ANY ATTEMPT TO LOOK INTO THE FUTURE is fraught with difficulty and the likelihood that much of it will be wrong. If someone in 1898 had tried to foresee issues relating to the implementation of the laws and customs of war in the twentieth century, it is highly unlikely that he could have foreseen many of the major developments that have characterized warfare in this century and, therefore, the difficulties of implementation that these created. At best, he could have based his attempt on trends, in particular the development of mechanization at that time. Putting aside the possibility of dramatic events like a catastrophic nuclear war, or unforeseeable fundamental changes in the nature of warfare or the organization of international society, the most one can hope to do is to extrapolate from present trends and see how these could affect the implementation of the law in the future. In so doing, one may assume that human nature will not change, although the organization of society and of international relations could well do so.

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

This article will attempt to analyze the factors that help or hinder the implementation of the law. It will first examine those factors that helped such law develop in customary practices, and analyze whether they continue to be present this century and what the prospects might be for the future based on present trends. The changes in international society that appear to be taking place and the effect these may have on implementation will then be considered. Finally, the article will consider certain mechanisms for implementation. With respect to implementation, this author does not assume that we should speak of implementation of the law in the next century as the law stands now, but assumes that changes and developments will take place in order to reflect developments in technology, methods of warfare, and society. This article will therefore consider implementation of the major principles of international humanitarian law that reflect its basic purpose as we understand it today, namely, the limitation of means and methods of warfare and the regulation of the treatment of persons in the power of adverse authorities in order to limit the destructiveness and suffering of war.

Factors That Helped Ensure the Implementation of the “Laws and Customs of War”

First, if rules reflect existing general practice, it is likely that their implementation will not be particularly difficult, as efforts will probably be limited to keeping in line the occasional individual who behaves differently from others in his society. It is noteworthy that prior to the attempts to codify the law in the late nineteenth century, the laws and customs of war were an articulation of the methods of warfare common to professional armies of that time. Nonprofessional groups were not expected to conform to this law and were, therefore, also not entitled to the privileges that were enjoyed by professional armies, especially prisoner-of-war status. The protection of the civilian population was assured largely by methods of combat rather than any strict rule to that effect. The lack of such a strict rule is illustrated by the fact that civilians did suffer greatly during sieges; they could even be forced back into the besieged city if they tried to escape. On the other hand, the practice in the Middle Ages whereby a city’s population could be punished for resisting capture was considered dishonorable and uncivilized by the eighth century.
This brings us to the second factor of importance, namely, the belief by combatants of the appropriateness of having certain rules in battle. Not only did concepts of honor prevent the sacking of cities after capture, but they also imposed a number of rules relating to the treatment of other combatants. Most important were the prohibitions on the use of poison, treachery, and attacking an enemy combatant once hors de combat. These values and the sense of responsibility that they entailed were clearly instilled not only by the societies in which professional soldiers were brought up but also by the ethic of the armies themselves. The criminality of violations of the law flowed fairly naturally from this sense of appropriate and inappropriate behavior.

The extent to which reciprocity was important in the context of this ethic is uncertain, for one must be careful not simply to project onto society of that age the concept as perceived today. There is no conclusive evidence that “civilized” societies, as they saw themselves, strictly required reciprocity for every action vis-à-vis each other. However, as far as behavior in relation to “uncivilized” societies was concerned, it was conditioned by their incapacity, as it seemed at the time, to apply or appreciate such niceties. Evidence of this is to be found in the Lieber Code and in the arguments of the British when they wanted to introduce the use of dum-dum (hollow-point) bullets. However, another type of reciprocity did become important with the introduction of new rules in treaties, namely, the international law rule that parties need to be bound by the treaties in question. This was particularly evident in the general participation clause of the Hague Conventions.

A third factor which fosters implementation is ease in applying the law. As the law followed practice in the last century, not being able to apply the law was simply not a problem for professional armies. Any potential difficulty was met by allowing exceptions where considered expedient. The most obvious example of this was the rule that captured soldiers were not to be attacked; exceptions were made if keeping them as prisoners of war was impossible for the commander concerned.

Fourthly, a lack of hatred for the enemy or of desire for personal vengeance clearly helps prevent atrocities of all kinds. The fact that recourse to war was not illegal, or even unusual, in the past helped armies view each other as fellow professionals doing their job. The notorious cruelty of non-international armed conflicts is at least partly caused by the emotions involved, the other important aspect being the frequent involvement of nonprofessional combatants.

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

Factors That Help Or Hinder the Implementation of the Law: Twentieth Century Difficulties and Future Prospects

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

From Law Reflecting Practice to Law Preventing Practice. The major motivation of the call by the czar of Russia for the conferences at the end of the nineteenth century and the beginning of the twentieth was the development of weaponry that he perceived was taking place. This was farsighted, for the extreme destructiveness of new technology was such that responsible politicians simply could not continue to let law reflect practice, which would have allowed whatever technology was capable of. However, this has meant that the law has increasingly been dictated by the need to curtail practice rather than reflect it, thereby creating tensions in relation to the implementation of the law in the twentieth century. Changes in the law largely prohibited certain new practices, such as the use of chemical weapons and massive bombardments of cities, although those who indulged in such practices were of the opinion that they had military utility. Other practices continued to be allowed despite some attempts to outlaw them; they have been responsible for a great deal of destruction and suffering. Examples include the use of submarines, bombardment by aircraft, mines, and long-range missiles. These inconsistencies have meant that the ethics of the law of war have become quite unclear to both normal soldiers and laymen.

The law no longer takes the simple approach that all militarily useless cruelty is prohibited, with the rest in principle allowed; the sheer destructive nature of today's technical possibilities means that compromises have had to be made for the sake of the survival of humanity. However, these compromises do
not always appear very consistent to the average person. The fact that certain bullets are prohibited but nuclear weapons have not been clearly and unambiguously prohibited creates scepticism regarding the seriousness of any of the law of war. The principle of proportionality in attack is an excellent example of compromise between military and humanitarian needs, but the implementation of this rule is somewhat subjective and unclear, and causes a certain degree of doubtfulness among those who hear it for the first time. The problem has been exacerbated by collateral damage that tends to occur after the event, such as water shortages or other highly negative effects of attacks on the power stations on which modern civilian society depends for survival.\textsuperscript{10} The difficulty that civilians have in practice in obtaining protection from the effects of hostilities has had the effect of creating questions as to the continued need for law to protect combatants from excessively cruel weapons.\textsuperscript{11}

