministers and heads of state: 'What you have done of your own free will is to announce to this and all succeeding generations that chemical weapons are instruments that no State with any respect for itself and no people with any sense of dignity would use in conflicts, whether domestic or international. You have been summoned by history and you have answered its call. One of the most monstrous tools of warfare has been ruled intolerable by all States Parties.'

[44] Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161, [1973] ATS 3, 7 ILM 809 ('Nuclear Non-Proliferation Treaty', 'NPT'). Note that, in accordance with art X(2), the Conference of States Parties decided on 11 May 1995 that the treaty should continue indefinitely: 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document, Part I: 'Organization and Work of the Conference'*, Annex, Decision 3, UN Doc NPT/Conf.1995/32 (Part I) (1995), reprinted in 34 ILM 959, 972.

right to possess nuclear weapons.[45] Furthermore, the three so-called 'nuclear threshold states' — Israel, India and Pakistan — have all refused to become parties to the Nuclear Non-Proliferation Treaty and to relinquish the right to develop nuclear weapons. Despite the existence of binding treaty obligations on 180 states parties to the Nuclear Non-Proliferation Treaty and of general principles of international humanitarian law, the lack of an international agreement prohibiting nuclear weapons for all states parties, including the five permanent members of the UN Security Council, is apparently determinative.

In July 1996, the International Court of Justice handed down a long awaited response to the UN General Assembly's request for an Advisory Opinion on the legality of nuclear weapons.[46] The Advisory Opinion was a somewhat disappointing, if not entirely unsurprising, decision. The court delivered a joint opinion, the final paragraph of which constituted the *dispositif*.[47] All fourteen judges then appended either personal declarations, separate opinions or dissenting opinions to indicate the extent to which they agreed or disagreed with specific sub-paragraphs of the *dispositif* as well as with particular aspects of the reasoning of the joint opinion.

Some aspects of the Opinion were approved unanimously — in particular, the reaffirmation that any use of nuclear weapons is subject to the customary international law principles governing the conduct of armed conflict,[48] and the reminder to nuclear weapons states of the obligation to negotiate and to conclude agreement on a comprehensive ban on nuclear weapons.[49] These unanimous findings are both positive outcomes of the Opinion. However, on the crucial issue of the legality of the threat or use of nuclear weapons, only seven judges could endorse the finding of the court. The other seven judges dissented from the decision for different reasons. According to article 55 of the Statute of the court, the President has a casting vote in the event of a split decision. In this Opinion, President Bedjaoui voted for the finding in the joint opinion and, as a consequence, the position enunciated in the *dispositif* is the prevailing one.

The court determined that, despite the lack of a specific prohibition on the threat or use of nuclear weapons in conventional or customary international law, the general principles of customary international law, particularly the principles of international humanitarian law, would apply to any use or threat of use of nuclear weapons. Although the court was able to conclude that the use of nuclear

[45] Nuclear Non-Proliferation Treaty, above n 44, art 1: 'Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.' Article 9(3) defines a nuclear-weapon state as 'one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.'

[46] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996)* 35 ILM 809, 35 ILM 1343 ('the Opinion').

[47] Ibid [105].

[48] Ibid [85]–[87], [105(2)D].

[49] Ibid [98]–[103], [105(2)F].

weapons 'seems scarcely reconcilable with respect for such requirements', the judges felt compelled to reach a qualified conclusion because of the perceived lack of 'sufficient elements to enable [the court] to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'.[50]

International law has traditionally distinguished between the law regulating the legitimate resort to force (the *jus ad bellum*), and the law regulating the actual deployment of force (the *jus in bello*). Any legitimate exercise of force must be consistent with both sets of principles. The joint opinion, however, confused the *jus ad bellum* with the *jus in bello*, because the majority of the court declared a non-finding (*non liquet*) — a determination that it was not possible to rule out the possibility of a legitimate use of nuclear weapons in an 'extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[51]

In the light of the majority's non-finding, the statement that, '[a]lthough the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial',[52] may well rank as one of the great understatements in the jurisprudence of the court. A split decision in the Opinion was always a likely result. However, the majority's qualification of the ruling on the illegality of the threat or use of nuclear weapons on the basis of self-defence *in extremis* rather than, for example, on the basis that such threat or use may not necessarily be inconsistent with the *jus in bello*, was both surprising and disappointing.

The unfortunate consequence of the reasoning of the court in the Advisory Opinion on the legality of the use or threat of use of nuclear weapons is that in the absence of a specific agreement by the international community to prohibit a particular weapons category, the general principles of prohibition of weapons which do not distinguish between combatants and non-combatants and weapons which cause superfluous injury and unnecessary suffering have little practical meaning, except as aspirational ideals. Given the tortuous processes of dealing with specific weapons categories individually, a major challenge for international humanitarian law in the future is to give the general principles some practical meaning.

D *Blinding Laser Weapons*

One of the most encouraging recent developments in the whole area of controlling the weapons of war was the agreement in 1995 to prohibit blinding laser weapons.[53] This agreement was unique in arms control history because the prohibition was negotiated before the weapons were actually deployed in battle.

[50] Ibid [95].
[51] Ibid [105(2)E].
[52] Ibid [90].
[53] Protocol on Blinding Laser Weapons, 13 October 1995, UN Doc CCW/CONF.I/16 (Part I) Annex A, 35 ILM 1218 (Protocol IV to the UN Convention on Conventional Weapons, below n 59).