Potential New Weapons and the Need that Practice Again Reflect Law. The perceived incongruity between practice and law that has developed this century has created a serious image problem for international humanitarian law. Law has to reflect practice at least to some degree in order to be taken seriously. For the reasons indicated above, it was not possible simply to have the law allow the use of any new technological possibility. Therefore, what is needed is a means to make practice reflect the law, or at least the basic principles of the law; in so doing practice can again reflect certain values rather than having primarily to stop practice. This is particularly important as there is evidence that we are, at the end of the twentieth century, on the brink of a major change in war-making capability that could be at least as important as the major changes that took place earlier in the twentieth century relative to the nineteenth. The extent of research that is taking place to develop directed-energy weapons means that we could see a major change in methods of warfare. At present, it is difficult to imagine the full impact of this change.\textsuperscript{12} The ability of high-power microwaves and electromagnetic-pulse weapons to incapacitate electronics has enormous potential for the destruction of the life-support systems of technologically developed societies, which use such electronics for all kinds of purposes. The potential effect of acoustic beams and electromagnetic waves on persons is as yet not fully certain, nor is the extent to which they could be weaponized for antipersonnel purposes. Antimateriel laser beams are still being worked on, and one should not rule out the possibility of the development of antipersonnel lasers that target persons in different ways from the blinding laser weapons that have been recently banned.\textsuperscript{13} Although the virtually instantaneous effect of these weapons, as well as their invisibility and silence, is bound to change methods of warfare in a major way, it would
require a military analyst with some imagination and foresight to indicate precisely how.

Other high-tech developments could be space-based weapons and various types of nuclear weapons. The so-called “star wars” antimissile systems ran into technical, as well as legal, difficulties, but it is not beyond possibility that these could be developed during the next century to hit targets within the atmosphere; currently, it is prohibited only to deploy nuclear weapons in space. With regard to possible further developments in nuclear weapons, the Comprehensive Test Ban Treaty should in theory prevent further development, but there are indications that this is not the case in practice. Abstension in use is largely due to their radiation effects; therefore, any developments that could substantially reduce or even eliminate these effects could tempt some to make use of their enormous blast capabilities.¹⁴

Mention must be made of a potential new method of warfare that is already prohibited in law but that could have horrific effects if developed, namely, genetic weapons. The specter of this as well as of new and obviously preliminary developments in bio-technology has already motivated States to begin negotiations for the development of verification methods for the Biological Weapons Convention.¹⁵

Compared with these potential developments, present work on so-called “non-lethal” weapons seems minor in comparison. However, care must nevertheless be taken to evaluate their potential impact, because any that could cause permanent disability would certainly not be more desirable from a humanitarian point of view than normal conventional weapons, and it is not even clear that all are necessarily non-lethal. Potential effects on the environment should also be considered.¹⁶

This author does not suggest that there should be a stop to weapons development. Not only would such a proposal be totally unrealistic, but some new characteristics, such as increased accuracy or ways to render targets hors de combat while minimizing damaging effects, could be positive developments. However, it does mean that if we are to preserve certain values for the sake of the survival of some notions of humanity, then those in a position to direct weapons research and development requirements need to take their responsibilities seriously. Therefore, it is important that in designing new weapons the values of the laws of war be taken into account at the outset to ensure not only that weapons are capable of distinguishing between civilians and combatants but also that antipersonnel weapons cause neither inevitable death nor permanent incapacity. Another factor of importance is the increasingly fragile environmental state of our planet. This is not something
that weapons developers had to think much about in the past, but for the sake of the survival of all of us it is earnestly hoped that this factor will be taken seriously in any new design of weapons. Given that much new weapons research these days is undertaken by companies which seek primarily to sell their products, it is important that States undertake to inform them beforehand of effects which are contrary to the rules or principles of international humanitarian law.

Belief in the Appropriateness of the Rules. Belief in the appropriateness of humanitarian rules is the single most important factor for effective implementation of the law. As already indicated, it has been dealt a severe blow in the twentieth century by the inappropriateness of law primarily preventing practice rather than reflecting it. It is clear that law will need to be developed in order to address new methods of warfare. Some of such developments in the past have usefully helped reflect professional military utility; for example, the creation towards the beginning of this century of the notion of the military objective, arising from a new ability to bombard targets from a distance, helped reflect the military concept of economy of force.

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

Some aspects of the law require interpretation by States, for example, the basic principles prohibiting weapons that are by nature indiscriminate or cause superfluous injury or unnecessary suffering. A lack of genuine belief in the importance of these rules renders ignoring them easy, and, generally speaking, States have not been willing to declare specific weapons illegal on the basis of these rules. Instead, treaty prohibitions or a demise of use in practice have tended to result from the enormous pressure of public opinion. Other rules are straightforward and detailed, in particular those in the 1949 Geneva
Conventions, which require certain respectful treatment of persons in the power of an adverse party. It would be possible to apply most of these rules without much difficulty if combatants and States genuinely believed in the importance of them. However, a number of factors have prevented this, including ignorance, hatred of the enemy, indifference, and competing interests. It is clear that if soldiers are to abide by the rules, they must be convinced that their commanders take such rules seriously and that to ignore prescribed behavior will result in military discipline. There is evidence that this is beginning to improve, with more armies beginning to teach the laws of war seriously. However, the situation is very far from perfect, and the personal impression of this author, on the basis of speaking with military personnel from around the world, is that their instruction in the law has been patchy or nonexistent. Respect for the law in future wars will depend to a great degree on whether instruction on the pertinent rules is improved during military training and whether the necessary sanctions are imposed, preferably by the soldier’s own country, in case of violations.

The Need to Repress Violations of the Law. The fact that international humanitarian law has not been considered to be of major importance by States is reflected in their failure to require the prosecution of war criminals; more than fifty years after the Geneva Conventions entered into force most countries have still not carried out their obligation to provide for compulsory universal jurisdiction over grave breaches. However, there can be no doubt that the prosecution of such criminals would go a long way toward convincing combatants of the serious nature of the law, rather than perpetuating its present image of theoretical lip-service, or at most of double standards by which some are prosecuted and others not.

There is at present quite a good chance that an international criminal court will come into being in the next century, but whether this helps the image of international humanitarian law or hinders it will depend almost entirely on the jurisdiction of the Court. The present draft contains two provisions that could seriously harm how it is perceived: that the United Nations Security Council can prevent the Court from hearing such a case if it is itself dealing with the conflict in question; and that the consent is required of the custodial State, the State where the act occurred, and the States of which the victim and the accused are nationals—consent that is in addition to their ratification of the treaty. These draft provisions undermine both the notion of universal jurisdiction for war crimes and the rule of law, and they are likely to encourage further an image of double standards. In particular, the provision that requires the consent of the State of which the accused is a national would notionally
provide a form of State immunity to war criminals. As the whole purpose of an international criminal court is to assure the prosecution of war criminals if they are not tried by their own courts or extradited for trial, it is essential that the court have inherent jurisdiction for such crimes. Otherwise, in the next century implementation of the duty to repress war crimes will prove no better than before.

The Influence of Society in General. Both an effective international criminal court and respect for the rules by combatants during conflicts depend on a genuine and clear understanding of the importance of limits in warfare and of respect for persons under control of an adversary. Detailed rules will inevitably vary over time to accommodate changes in society and in methods of warfare, but it is important to preserve the basic values. If these were viewed as important by society in general, soldiers would perceive them as normal when taught them during military training. The most insidious problem is that many persons are of the opinion that war should know no rules and that the only way to deal with adversaries is to be stronger, more prepared than they are, and willing to use any means to accomplish one's aims. This is based on a belief that such means are necessary for personal and national survival. Unfortunately, this is what the new generation seems to be primarily taught, through the media and war-play computer games. The same means could instill humanitarian law values, but unfortunately it is obvious that humanitarian law is either unknown or not believed in—or considered completely irrelevant—by those who produce these games and programs. This is a vicious circle that must be rectified somehow. Otherwise, we could face a situation in the next century where, with weapon developments which could be even more dangerous than those of this century, the rulers and combatants will be uninterested in upholding the values of international humanitarian law.

The Influence of International Human Rights Law and Human Rights Organizations. In the second half of the twentieth century the driving factor in keeping notions of limits on behavior in wartime alive has been the development of human rights law. Despite the totally unrelated origin of this law—it was primarily motivated by a desire to render governments accountable for behavior towards their own citizens—the humanitarian, protective purpose of human rights law has had its influence on the views of certain parts of the international community. The horrors of the Second World War not only led individuals to pressure States to include the promotion of human rights as a basic purpose of the United Nations but also led to the creation of "crimes against humanity" as an international offense and to conclusion of the 1948 Genocide Convention. Nor is it a coincidence that non-international armed
conflicts were regulated by treaty for the first time in 1949. A major step was taken at the 1968 United Nations Human Rights Conference in Teheran, where a resolution entitled “Human Rights in Armed Conflict” encouraged States to afford more respect to existing humanitarian conventions and to add further rules to protect “civilians, prisoners and combatants in all armed conflicts.” The influence of human rights law can be clearly seen in the wording of the fair trial guarantees in the 1977 Protocol II Additional to the Geneva Conventions. (Ironically, humanitarian law could have usefully influenced human rights law at that time, for the judicial guarantees found in the Geneva Conventions were not listed as nonderogable rights in the European Convention of Human Rights nor in the United Nations Covenants. Practice since then has shown that this was a mistake.)

In some respects, the influence of human rights law was inevitable, for much in the Geneva Conventions that is devoted to protecting individuals overlaps with a number of civil rights as well as with economic and social ones. However, a major difference is that humanitarian law concerns itself with behavior by all parties to a conflict, a concept particularly important in non-international armed conflicts and for which human rights law is not entirely suited. We will return to the particular problem of such conflicts.

Since the 1970s the United Nations has concerned itself with issues that include important aspects of international humanitarian law in human rights contexts, in particular in the Human Rights Commission and its Subcommission for the Elimination of Discrimination and the Protection of Minorities. Human rights rapporteurs have also been asked to analyze subjects that primarily concern armed conflict. Some rapporteurs are theme based, such as the special ones for mercenaries and for sexual violence during armed conflict, while others are country based, such as those for Afghanistan, the former Yugoslavia, Iraqi-occupied Kuwait, and Rwanda.

The most dramatic recent example of this trend is the present negotiation of a Protocol Additional to the Convention on the Rights of the Child, which will be solely devoted to the recruitment and participation of children in hostilities. There can be no doubt that most of the impetus for these developments comes from nongovernmental human rights organizations, which represent important segments of civil society. Resistance or protest from civil society has also had a major effect on limits on weaponry. The nonuse of nuclear weapons since the Second World War is largely due to such civil protest, as was the desire following the Vietnam war to prohibit the use of incendiary weapons. The call for the ban on blinding laser weapons, although
originated by the governments of Sweden and Switzerland\textsuperscript{40} and primarily pursued by the International Committee of the Red Cross, was boosted by the support it received from various human rights organizations.\textsuperscript{41} The most stunning recent development in this regard is the ban on antipersonnel mines, agreed to in principle by all States\textsuperscript{42} and actively supported by over one hundred of them.\textsuperscript{43} In just five years the initial call in 1992 by six nongovernmental organizations led to a coalition of about a thousand such entities, collectively referred to as the International Campaign to Ban Landmines.\textsuperscript{44} In 1997 it received the Nobel Peace Prize for its work. The efforts were not entirely civilian, for the original founder of this coalition was the Vietnam Veterans of America Foundation,\textsuperscript{45} and there can be no doubt that the decision by the International Committee of the Red Cross in February 1993 to support such a ban helped the process enormously.\textsuperscript{46} Certain military personnel were also supportive of the process, by indicating that the harmful effects of antipersonnel mines outweigh any military utility they may have—a classic humanitarian law approach.\textsuperscript{47} However, despite some military support, there can be no doubt that the trend at present is for civil society to push most actively for restraints in methods and means of warfare and in the protection of its victims.

What does this bode for the future? On the one hand, if this trend continues, it means that humanitarian law principles are still being fought for by some members of society. This should have the effect of saving at least some of the law. If this concern filters down to the average person to the extent that potential combatants consider restraint in armed conflict natural, a positive development will have taken place. If, on the other hand, we continue to have a clash of interests, with civil society continuing to make Herculean efforts to regulate one aspect of the law at a time, its efforts could be overtaken by contrary military or technological developments, and the tension between legal principle and practice will continue into the next century.

\textit{Ease in Application of the Law.} This issue is highly pertinent for the implementation of the law relating to methods of warfare. As already indicated, in the days when law followed practice and warfare largely consisted of hand-to-hand fighting and sieges, there was no particular difficulty in applying the law. However, with the introduction of aerial bombardment and missile warfare, the rules limiting attacks to military objectives and requiring proportionality are not always easy to respect. First, accurate intelligence is necessary in order to ascertain correctly which objects and persons are military objectives and what their exact location is. Secondly, correct identification of protected persons, vehicles, and buildings will continue to be problematic until
more sincere efforts are made to take advantage of the technological possibilities for identification. Thirdly, perfectly accurate weapons systems are still in the minority. Finally, any assessment of proportionality in attack has so substantial a subjective element that it is very difficult to gauge whether the law has been respected.