For several years, a number of countries had been developing the technology to inflict blindness using laser weapons, and in some circumstances these weapons had gone into production. However, the weapons had not been deployed in battle situations, and to have reached agreement in the international community for their prohibition before that happened is a landmark development.[54] Again, as with chemical weapons, the international community has engaged in self-congratulatory rhetoric in relation to the successful conclusion to the negotiations for a prohibition of blinding laser weapons. However, the motivation for the ban stems less from humanitarian concerns than from national security concerns about the threat from the proliferation of blinding laser weapons technology and possession of the weapons.

E *Anti-Personnel Landmines*

The agreement to ban blinding laser weapons can be contrasted with the reluctance of many states to commit themselves to a comprehensive prohibition of anti-personnel landmines. The International Committee of the Red Cross estimates that as many as 24,000 people are killed or severely injured by anti-personnel landmines every year.[55] The overwhelming majority of these victims are civilians, because most landmines remain active in the ground decades after the cessation of armed conflict.[56] The ICRC has also estimated that there are up to 120 million sown landmines in the world. While these landmines are being cleared at a rate of 100,000 per year, an additional two million landmines are being sown every year. Even if from today, no new landmines were sown, at current rates of clearance it would still take 1,100 years to clear the landmines currently in the ground. Most anti-personnel landmines detonate on the exertion of a minimum amount of pressure,[57] but, whatever the triggering mechanism, no landmine distinguishes between soldiers and civilians as the victims of the explosion.

The original Protocol II[58] to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects[59] imposed certain limitations on the use of mines and other devices — including strict

[54] See, eg, Louise Doswald-Beck, 'New Protocol on Blinding Laser Weapons' (1996) 312 *International Review of the Red Cross* 272; Burrus Carnahan and Marjorie Robertson, 'The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law' (1996) 90 *American Journal of International Law* 484.

[55] ICRC, *Special Brochure: Landmines Must be Stopped* (1996) 12. See also http://www.icrc.org (Campaign: Land Mines Must be Stopped) (on 15 October 1997).

[56] Ibid.

[57] There are types of anti-personnel landmines which are detonated by trip wires or by remote control but these types are not as prevalent as those which explode under the pressure of body weight.

[58] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 October 1980 (Protocol II to the UN Convention on Conventional Weapons, below n 59).

[59] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, UN Doc A/CONF.95/15 and UN Doc A/CONF.95/15/Corr.1–5, 1342 UNTS 137, [1984] ATS 6, 19 ILM 1523 (in force 2 December 1983) ('UN Convention on Conventional Weapons').

requirements on the laying of mines in marked fields with warning signs and with responsibility for reporting on location and assisting post-conflict clearance. These standards have been manifestly inadequate and so the 1995 Review Conference for the 1980 Convention agreed on measures to strengthen the regulation of anti-personnel landmine use. Under the revised Protocol II, states parties are only permitted to use detectable or self-destructing mines.[60] Detectable mines must contain minimum specified levels of metal and self-destructing mines must meet specified minimum levels of reliability in the activation of their self-destructing mechanisms.

Until recently, most defence forces have argued that anti-personnel landmines are essential to their strategic security interests, despite the terrible humanitarian consequences of the illegitimate use of these weapons.[61] In the context of intergovernmental negotiations attempting to regulate the deployment of landmines, the deleterious humanitarian consequences of the use of landmines are often overlooked. The intergovernmental negotiation process, dominated by representatives from foreign ministries and defence establishments, has laboured over wording for limitations on the use of anti-personnel landmines — for example, how many grams of detectable material need to be included in each mine, what weight of pressure is required to trigger a mine, what percentage of failures among mines subjected to detection or self-destruction tests is adequate? While this process has dragged on, tens of thousands of civilians have died or lost limbs as a result of contact with landmines, and millions more landmines have been manufactured, sold and sown.

The anti-personnel landmine problem again exposes the gap between general principles and their application to specific weapons. It is self-evident that, like all weapons, landmines are inanimate objects and are therefore incapable of independently distinguishing between soldiers and civilians. The legal prohibition of weapons which do not discriminate applies to the use or deployment of weapons and not to their design. Defence lawyers have argued that, in the absence of a specific conventional prohibition, the legitimate deployment of landmines (in marked fields which are mapped and cleared after the cessation of armed conflict) renders the weapon discriminate and therefore not inconsistent with the general prohibition on weapons which fail to discriminate between military and civilian targets. This argument continues that the weapon itself cannot be illegal if the possibility of legitimate deployment exists.

For the first time in the history of the ICRC, the imperative of the devastating humanitarian consequences of anti-personnel landmines for non-combatants has forced the ICRC to take a political position in pushing, not just for international humanitarian law standards on the deployment of landmines, but for complete disarmament — a comprehensive prohibition on production, use and transfer which extends to destruction of existing stockpiles. In the past, the ICRC has

[60] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996, 35 ILM 1209, technical annex arts 2–3.

[61] ICRC, *Anti-Personnel Landmines, Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Landmines* (1996) 71–3.

always adopted a position of neutrality on disarmament negotiations, arguing that it is a political question for the states participating in the negotiation process.[62] While many within the organisation still question the validity of the ICRC taking up its current position in the landmine debate, it is arguable that the primary reason why significant progress has been achieved in recent years in relation to more comprehensive limitations on landmines has been the mobilisation of public opinion against the effects of these weapons. International humanitarian relief organisations, professional medical associations and other non-governmental organisations have exposed the deleterious humanitarian effects of landmines, as well as the magnitude of the problem, and the campaign has begun to have some effect on government policy. It remains to be seen whether these developments will produce positive improvements 'on the ground', but there is a basis for optimism. It may well be that a popular outpouring of support for a radical departure from past approaches will achieve what all previous efforts have not — a real congruence between general principles and their application to specific weapons types.

VI THE CHANGING NATURE OF CONFLICT

Since the conclusion of World War II, we have witnessed a significant increase in the incidence of internal armed conflict and a corresponding decrease in the number of international armed conflicts. Consider the following contemporary conflicts, for example: in Africa, the conflicts in Algeria, Nigeria, Liberia, Angola, Rwanda, Zaire, Burundi, Mozambique and Somalia; in the Middle East: Iraq, Israel-Palestine and Cyprus; in Europe: Albania, Chechnya and Northern Ireland; in Asia: Afghanistan, Kashmir, Sri Lanka, Burma, Korea, East Timor and Bougainville; in Central and Latin America: Guatemala, Honduras and El Salvador. Of all these conflicts, although classification of some of them is debatable, it is arguable that the only international ones are Cyprus (involving Greek and Turkish troops), Korea (involving North and South Korean troops) and Kashmir (involving Indian and Pakistani troops). Even the conflict in Rwanda, Burundi and Zaire, involving parts of the territory of three contiguous states, can hardly be described as an international armed conflict. The fighting occurred between the Hutu and Tutsi communities of Rwanda and spilled over the borders into neighbouring Burundi and Zaire. Some, of course, would characterise the Israeli-Palestinian conflict as an international one, others would argue that the Northern Ireland conflict is an international one. There are political interests at stake in arguing for the international character of conflict.

[62] For example, in a policy document entitled 'The ICRC and Disarmament' (1978) 203 *International Review of the Red Cross* 99, the ICRC stated that, *inter alia*: 'The Red Cross is aware of the fact that it is of the utmost priority for mankind that the disarmament cause be vigorously defended and that it must take up its position in the vanguard of this battle ... However, it can take no stand on the methods to be used in achieving disarmament without endangering one of its basic principles, that of neutrality. So it has to act in a general way as it has already done by associating itself, through various resolutions adopted by its international conferences, with the desire for general and complete disarmament which has so often been expressed at the UN.'

However these particular conflicts are classified, the fact remains that the overwhelming proportion of the existing conflicts in the world are internal ones. Internal conflicts are characterised by the involvement of irregular armed forces. In many cases, the government of the state is a party to the conflict, along with rebel groups or liberation forces. However, in the case of 'failed states', where effective government no longer exists, the conflict is more accurately described as unruly violence and is often perpetrated by individuals, mobs, tribal clans or other factions.

The conflict in the former Yugoslavia is a good example of the particular problems associated with attempts to regulate the conduct of an internal armed conflict. Although at some stage in the dissolution of the former Republic of Yugoslavia the conflict ceased to be an internal one and became an international one, there is no question that when fighting broke out this conflict was seen to be wholly internal — within the domestic affairs of the Federal Republic of Yugoslavia.[63] Throughout the fighting in the former Yugoslavia there were numerous warring factions. The conflict involved the following regular armed forces: Serbian, Bosnian and Croatian Serbs; Bosnian, Serbian and Croatian Croats; Slovenes; and Bosnian Muslims. Allegiances and alliances changed and altered as the focus of the conflict shifted from Slovenia through Croatia to Bosnia-Herzegovina.[64] Throughout these different stages of the conflict, particular factions ended up on different sides of the conflict.

This multiplicity of parties constituted a complicating characteristic of the conflict — it was difficult to know exactly who was fighting whom. But in addition to the different regular armed forces, the conflict involved at least 80 separate para-military or irregular forces.[65] Some of these irregular forces were well organised and operated in close co-operation with one or other regular armed force. Many of the irregular groups were only loosely organised and operated at the local level, in villages and towns. The use of mercenaries from around the world by all sides in the conflict was prevalent.

[63] This particular characterisation of the conflict as an internal one had significant consequences in the trial of Duško Tadic before the International Criminal Tribunal for the Former Yugoslavia. Tadic was charged with a number of offences including some under article 2 of the Statute of the Tribunal for Grave Breaches of the Geneva Conventions. The majority of the Tribunal found that article 2 of the Statute of the Tribunal required the victims of the alleged acts to be 'protected persons' within the meaning of the Geneva Conventions 1949 and that, because the alleged acts took place in the context of an internal armed conflict, this element of the offence was not satisfied. Although Tadic was convicted of several of the other crimes, he was acquitted by the majority of the Tribunal in relation to the specific counts of Grave Breaches of the Geneva Conventions. See *Prosecutor v Dusko Tadic a/k/a/ 'Dule' (Opinion and Judgment of 7 May 1997)*, Case No IT-94-1-T (http://www.un.org/icty/tad-jtc.htm (on 15 October 1997); extracts reprinted in 36 ILM 908), particularly Part VI(B) 'Applicable Law — Article 2 of the Statute'. Cf 'Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute' (http://www.un.org/icty/970507op.htm (on 15 October 1997); 36 ILM 970).

[64] For a helpful overview of the development of the conflict, see Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 25–44.

[65] Ibid 44–7; *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 49 UN SCOR, UN Doc S/1994/674/Add.2 (1994) Annex III.A — Special Forces ('Final Report'), summarised in Bassiouni and Manikas, above n 64, 77, 81.