Faced with these difficulties, both commanders and soldiers are likely to make mistakes, and it is not surprising that the number of civilian casualties has dramatically risen since the beginning of this century. 48 A study by two International Committee of the Red Cross (ICRC) doctors has shown statistically what has always seemed common sense before, namely, the more use that is made of bombs and missiles as opposed to bullets, the greater the number of civilian casualties compared with military ones. 49 It is the extreme difficulty of in practice respecting Protocol II to the Convention on Certain Conventional Weapons applicable to landmines, particularly the rules relating to limitation to military objectives and to marking and recording, that has led the international community to ban antipersonnel mines altogether as indiscriminate weapons. 50

The phenomenon of fighting from a distance is said to adversely affect also a combatant's care as to the nature of the target, for he will not see the damage that is actually being done. 51 Present trends, with increasing computerization, are likely to exacerbate this problem. Unless major efforts are made to improve the accuracy of identification and the accuracy of weapons generally available, implementation of the law may well become more difficult.

Another aspect of concern is the complexity of the legal régime itself; the more complex the rules, the more likely it is that they will not be followed accurately. This has been seen in the context of the law of naval warfare, where not only has there been no general treaty regulation since 1907, but the rather complex traditional customary rules were also extensively violated during the Second World War. 52 Even the Nuremberg Tribunal, in the cases of Admirals Doenitz and Raeder, confused the two separate notions of rescue after sinking of a vessel and removal of personnel before sinking in situations where capture is not possible. 53 It is for this reason that during the drafting in 1994 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea 54 this author argued for a simple rule prohibiting the attack and capture of passenger vessels carrying only civilians—rather than allowing capture and even destruction subject to certain rules, as now provided. 55

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

**Attitude toward the Enemy.** The prohibition of aggression, the rise in ideological wars, and the increasing intensity of non-international armed conflicts have all had the effect of introducing additional personal hatred for the enemy in the twentieth century.\(^\text{56}\) For these reasons, the murder of civilians is particularly acute in non-international armed conflicts, an issue that will be revisited later. Unfortunately, in that there appears to be no downturn in this trend, the problem could well become much worse in the next century, making implementation more difficult, if not impossible in some situations. The present rise in fundamentalism and fanaticism is extremely perturbing in this regard. It is clear that in order to avoid the worst, the international community will need to make a particular effort to try to solve certain situations of tension caused by ethnic rivalries or other ideologies. It will also need to be more assiduous in punishing violations of the laws of war, including those in non-international armed conflicts. More serious efforts should also be made to limit the extent of proliferation of weapons, including small arms, to try to minimize the effects of such wars.

**Mental Health of Combatants.** The longer the period of tension, the more likely it is that combatants will suffer from combat stress disorder and have greater difficulty in maintaining the discipline necessary to respect the rules in threatening situations.\(^\text{57}\) Suggestions on improving this situation\(^\text{58}\) include ensuring that weapon effect does not induce a sense of total helplessness in the soldier,\(^\text{59}\) and giving soldiers leave on a regular basis.\(^\text{60}\) The difficulty in accurately identifying hostile objects from a distance is exacerbated by stressful situations, a fact very clearly seen in the case of the USS Vincennes and its attack on the Iran Air airbus in July 1988. Both the International Civil Aviation Organization report and that undertaken by the United States attribute the mistake to the feeling of tension on board the Vincennes at the time and the conviction by the crew that they could well be attacked that day. This led a technician to so misread the information on the computer screen that he believed the opposite of what he saw.\(^\text{61}\) This mistake occurred in circumstances that did not amount to a full-scale conflict, so one can only assume that in intensive armed conflict such mistakes will be more frequent. Close range and rapid approach of a hostile object makes the tension particularly acute.
Unfortunately, the situation is likely to get worse in the future if major developments in directed-energy weapons go ahead. This is primarily because the effects of such weapons are virtually instantaneous and may well occur over large distances, thus increasing the feeling of inability to defend oneself. Inappropriate preemptive attacks may well result, leading to further attacks on protected or civilian persons or objects.

Changes in the Structure of International Society

*Inter-state Armed Conflicts Are in the Minority.* This situation is not in itself unfortunate, for it shows that the rules prohibiting the use of force by one State against another have had some effect. This author is also not convinced that internal armed conflicts have actually become more numerous as such; rather, we are more aware of what is going on in all parts of the world, and the level of weaponry now available in such conflicts means that they have a more serious effect on the population. The extent of political and commercial intercourse between States also means that the effects of such conflicts are far more serious in international relations than they used to be. However, the facts remain that inter-State conflicts are in the tiny minority and that unless this situation is seriously addressed, most of international humanitarian law is at risk of being perceived as largely irrelevant to modern realities.

It is an obvious truism that international law is primarily aimed at regulating relations between States, human rights law notwithstanding. Despite Article 3 common to the Geneva Conventions and Additional Protocol II, the detailed rules of international humanitarian law have been largely developed for international armed conflicts. The easiest legal application is in the case of a classic conflict between States. It is also a truism to state that far more numerous than international armed conflicts are non-international armed conflicts and actions by various international peacekeeping or peace-enforcement groups.

Present trends seem to show that this situation is likely to continue into the next century. We are witnessing not only the breakup of a number of nations and increased stress on local government within nations, but also an increasing trend towards supranational law in the form of economic and political international organizations with extensive lawmakers powers and increasing influence in international affairs. At the same time, force is being used quite extensively by private groups of a financial or criminal nature, with effects that cannot be ignored. The challenge of the next century will be how to deal effectively with these developments. It will require a willingness to venture into
legal regulation that does not rely on classical methods of qualifying a conflict, which at present can determine only whether a conflict is international or non-international.

Non-International Armed Conflicts. In practice, soldiers are not trained in two different ways, and this is reflected by the fact that most existing military manuals do not include one set of rules for international armed conflicts and another for non-international ones. The problem is mostly one of principle. It is unfortunate that a number of States are still unwilling to admit the formal applicability of more detailed rules for non-international armed conflict; their view is that this would amount to some kind of interference in their internal affairs or could be seen as granting international recognition to opposing forces. The negotiation of Additional Protocol II illustrated the widely differing views of States on this important issue.  

The Principle of Application of International Humanitarian Law. There being no indication that non-international armed conflicts are dropping in number, we are likely to see a continuation of this problem in the next century. In principle, professionally trained soldiers should be able to use the same methods for international and non-international armed conflicts.

Application by Governmental Armed Forces. As far as behavior by government armed forces and other governmental institutions is concerned, they are in law bound by the wording of Common Article 3, Protocol II, where applicable, and relevant human rights law. As indicated above, willingness to regulate internal armed conflicts by treaty arose when international human rights law came into being. However, States that are not keen on human rights law tend also to resist further regulation of internal armed conflicts in international humanitarian law. The difficulties during the negotiation of Protocol II were such that the compromise which resulted in the definitive text came at the last minute, allowing very little discussion on the final wording. This has resulted in an incongruous situation, in that some of the rules in Protocol II are more absolute in their protections than those to be found in Protocol I; it is obvious that reference to the equivalent articles in Protocol I will be necessary for their interpretation in practice. It is also hoped that the study presently being undertaken by the ICRC on rules of international customary law will further elucidate the rules generally accepted as being applicable in non-international armed conflicts. It is quite likely that the study will indicate points of weakness where the international community could be encouraged to continue work towards greater specificity.
There is one area, however, where application of the rules by governmental armed forces is difficult—the distinction between the civilian population and others. Common Article 3 does not define what is meant by the “armed forces” of the other party, nor is there any definition of who are considered to be combatants. Civilians are referred to simply as persons who do not take an “active” part in the hostilities. Does this mean that all other persons are combatants that can be attacked? What does “active” mean? Is it the same as the term “direct” found in Article 13 of Protocol II? Article 1 of Protocol II is better in this regard, as it describes the type of dissident armed forces that need to exist for Protocol II to come into effect. One could assume that only persons belonging to such groups are combatants and that all other persons are civilians. However, Article 13, paragraph 3, speaks of the protection of civilians unless they take “a direct part in hostilities.” This could be interpreted as meaning that all persons that do not take such a direct part are civilians. However, this interpretation could conflict with the concept of “armed forces” referred to in Article 1, and it may well be that the reference to “direct” participation is only the equivalent of Article 51, paragraph 3, of Protocol I.

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

Application by Non-governmental Forces. As to the behavior of non-governmental groups, there are both theoretical and practical problems. The application of international law to non-governmental groups is still perceived by many governments as problematic despite the existence of Common Article 3 and the ratification of the Geneva Conventions by virtually all States. Recent attempts by the government of Colombia to indicate clearly that the new treaty banning antipersonnel mines applies to non-State entities ran into difficulties when certain Western governments could not accept the proposition that such entities might have responsibilities under international law. In the end, Colombia had to content itself with the preambular
paragraph indicating that the rules of humanitarian law apply to all parties to a conflict, and a statement at the closing session as to the importance of this point—a statement supported by the ICRC at the same session.66

Another example of the same problem arose in the context of the negotiations for the Protocol to the Convention on the Rights of the Child.67 A number of States and the ICRC spoke in favor of a rule that would prohibit all parties to a non-international armed conflict from recruiting children under the age of eighteen years.68 Several States could not accept this, and the draft now indicates two possible methods of dealing with this issue, neither of which is satisfactory. Draft paragraph 2 merely states that the government is to ensure that children under eighteen are not recruited;69 draft “New Article A,” presently in square brackets, would require governments to “take all appropriate measures to prevent recruitment of persons under the age of 18 years by non-governmental armed groups involved in hostilities.”70 These proposals may be doctrinally pure in the minds of strict international lawyers, but they are hardly useful when it comes to the actual behavior of non-governmental groups.

The application of human rights law concepts to non-governmental forces is far more problematic than that of humanitarian law concepts. This is because human rights law is primarily conceived as consisting of the obligations of the government towards its own population, not the other way around.71 This principle was another reason why a reference to the duties of non-governmental groups was not accepted for the draft Protocol to the Convention on the Rights of the Child.72 Humanitarian law, on the other hand, is meant to apply to both parties to a conflict; indeed, the very notion of equality of obligations is fundamental to the nature of this law. However, a major problem is that although States wished these obligations to be made clear in Common Article 3 and Additional Protocol II, they did not wish the corollary to be true, i.e., the same rights for rebel forces.

One of the most important motivating factors for the respect of humanitarian law is the right to the status of prisoner of war, and the certainty of not being punished if one has not violated the rules of international humanitarian law. Given that this is not the case in internal armed conflicts, what is the motivating factor for non-State entities to abide by international law? They can hope to gain some respect, perhaps, and there is also the recommendation in Article 6, paragraph 5, of Protocol II that the broadest possible amnesty should be granted at the end of hostilities. It is assumed, although not specifically indicated, that such amnesty should not apply to those who have violated humanitarian law, at least in any serious way.
However, this does not seem to be very persuasive, and another method will need to be found to create a motivation to abide by the rules of international law. In this regard, one could consider both the carrot and the stick. The carrot could be, for example, allowing respect of international law rules to be used in mitigation of sentence when such persons are tried in national courts. The stick could be more rigorous in trying violators of the law before international tribunals, such as those created for Rwanda, the statute of which specifically lists crimes that are violations of international humanitarian law applicable in non-international armed conflicts. For this reason, this author hopes that the new Statute of the International Criminal Court will include such crimes.

Given that many persons using force in non-international armed conflicts have not been members of an official State army, it is not surprising that they are quite unaware of even the existence of rules applicable to such situations, let alone their content. The ICRC tries to teach some of these rules to such forces and has had some success, but its approach has certainly not always worked. The only way to make such forces have some idea of these rules is to ensure that the civilian population as a whole is aware of them. This is certainly not the case at present, and most governments have made no particular effort to remedy this situation. In light of the increasingly destructive and destabilizing nature of non-international armed conflicts, a determined and serious effort in this regard must be made in the next century. However, it should be realized that knowledge of such rules cannot assure that they will be perfectly respected, even if supported by nongovernmental groups. As indicated above, some of the rules relating to the conduct of hostilities require quite sophisticated training and means. Therefore, the goal must be to reduce the incidence of direct attacks on civilians, torture, and other acts from which the forces involved could abstain if so inclined.