The conflict brought long-simmering ethnic, cultural and religious tensions to the fore. Emigrants from the former Yugoslav Republics came from different areas of the world to join their cultural and ethnic group to help in the fighting. In this conflict, the distinction between combatants and civilians was often meaningless. Although many of the warring factions were distinguishable by uniforms and operated under army command and took orders from military superiors, the reality of the conflict was that membership of a particular ethnic, cultural, linguistic and religious group was the basis of subjection to armed hostility.

The international community observed terrible atrocities in the Balkans conflict. Here was the deliberate and wilful destruction of historic items of cultural significance because those items — buildings, collections of art, houses of worship — represented aspects of cultural identity that one side of the conflict wanted to erase.[66] Here was the euphemistically titled practice of 'ethnic cleansing', a form of cultural genocide undertaken to change the relative proportions of ethnic groups represented in a particular town or region.[67] Here was the establishment of rape camps, not just to provide a physical distraction to the combatants on one side of the conflict, not just to humiliate the victims of the repeated and degrading sexual assaults, not just to inflict humiliation on the entire ethnic group that the women were drawn from, but set up in order to enforce the impregnation of these groups of women with the seed of a different ethnic group, so that the children of those women would not belong to the group of their mothers.[68] Here was the mass slaughter of civilians because of the ethnic group they belonged to, and the hurried burial in mass graves of many of them. Here were examples of some of the most perfidious uses of the Red Cross emblem to gain military advantage. Here were examples of deliberate targeting of ICRC and other humanitarian relief organisations' personnel because they were seen to be giving humanitarian assistance to people on the other side of the conflict. Here too was the taking hostage of UN personnel involved in peace observance missions.

Perhaps even more disturbing than these particular examples of violence are allegations of other practices that took place during the Balkan conflict. For example, it has been alleged that on several occasions sporting shooters from southern Germany travelled into the Balkans for weekends of blood sport, set up positions overlooking areas of the conflict, and proceeded to snipe at any person they were able to view through long-range viewfinders attached to their semi-automatic weapons.[69] Examples of this sort of violence pose almost insurmountable problems for the application of international humanitarian law and for attempts to regulate the conduct of armed conflict.

[66] Final Report, above n 65, Annex XI — Destruction of Cultural Property, summarised in Bassiouni and Manikas, above n 64, 177.

[67] Final Report, above n 65, Annex IV — The Policy of Ethnic Cleansing, summarised in Bassiouni and Manikas, above n 64, 85.

[68] Final Report, above n 65, Annex IX — Rape and Sexual Assault, summarised in Bassiouni and Manikas, above n 64, 158.

[69] These allegations were made by an ICRC delegate to the former Yugoslavia in a conversation with the author in May 1996.

Add to the difficulties posed by the conflict in the former Yugoslavia examples of complete breakdown of civil society in other internal armed conflicts, and the challenges to international humanitarian law multiply. For example, in Somalia the domestic situation had degenerated to such an extent that the government was incapable of governing, and society had turned into an anarchical state of tribal warfare. In this context, different tribal factions formed their own militias and exercised authority through military fire power.[70] The international community witnessed the great challenges of attempting to intervene in such a situation and of avoiding simplistically summing up the conflict by targeting one particular faction as the enemy. In Rwanda, too, there was a breakdown of civil order and the long-standing tension between the Hutu and Tutsi ethnic communities erupted into open and violent conflict. In Rwanda, as in the former Yugoslavia, former neighbours often took up arms against each other. In Rwanda, where there was a lack of small arms and other sophisticated weapons, many turned to rudimentary weapons, including machetes and axes, and still managed to cause atrocious carnage.

There are significant challenges to international humanitarian law that are posed by these sorts of conflicts. In many ways, these challenges are the same challenges posed to international law more generally. The title 'international law' automatically raises a number of problems. International law suggests a body of principles which governs relations between nations or independent sovereign states. In these last years of the 20th century, it is becoming increasingly obvious that a number of non-state entities are very active on the international plane. Multinational corporations, international organisations, non-governmental organisations, and some national cultural groups and entities — all are acting as other-than-sovereign independent nation states. International law is created by agreement between sovereign independent nation states. The processes to develop this law tend to be exclusively the domain of states and their governments and this creates two problems.

First, the governments which participate in the independent sovereign state processes are not necessarily representative of the peoples who make up those nation states. Despite the claimed advances of democratic processes of government around the world, there are still many countries where people have not participated in the appointment of particular governments and there are also increasingly large numbers of minority groups completely excluded from representation by a particular government.[71] One consequence of this, of course, is that many individuals do not feel bound by particular rules of international law which do not reflect their own interests and positions.

Secondly, and similarly, the fact that non-state entities are precluded from the processes of making international rules means that some of those entities do not

70 Michael Kelly, *Peace Operations* (1997) [724]–[774], especially [727].

71 For critiques of the notion of representative government and legitimacy in international law, see, eg, Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53; Gerry Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 *Australian Yearbook of International Law* 103, 115–27.

necessarily feel bound by what has been agreed. This is particularly so, given that independent sovereign states have the ability to determine which rules apply to them and which rules do not on the basis of their own consent. Until the international community of states recognises that the making of international rules can no longer be the exclusive domain of states, it is likely that non-state entities will often not feel bound by the rules that have been agreed.

The Geneva Conventions 1949[72] are only applicable to international armed conflicts, and common article 3 alone extends some of the basic principles to internal armed conflicts.[73] In the 1970s, as the international community was negotiating new instruments to extend and develop further the rules of international humanitarian law, it was recognised that internal armed conflicts posed a particular challenge to the application of these rules. The two Additional Protocols of 1977[74] were created to extend the minimum standards of humanitarian protection for victims of armed conflict, and the scope of the rules dealing with means and methods of warfare. Somewhat controversially, Additional Protocol I applies to international armed conflicts, including struggles for self-determination against 'colonial domination and alien occupation and against racist regimes'.[75] Additional Protocol II extends some of the rules of international humanitarian law to internal armed conflicts not otherwise covered by Additional Protocol I. However, a number of problems have arisen among states' reactions to this approach.