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

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

Mercenaries. The use of mercenaries is an ancient practice that shows no indications of ceasing. In the past such persons simply had the same status, and were entitled to the same treatment, as the group for which they were fighting, which in turn depended on whether the conflict was international or non-international. However, since 1977 a significant segment of the international community has tried to eliminate this practice by, inter alia, refusing such persons prisoner-of-war status.76 So long as mercenaries continue to exist, the problem of how to motivate them to abide by the rules of international humanitarian law will remain. In this regard, the carrot-and-stick approach suggested for nongovernmental groups in non-international armed conflicts could prove useful.

Private Security Companies. A relatively new phenomenon is the practice of private security companies offering their services to governments or private industries, particularly in unstable areas where the government's normal police force cannot provide adequate protection. The best known example is "Executive Outcome," a security company which operates quite extensively in Africa; a number of others are active in a variety of contexts.77 Although such companies are frequently referred to as "mercenaries" in the media, they do not fall within the traditional understanding of the term, nor do they easily fit within the legal definition found in Article 47 of Additional Protocol I.78 However, they do use military methods and consist primarily of ex-soldiers.

A major issue is whether security companies are bound by any international rules. When used by governments in the context of an internal armed conflict, it is arguable that they form part of the government's forces and thus are bound by the rules of non-international armed conflict. However, they are not officially part of the government's army. Moreover, the concept of mercenaries in Article 47 of Protocol I applies only in international armed conflicts. Insofar as multinational or other industries use such companies, they ought to be accountable in some way for their behavior; yet they are neither a State nor a party to an internal armed conflict in any traditional sense of the word. The

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security companies concerned are in principle bound by the law of the State in which they function. In reality, this will not have much effect if they actually engage in hostilities, which press reports say that they have done in some instances. Given the increasing influence of private industry and the growing importance of multinational companies, the international community is going to have to face this issue and decide whether the use of force by such companies against armed groups should be subject to international rules. If so, a departure will have to be made from the traditional application of international humanitarian law to governments and armed rebel groups.

Criminal Groups. Criminal groups engaging in armed conflict include the Mafia and various “drug lords,” whose activities are extensive not only internally but internationally. On the one hand, it seems abhorrent to suggest that they should be bound by international humanitarian law. On the other, it is difficult in law to justify any distinction inasmuch as traditional rebel groups in non-international armed conflicts are also considered common criminals by the authority they are opposing. The term “armed groups” in common Article 3 is arguably general enough to cover criminal groups, but one generally assumes that humanitarian law has in mind groups fighting for a political purpose. This assumption derives from the historical context of the development of the law, but it is written nowhere. An added complication is that some rebel groups, including a number in Colombia, ostensibly have some political purpose (albeit often obscure), though they use straightforward criminal methods and drug money. The lack of clarity as to whether international law is applicable in these situations makes its implementation very difficult. Even if one assumes, as this author does, that a group should possess some political purpose if humanitarian law is to be applicable, there remains the problem of determining the facts. Doing so can be extremely difficult in unstable, internal conflict situations. A tragic example of this was the murder of six employees of the ICRC on 17 December 1996 in Novye-Atagy, Chechnya. Although an official enquiry has opened, we are at at the time of writing still no nearer to establishing who was responsible, or even whether the attack clearly amounted to a violation of international humanitarian law, given that the various groups active in that highly volatile situation included both the criminal Mafia and armed political groups.

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

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

United Nations Forces. The issue of which law binds United Nations forces is
not a purely academic one. There have been allegations of violations of the law,
particularly in the case of United Nations operations in Somalia, wherein UN
forces have been accused of murdering noncombatants and of detaining
Somalis without allowing contact with lawyers or their families. Through
participation agreements, personnel contributed by States fall formally under
the command of the UN Secretary-General. Further, the United Nations is an
international person in international law. Therefore, although one could argue
that each contingent is still bound by the humanitarian law that binds its flag
State, this conclusion is not at all satisfactory from either a legal or a practical
point of view. The area of practice is actually rather confused, with the UN
force commander being in theory responsible but with heads of national
contingents retaining a certain control. The actual name given to the force
should be irrelevant, as the question of applicability of humanitarian law
should arise when hostilities actually occur, whether the contingent was meant
to be a peacekeeping force in the traditional sense or was given a more active
role.

The difficulty at present is that apart from cases of clear enforcement action,
UN forces are not meant to be seen as belligerents in the traditional sense of
the term. Humanitarian law is meant to apply to “parties to a conflict;” the

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

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

Multinational Forces. Multinational forces can be specifically authorized by the United Nations, either for an enforcement action, as with the coalition effort against Iraq in 1991, or to conduct a humanitarian mission, such as that in Albania. In principle such forces apply humanitarian law by virtue of the international law obligations undertaken by each State. However, with such official authorization, the question arises as to whether such forces should undertake as a group to apply specific rules of humanitarian law. Not all States will be parties to the same treaties, and therefore problems of interoperability arise. This is true for forces of a regional organization such as NATO or ad hoc forces, like the multinational forces in Beirut in 1982–1984 or Liberia in 1990.

In that it is quite likely that multinational forces will continue to be used in the next century, proper implementation of humanitarian law requires greater clarity as to the rules under which they will operate and how those rules will be carried out in practice.
Supranational Organizations. Although there is no such thing as “supranational” law—a matter of concern to some purist international lawyers—the fact remains that there are arrangements whereby States have given non-national organs powers that go well beyond the usual functions of international organizations. The most obvious example of this is the European Union. The Treaty of Amsterdam, adopted in 1997, contains provisions in Title V on a “common foreign and security policy.” Article J.3 states, “The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.” More specifically, Article J.7 provides that:

The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy . . . which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their constitutional requirements.

The Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability . . . It supports the Union in framing the defence aspects of the common foreign and security policy as set out in this Article. The Union shall accordingly foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide . . .

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by co-operation between them in the field of armaments.

Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacekeeping.

The Union will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications.

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

The ICRC attempted to persuade European Union States to include references to international humanitarian law in the sections of the treaty dealing with foreign and security policy.94 Other parts of the treaty make reference to the importance of respecting human rights law; therefore, such a mention of humanitarian law in the relevant sections would have been totally appropriate. These efforts were unsuccessful, an extremely unfortunate outcome in this author’s opinion.

In the light of such developments, States cannot continue to simply assume that the present scope of application of humanitarian law treaties suffices. What if the European Union uses the WEU in an internal armed conflict in a way that involves fighting? Does all law apply, or only that law applicable to internal armed conflicts? What of the duty of States in common Article 1 of the Geneva Conventions to respect them and ensure their respect? Does the obligation also apply to policies of the European Union as such? Which body will implement whatever is supposed to be the applicable law? The European Court of Justice even though there is no mention of humanitarian law in any of the European Union treaties? Do the general references to human rights in the Maastricht and Amsterdam treaties suffice? Such issues will have to be faced in the future, although it would be better to do so before becoming involved in a difficult situation.