A number of states in the international community have not accepted the scope of application of either Additional Protocol and have refused to become parties to them. The principal objection of some of these states is that the Additional Protocols give legitimacy to terrorist groups, insurgent groups and other sub-national entities.[76] In any case, because only states can become parties to either Additional Protocol, sub-national entities do not necessarily feel bound by their provisions.

One of the ways the international community has sought to respond to current challenges to the application of international humanitarian law is through the creation of *ad hoc* war crimes tribunals. In 1993, the international community,

[72] Geneva Conventions 1949, above n 14.

[73] Common article 3 of the Geneva Conventions 1949, above n 14, preserves minimum standards of protection for application in 'armed conflict not of an international character'. In addition, common article 3 prohibits '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.

[74] Additional Protocols I and II, above n 16.

[75] Additional Protocol I, above n 16, art 1(4).

[76] See, eg, Alfred Rubin, 'Terrorism and the Laws of War' (1983) 12 *Denver Journal of International Law and Policy* 219; Guy Roberts, 'The New Rules for Waging War: The Case Against Ratification of Additional Protocol I' (1985) 26 *Virginia Journal of International Law* 109. In reply, see George Aldrich, 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I' (1985) 26 *Virginia Journal of International Law* 693; Theodor Meron, 'The Time has Come for the United States to Ratify Geneva Protocol I' (1994) 88 *American Journal of International Law* 678.

through the Security Council of the UN, created a War Crimes Tribunal for the Former Yugoslavia,[77] and more recently created a similar tribunal for Rwanda.[78] There has been no official articulation of the reasons for the inherent inconsistency in the creation of *ad hoc* tribunals for these two particular conflicts but not for others of grave concern to the international community. In relation to the Rwandan tribunal for example, the conflict in Rwanda spilt over into neighbouring Burundi and Zaire, and yet the jurisdictional competence of the tribunal is limited to the geographical territory of Rwanda or to acts committed by Rwandan nationals in neighbouring countries. Consequently, acts committed by Burundi or Zairean Hutus or Tutsis outside Rwanda are beyond the jurisdictional competence of the tribunal. Furthermore, the tribunal's jurisdiction *ratione tempore* is limited to acts committed between 1 January and 31 December 1994 and excludes any acts committed since.[79] Quite apart from the inconsistency in relation to that particular conflict, the same argument of inconsistency can be levelled against both tribunals. Why do we create a tribunal for the former Yugoslavia and for Rwanda but not for Mozambique, Somalia, Honduras, or the Middle East?[80] This argument is not intended to suggest that the creation of the two tribunals was worthless. Rather, the challenge remains for the international community to act more consistently. One hope is that the proposed permanent international criminal court will be established and will overcome some of the inconsistencies inherent in past approaches to war crimes trials. It remains to be seen, however, whether the international community will be prepared to be more inclusive in the process of international law-making, in the hope that the application of international legal rules will become more widespread than may currently be the case.

VII Responding to the Challenges to International Humanitarian Law

A key issue for each of us is the nature of our personal and collective response to these challenges to international humanitarian law. One obvious response is despair and cynicism. Many people feel that the notion of international humanitarian law is laughable. This so-called 'law' does not work, and there is no point in wasting time and energy to try and pretend that we might be able to make it work. I do not agree with that position, and for reasons other than attempting to justify my recent appointment! The enduring legacy of Henri Dunant's life is one of the key motivations for continuing to work for a more effective implementation of international humanitarian law. Dunant refused to accept that thousands of individuals had to be left to die and to suffer intolerably with their injuries.

77 Established pursuant to SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/RES/827 (1993).

78 Established pursuant to SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/RES/955 (1994).

79 Statute of the International Tribunal for Rwanda, art 1. The Statute is annexed to SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/Res/955 (1994) and reprinted in 33 ILM 1600, 1602–13.

80 Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 1, 4–11.

Regardless of the merits of either side of the conflict, and on the basis of a deep personal conviction about the inherent dignity and worth of individual men and women, Dunant challenged the political leaders of Europe to respond to the desperate need that he saw. His observations of the needs, his vision for ways of meeting those needs, and his tireless efforts in promoting his ideas for how those needs could be met, all combined to enable him to achieve tremendous results for many victims of armed conflict. His life is a demonstration of the potential impact of individuals, particularly when they are engaged in collective effort for a common goal.

Is there a continuing role for international humanitarian law? It probably comes as no surprise that my answer to that question is a resounding 'yes'. There are a number of current proposals and projects under consideration by the international community which could increase the effectiveness of international humanitarian law. None of these proposals is sufficient in and of itself to respond comprehensively to the current challenges to international humanitarian law. However, each of them is worth pursuing vigorously, and their collective effect could well make a substantial difference in the world.

A *Creation of a Permanent International Criminal Court*

The international community can continue to establish war crimes tribunals for particular conflicts but, as already mentioned, the permanent international criminal court may provide an alternative, more comprehensive, more appropriate response. All past initiatives to establish international criminal tribunals (Nuremberg, Tokyo, the Former Yugoslavia and Rwanda) have suffered from major limitations — all four tribunals have been *ad hoc* for particular conflicts and entirely reactive, in that prosecutions have only taken place after the conflicts were over. In addition, the Nuremberg and Tokyo Tribunals were created by the victors in World War II for the exclusive trial of defendants from the defeated powers.[81]

There are still substantial unresolved issues in the negotiation process for an international criminal court, and it is clear that any final agreement will involve significant limitations on the effectiveness of the court.[82] However, the successful creation of a permanent international criminal court with potential jurisdictional competence over a broad range of future international crimes could help fill an existing void in the enforcement of international humanitarian law. The next twelve month period will be critical in the negotiation process as the international

[81] For a more detailed discussion of the limitations of *ad hoc* international criminal tribunals and the potential for a permanent international criminal court to overcome those limitations, see Timothy McCormack and Gerry Simpson, 'A New International Criminal Law Regime?' (1995) 42 *Netherlands International Law Review* 177.

[82] Timothy McCormack and Gerry Simpson, 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 229, 233–48.

community aims for a diplomatic conference in Rome in June 1998 to establish the court.[83]

B *Preventive Diplomacy*

For those of us involved with international humanitarian law, it is easy to accept the inevitability of armed conflict and to become preoccupied with the legal regulation of it. Clearly, the most effective way of ensuring compliance with international humanitarian law is to prevent conflict breaking out in the first place. To that end, calls for the allocation of resources by the international community to preventive diplomacy, in an attempt to identify potential sources of conflict and to address them much earlier in the process, must be encouraged and applauded.[84] The International Committee of the Red Cross has tended to be a reactive organisation because it exists to help alleviate the suffering of victims of armed conflict, and victims can only emerge when the conflict has already broken out. While there is obviously a need for this sort of organisation and there are now many humanitarian relief organisations in the world, the ICRC would do nothing to diminish its own role if it engaged in more substantial dialogue with conflict prevention and conflict resolution agencies.

In addition, there is perhaps a greater proactive role for national Red Cross Societies in working within their own countries to help provide humanitarian assistance to those who need it most. National organisations are arguably better placed than international organisations to identify potential sources of conflict within their own territory and to be channels for international assistance in minimising the potential for outbreak of armed conflict.

C *Further Progress on Current Weapons Negotiations*

The conclusion of the Chemical Weapons Convention[85] is a major breakthrough in arms control and disarmament agreements. On one level, the Convention is the culmination of more than 20 years of negotiations and now, finally, the international community has agreed to a comprehensive prohibition of chemical weapons. On another level, the Convention establishes a verification regime with an unprecedented level of intrusiveness, and already this new verification regime has become the benchmark for other arms control and disarmament negotiations.

[83] The timetable of June 1998 for a Diplomatic Conference was agreed at the 51st Session of the UN General Assembly: 51 UN GAOR (88th mtg), UN Doc A/RES/51/207 (1997) preamble.

[84] Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping — Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, UN Doc A/47/277–S/24111 (1992), 31 ILM 956, especially 960–3, also available at http://www.un.org/Docs/SG/agpeace.html (on 15 October 1997); Boutros Boutros-Ghali, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc A/50/60–S/1995/1 (1995), also available at http://www.un.org/Docs/SG/agsupp.html (on 15 October 1997); Gareth Evans, *Cooperating for Peace: the Global Agenda for the 1990s and Beyond* (1993) 61–88.

[85] Chemical Weapons Convention, above n 42.

For example, the negotiations for the Comprehensive Nuclear Test-Ban Treaty[86] were premised on the notion that the treaty must contain an effective verification regime and the Chemical Weapons Convention was consistently cited as the model for this.

Other existing arms control and disarmament conventions are being revisited for possible strengthening, at least partly in response to the conclusion of the Chemical Weapons Convention. The Biological Weapons Convention[87] is one example. That Convention entered into force in 1975. The Convention imposes a comprehensive prohibition on biological weapons for states parties but is devoid of any verification regime. There is now a negotiation process in the Conference on Disarmament in Geneva to conclude a verification protocol to the BWC.[88] Again, the verification regime of the Chemical Weapons Convention is consistently cited as the model for increased effectiveness of the BWC.[89]

Another example of the influence of the conclusion of the Chemical Weapons Convention on existing arms control negotiations is the Nuclear Non-Proliferation Treaty ('NPT').[90] Although the NPT, unlike the BWC, does have a verification regime, involving the inspection of declared nuclear facilities by inspectors from the International Atomic Energy Agency ('IAEA'), that verification regime has been shown to be weak. Both Iraq and North Korea were able to avoid their obligations under the NPT, despite the inspection of declared facilities in both countries, and these two situations exposed the need for stronger verification measures.[91] Again, the verification regime of the CWC, particularly the provision for challenge inspections, has been regularly cited as a model for the strengthening of the NPT/IAEA safeguards system.[92]

It is encouraging that the CWC has been cited as the benchmark for other arms control and disarmament conventions. Although we have seen that the humanitarian consequences of the use of chemical weapons were not the primary motivation for the conclusion of negotiations, one hopes that the expressions of satisfaction at the international community's agreement to ban one category of abhorrent weapons will add to the momentum for early conclusion of other arms control and disarmament negotiations. It is certainly worth reminding govern-

[86] Comprehensive Nuclear Test-Ban Treaty, 24 September 1996, text appended to UN Doc A/50/1027 (1996), adopted by GA Res 50/245, 50 UN GAOR (125th mtg), UN Doc A/50/L.78 (1996), also available at http://www.acda.gov/treaties/ramaker.htm (on 15 October 1997).