**Implementation Mechanisms**

It may seem strange in an article about implementation to refer to implementation mechanisms only rather briefly, in closing. However, this author believes that the preceding issues are more fundamental to the problems of implementation procedures. Mechanisms will only be efficient if the will exists to make them so, and that depends on the factors outlined earlier. Therefore, this section will not explore existing and potential implementation mechanisms in detail;95 rather, it will look at factors that are relevant for such mechanisms in the future.

**National Mechanisms.** Obviously, if the implementation mechanisms already foreseen for the national level had been carried out, we would be in a much better situation than we are now. In the face of the enormous challenge of rectifying the present situation, the ICRC’s new Advisory Service96 has had to set priorities.97 It has therefore decided to try to create a snowball effect by
encouraging the creation of national commissions responsible for national implementation of humanitarian law. It is also making particular efforts to induce States to comply with their duty under the Geneva Conventions to provide for universal jurisdiction for grave breaches. In this regard, there can be no doubt that if States could arrange for the direct applicability of the treaty provisions, a great deal would be gained. This could perhaps ultimately make national courts able not only to try war criminals more effectively but also to award reparation to victims of violations. At present, the latter possibility is being explored by the Human Rights Commission, and there are cases being brought by individuals before national courts asking for reparations for violations committed during the Second World War. Success by such individuals would almost certainly motivate governmental and nongovernmental bodies to abide by their obligations with greater care.

Some imagination and determination will also be needed to make sure that the civilian population as a whole is aware, at least at the most basic level, of certain rules of armed conflict. In formal teaching, the topic could be introduced into a number of traditional school courses, probably together with some notions of human rights. However, other methods will also be necessary. In particular, efforts should be made to stem teaching that encourages violations of the law. For example, behaviors that should not be introduced in computer games could be made known to game creators, and those that should be promoted could be. It has already been suggested that industries developing new weapons should become aware of certain international rules. They have at least one strong motivation for making an effort to do so, namely, the thought of the money they would waste should they develop a weapon that is then formally prohibited!

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

It remains to be seen whether other mechanisms could be introduced that would be useful to encourage better implementation of humanitarian law in
future wars. The suggestion has been made to introduce a reporting system in which States could inform a body on the measures they have taken to implement humanitarian law. Such reporting systems are being used in other contexts, with mixed results (determined by a number of factors). In the context of humanitarian law, such a system would have greater likelihood of acceptability and success once States have taken more effective national measures, which it is hoped will be the fruit of the Advisory Service's efforts and of the fuller understanding being gained these days of the importance of this aspect of law.

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

This author is well aware of the highly sensitive nature of this issue, but given the crisis in the implementation of humanitarian law created by the totally new weapons of the twentieth century, and given the need for practice to be in conformity with law rather than in constant tension with it, an evaluation of the foreseeable effects of contemplated new weapons is the only way to implement this area of law effectively. Such an evaluation cannot be left to a totally national mechanism, but must include unbiased and neutral persons. With present rapid technological and biotechnological developments, this will be crucial for the twenty-first century. This process would be helped by the establishment of more objective data and criteria for evaluating whether certain weapons present problems in relation to the rules prohibiting inherently indiscriminate weapons or those that cause superfluous injury or unnecessary suffering. A mechanism will also need to be found that will sufficiently protect the sensitive nature of the material. This author believes that if the political will were present, it would not be impossible to find one.
Such a mechanism could also study the likely effects of means or methods of warfare on the environment. The relative novelty of this problem makes it difficult at present to foresee with accuracy the extent and permanence of environmental damage that will occur. However, with the degree of present environmental degradation, the world’s ever-increasing population, and forecasts of water shortages, all the elements of future disaster are present. Not only are these factors likely to be the cause of a number of wars in the next century, but the problem will be exacerbated if means or methods of warfare significantly contribute to further environmental damage.

Although it is a sensitive issue, further thought needs to be given to the fact that the possibility of nuclear war remains. Despite all efforts to stem proliferation, it is not impossible that a State or group could decide to use these weapons without fearing or caring about retaliation. All existing mechanisms to prevent such an occurrence need to continue. In addition, now that the Cold War has ended, more serious attention should be given to the Advisory Opinion of the International Court of Justice that there is an obligation to achieve “nuclear disarmament in all its aspects under strict and effective international control” through bona fide negotiation.

Reference has already been made to the need to find better means to implement humanitarian law in non-intestate conflicts. Specific mechanisms should also be considered, for implementation by international and “supranational” bodies, of a system of reparations for victims of violations and of punishment for offenders. The implementation of the law in non-international armed conflicts and in so-called “internationalized” ones would benefit from an independent and impartial qualification of the conflict. The ICRC frequently does not do this publicly because of possible implications for its field work. The ideal situation, of course, would be for an independent court to undertake this task, but it could also be given to an independent commission. The experience of human rights law shows that mechanisms allowing for individual petition are particularly successful in ensuring that issues are addressed. Through this channel, cases relating to situations which may qualify as armed conflicts have been brought under the European Convention on Human Rights, but the European Commission of Human Rights or European Court of Human Rights does not have to make such a qualification, as it is unnecessary for the application of human rights law.

Finally, it is worth addressing the particular role of civil society, in particular nongovernmental organizations. Until now the implementation of humanitarian law has been largely left to governments. The only official nongovernmental role was that given to the ICRC, in particular through its
visits to prisoners of war \(^{116}\) and civilian internees \(^{119}\) and its role relating to the Central Tracing Agency \(^{120}\) in international armed conflicts. A recognition of additional roles that it may undertake, with the consent of the parties to the conflict, is found in various other parts of the Conventions, including roles during non-international armed conflicts. References are also made to national Red Cross or Red Crescent societies. The recognized role of the ICRC in fostering the development of humanitarian law means that, in practice, it is given observer status at diplomatic conferences relating to international humanitarian law. \(^{121}\) In this context, it is frequently requested to prepare documentation and allowed to make statements and proposals.