[87] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 UNTS 163, [1977] ATS 23, 11 ILM 309 (in force 26 March 1975) ('Biological Weapons Convention', 'BWC').

[88] Annabelle Duncan and Robert Mathews, 'Development of a Verification Protocol for the Biological Weapons Convention' in John Poole and Richard Guthrie (eds), *Verification 1996: Arms Control, Peacekeeping and the Environment* (1996) 151.

[89] Ibid.

[90] Nuclear Non-Proliferation Treaty, above n 44.

[91] See, eg, Dunbar Lockwood and Jon Wolfstahl, 'Nuclear Weapon Developments and Proliferation' [1993] *SIPRI Yearbook: World Armaments and Disarmament* 243; Timothy McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (1996) 92–5.

[92] Daniel Fischer, '1989–95: Radical Changes in IAEA Safeguards' in John Poole and Richard Guthrie (eds), *Verification 1996: Arms Control, Peacekeeping and the Environment* (1996) 65, 71.

ments of their own statements at the opening for signature and on the entry into force of the CWC, and to challenge them to demonstrate consistency in their efforts to strengthen the legal regulation of other weapons.

The recent initiative of the Canadian government to bypass the often dilatory processes of the UN Conference on Disarmament in Geneva, and to push instead for the conclusion of a comprehensive treaty ban on anti-personnel landmines by the end of 1997,[93] is a welcome one. There is a danger that any such treaty may only attract the participation of the 'well behaved' states — those which are either not using landmines at all or are only using them responsibly — and so have no impact on the global anti-personnel landmine problem.[94] However, even if all that is achieved is that some of those 'well behaved' states commit themselves to a ban on the continued manufacture and export of landmines, that in itself would be an improvement on the current situation. It is also possible that the negotiation process could maintain a momentum of its own — particularly if global public opinion can be mobilised to put pressure on governments to commit to the Ottawa treaty. It is surely worth the effort to attempt to establish a normative standard of complete prohibition, which could then fuel a growing opprobrium against the future deployment of landmines, whether or not particular states are party to the new treaty. Of all states, Australia ought to recognise the potential significance of the Canadian initiative, given the success of its own efforts to conclude negotiations on the Chemical Weapons Convention.[95]

D *Defining Superfluous Injury and Unnecessary Suffering*

One partial explanation for the apparent lack of application of the general principles of international humanitarian law to specific weapons categories is the lack of any definition of 'superfluous injury and unnecessary suffering'. Another ICRC project involves the development of medical criteria to define precisely what constitutes superfluous injury and unnecessary suffering. The concept is that agreed criteria could be applied both to existing weapons and to future weapons. Any weapon designed not to meet, or which had the effect of not meeting, one or more of the criteria would be illegal, and its use in armed conflict would be in violation of international humanitarian law.[96]

It is a particularly interesting development that this project is health-driven. ICRC surgeons have been collecting data from the treatment of war wounds in

[93] 'Towards a Global Ban on Anti-Personnel Landmines' (Declaration of the International Strategy Conference, Ottawa, 3–5 October 1996), reprinted in (1996) 315 *International Review of the Red Cross* 647; Peter Herby, '1997: The Year of a Treaty Banning Anti-Personnel Mines?' (1997) 317 *International Review of the Red Cross* 192. Note that the text negotiated in Oslo in September 1997 will be opened for signature in December 1997.

[94] This is certainly the view of the Commonwealth of Australia: see, eg, 'The Australian Government's Statement to the Regional Colloquium of the International Campaign to Ban Landmines: Towards Ottawa and Beyond' in Department of Foreign Affairs and Trade, *Peace and Disarmament News* (July 1997) 10.

[95] See generally Martine Letts *et al*, 'The Conclusion of the Chemical Weapons Convention: An Australian Perspective' (1993) 14 *Arms Control* 311.

[96] Coupland, above n 35; ICRC, *The Medical Profession and the Effects of Weapons* (1996).

field hospitals over many years.[97] That data provides empirical evidence of the effect of particular weapons. In the case of anti-personnel landmines, for example, it led the ICRC to the unprecedented decision to advocate publicly a comprehensive prohibition on a category of weapon as the only meaningful way for the international community to respond to a humanitarian tragedy.[98] Much of the current momentum for a global ban on the production, stockpiling, testing, transfer and use of anti-personnel landmines is directly attributable to the mobilisation of the medical profession worldwide to protest against the horrendous effects of landmine injuries. A health-related global campaign on a definition of superfluous injury and unnecessary suffering for application to any weapons category is a welcome development with significant potential.

E *Export Controls on Conventional Weapons*

Another proposal which may help achieve a more effective implementation of the current restrictions on the use of weapons is the institution of export controls on conventional weapons. States participating in any arrangement would need to commit themselves to imposing bans on the export of conventional weapons to purchasers who refuse to commit themselves to be bound by the relevant international instruments on international humanitarian law. This initiative could further strengthen the existing United Nations Register of Conventional Arms.[99] Despite all the problems associated with the conventional arms trade, and in particular the arms merchants who buy from the manufacturing states and sell to government regimes as well as to sub-national entities, a key challenge to the greater control over who buys what is a willingness on the part of the exporting state to impose stricter controls on exports.

Export restrictions have already been voluntarily agreed on between states in relation to nuclear, biological and chemical weapons, long-range missiles and supporting equipment and infrastructure.[100] There is no reason in principle why export restrictions could not be placed on conventional weapons. Given the

97 Coupland, above n 35.

98 ICRC, *Anti-Personnel Landmines, Friend or Foe?*, above n 61, 73.

99 The Registry was established in December 1991 by GA Res 46/36 L to increase transparency in relation to the transfer of conventional arms. For an explanation of the Registry, see Paul Ingram, 'The Verification of Arms Transfers' in John Poole and Richard Guthrie (eds), *Verification 1993: Peacekeeping, Arms Control and the Environment* (1993) 181. For an update on developments in relation to the Registry, see Malcolm Chalmers and Owen Greene, 'The UN Register of Conventional Arms: The Third Year of Operation' in John Poole and Richard Guthrie, *Verification 1996: Arms Control, Peacekeeping and The Environment* (1996) 249.

100 For a general survey of each of these régimes, see, eg, Ian Anthony *et al*, 'Multilateral Weapon-Related Export Control Measures' [1995] *SIPRI Yearbook: Armaments, Disarmament and International Security* 597; Ian Anthony and Thomas Stock, 'Multilateral Military-Related Export Control Measures' [1996] *SIPRI Yearbook: Armaments, Disarmament and International Security* 537. In relation to the Australia Group in particular, see Timothy McCormack, 'Some Australian Efforts to Promote Chemical Weapons Non-Proliferation and Disarmament' (1992) 14 *Australian Yearbook of International Law* 157, 162–6; Julian Perry Robinson, 'The Australia Group and the Chemical Weapons Convention' (Paper presented at the 19th Workshop of the Pugwash Study Group on Chemical and Biological Warfare, Geneva, 11–12 January 1992) (on file with author); Amy Smithson, *Separating Fact from Fiction: The Australia Group and the Chemical Weapons Convention* (Occasional Paper No 34, Henri L Stimson Center, March 1997) (on file with author).

prevalence of conventional weapons and the large number of manufacturing and exporting states, any export control measures on these weapons will be less successful than with weapons of mass destruction. However, participation by just some of the major exporters of arms could have a positive influence on awareness of, and respect for, the key principles of international humanitarian law.

F *Application of International Humanitarian Law to Non-State Entities*

The term 'international law', the law governing relations 'between nations', reflects the primacy of sovereign independent nation states within that particular legal system. However, the irrepressible process of globalisation has been characterised by the emergence of a range of non-state entities as global actors. Increasingly, states are recognising the limitations of a system of law which does not impose obligations upon non-subjects of the legal system. But this automatically raises a tension. Given the consensual nature of international law, non-state entities can only be bound by the law if they have participated in the making of it and consent to be bound by it. To date, states have jealously guarded their monopoly over the processes of international law-making. An ongoing challenge for the international community is to become more inclusive of other international actors in the making of international law, in order to impose binding obligations upon those other actors and so increase the effective implementation of legal principles. While the UN Security Council can establish *ad hoc* war crimes tribunals to try individuals alleged to have committed violations of international humanitarian law in particular conflicts, this is surely not all that can be done to increase respect for the basic principles by all participants in armed conflict.

One interesting proposal, which reflects the growing acceptance of the limitations of an exclusively intergovernmental process for the negotiations of new rules of international humanitarian law, is to establish a parallel consultation group for irregular armed forces alongside the so-called 'Ottawa Process', to 'fast track' negotiations for a comprehensive treaty ban on anti-personnel landmines. In the context of the ICRC/NGO-led International Campaign to Ban Landmines, many campaigners are engaged in national campaigns to influence the development of government policy. Many of these national campaigns have also targeted irregular armed forces, to attempt to influence the attitude of such forces to the use of landmines.[101] The hesitancies of statism will inevitably translate into a protracted and tortuous process toward a quantum shift in the way international

[101] For example, the Philippine Campaign to Ban Landmines has targeted the National Democratic Front ('NDF') as well as the Philippines government on the issue of the use of anti-personnel landmines. The Campaign organisers have also proposed the inclusion of a ban on the use of anti-personnel landmines in a Comprehensive Agreement on Human Rights–International Humanitarian Law between the government and the NDF as part of their negotiated settlement to the current armed conflict. See generally Soliman Santos, Philippine Campaign to Ban Landmines, *Proposal to Include a Total Ban on Anti-Personnel Landmines in a GRP-NDF Agreement on HR-IHL* (1996) (on file with author).

law is made. However, some progress is already observable and history shows that new global realities will ultimately compel change.

G *A Personal Response*

Despite the terrible brutality that some human beings perpetrate on others, I cannot accept that it is a justifiable response to sit back and accept it all as inevitable. As an academic, entrusted with responsibilities to inaugurate a chair in international humanitarian law, I have spent some time contemplating the contributions someone in my position might be able to make. One of the most exciting possibilities for me personally is the prospect of encouraging new generations of international law students to commit themselves to making a difference in the world. It is both encouraging and motivating to see so many past and present students of international law here — particularly knowing that many of you believe in, and are committed to, the rule of law in international affairs.

Some would say we are naive to believe that we can work for a more effective implementation of international humanitarian law. But Henri Dunant could easily have chosen a more comfortable path. He could have responded to his observations of the Battle of Solferino with introspective depression about the terrible suffering of the victims of that particular conflict. Instead, he chose to give his efforts to challenging the governments of Europe to respond to the situation and saw great results from that. We do not have to physically visit the battlefields of a major conflict to be aware of the terrible suffering of victims of violence and conflict. In the relative comfort of our own living rooms, we are confronted with images of violence and conflict on a daily basis, if we choose to watch them. I hope many of you will refuse to be content with momentary inspiration for your potential contribution while at law school, only to settle for introspective preoccupation with your own careers and other responsibilities in the longer term.