Until now, other organizations have not had any such formal role. Therefore, it was a significant development when the Norwegian government decided to allow the International Campaign to Ban Landmines the same observer status as the ICRC during the diplomatic conference that led to the adoption of the antipersonnel mine ban treaty in September 1997. The contribution of this organization is specifically mentioned in the preamble to the treaty, the relevant paragraph of which makes a point of "stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of antipersonnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world." \(^{122}\) Language from the Martens Clause was intentionally included. \(^{123}\) This means that the "Ottawa process," which culminated in signature by many States of the treaty banning antipersonnel mines in Ottawa in December 1997, specifically recognized the importance of civil society monitoring the implementation of humanitarian law and being involved in its development where appropriate. Those States which did not participate in this process cannot be said to approve this practice, and therefore one cannot say that it is a universally accepted tendency. However, it does reflect the already existing practice of human rights bodies giving a recognized role to nongovernmental organizations. \(^{124}\) The next century may well see, therefore, an important development in this direction for humanitarian law.

**Conclusion**

The twenty-first century could easily witness a catastrophic lack of humanitarian law implementation, with much of it being seen as irrelevant because the vast majority of conflicts are not classic inter-State ones.
Dangerous new means and methods of warfare, ideological conflicts, and further rampant arms proliferation, all taking place in the context of an increasingly disturbing environmental situation, could easily spell disaster. Political will could prevent such a scenario, but this requires a willingness to depart from the usual way of thinking. Efforts should be made to establish how the law can be applied to nontraditional situations, and effective mechanisms put in place. Whether this will be done essentially depends on how important the regulation of armed conflict is considered to be when balanced against competing interests. It also depends on whether one is willing to be farsighted and realize the long-term interest in preserving the values of humanitarian law—an application of enlightened self-interest. The author is enough of a realist not to expect this to happen by itself. However, certain tendencies do give hope. Humanitarian law is more talked of these days than it was even a few years ago, and some mechanisms are beginning to work, albeit for the time being in a rather uneven fashion. The further involvement of civil society has been important for this development, and there is no obvious reason why it should weaken in the future. Therefore, it may well be that the implementation of humanitarian law, whatever its exact content needs to be in the next century, will improve compared with this one. One can try to be an optimist!

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Notes

The views expressed in this paper are entirely the personal ones of the author. They do not necessarily represent the views of the International Committee of the Red Cross, and they in no way engage its responsibility.

1. Throughout this paper, the term “practice” will be used in the sense of actual behavior on the battlefield, and not in the sense given to it for the purpose of assessing customary international law, which would include statements made by States.


4. Lieber Code, supra note 3, arts. 16 & 71.

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


7. For a description of the negotiating history, see Kalshoven, The Soldier and His Golf Clubs, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 369, 375 (Swinarski ed., 1984). The British delegate to
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the 1899 Hague Conference argued that "savages" did not stop when shot, as "civilized" soldiers did.


9. Lieber Code, supra note 3, art. 60.

10. This problem became an issue after the attack on electrical power stations during the second Gulf War.

11. The difficulty in getting blinding laser weapons prohibited was outlined by this author in Obstacles to Regulating New Weaponry: Battlefield Laser Weapons, in ARMED CONFLICT AND THE NEW LAW: EFFECTING COMPLIANCE 107 (Fox and Meyer eds., 1993). A description of efforts to develop the law relating to certain weapons this century and prospects for the future is described in PROKOSCH, THE TECHNOLOGY OF KILLING (1995).


15. A series of articles on the Biological Weapons Convention and present negotiation for strengthening its implementation have been published in the INT’L REV. RED CROSS, No. 318, 1997, at 251–307.


17. The International Court of Justice in its advisory opinion on nuclear weapons confirmed that these rules mean that certain weapons are illegal as a result of these rules whether there is a specific treaty prohibiting them or not. Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (Advisory Opinion of the International Court of Justice, July 8, 1996), paras. 78–79, 35 I.L.M. 809 (1966) [hereinafter Nuclear Weapons].

18. This point will be returned to below in the context of the influence of human rights law.


20. Particular efforts to improve this situation have been made by the ICRC over the last ten years, and mention should also be made of the courses organized by the International Institute of Humanitarian Law. Ideally, such courses ought not to need to provide basic teaching of the law but rather an exchange of views on implementation, trends, etc.

21. Although there have been some war crimes trials, these have been the exception rather than the rule. The Nuremberg and Tokyo trials are still seen by many as “victors’ justice,” the Yugoslav and Rwanda tribunals are recent and rare examples. The ICRC’s Advisory Service is
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presently making major efforts to persuade States to implement in their internal legislation universal jurisdiction for war crimes. However, is it unfortunately noteworthy that most States were not keen to discuss the issue of national repression of war crimes during the first periodic meeting of States (to be held by Switzerland in January 1998). Such periodic meetings to discuss general problems in the implementation of international humanitarian law were formally accepted by the 26th International Conference of the Red Cross and Red Crescent, December 1995, Resolution 1.

23. Id., draft art. 21 bis, para. 1.
24. For a comparative analysis of both areas of law, see, for example, Doswald-Beck & Vité, International Humanitarian Law and Human Rights Law, INT’L REV. RED CROSS, No. 293, 1993, at 94.
25. U.N. CHARTER art. 1(3).
27. A direct reference to human rights law was made in the preamble to this resolution in terms which reflected the preoccupation of much of the international community at the time: Noting also that minority racist or colonial régimes which refuse to comply with the . . . principles of the Universal Declaration of Human Rights frequently resort to executions and inhuman treatment of those who struggle against such régimes and considering that such persons should be protected against inhuman or brutal treatment.

The resolution was adopted by a vote of 67-0, with two abstentions. This resolution, and two subsequent ones adopted by the General Assembly in 1968 and 1979 (Resolutions 2444 and 2675 respectively), ultimately led to the negotiation and conclusion of the two Additional Protocols of 1977 to the Geneva Conventions.


33. Mr. Felix Ermacora, first appointed by the Economic and Social Council in 1984 by Resolution 1984/37. The mandate was subsequently renewed yearly. A new rapporteur, Mr. Choong-Hyun Paik, was appointed in April 1995. Many of the elements in these reports relate directly to the armed conflict situation in that country.
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38. Two notable human rights non-governmental organizations have begun to report on the respect or otherwise of international humanitarian law. See, e.g., MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR (1991), and AMNESTY INTERNATIONAL, UNLAWFUL KILLINGS DURING OPERATION “GRAPE’S OF WRATH” (1996).
39. Although, due to the consensus rule, Protocol III of the Convention on Certain Conventional Weapons [19 ILM. 1394 (1980)] does not actually contain such a prohibition, there can be no doubt that the political sensitivity of incendiary weapons has in practice virtually eliminated their use against personnel.
40. During the 25th International Conference of the Red Cross.
41. Most notably, the Human Rights Watch Arms Project. For a description of the development of this treaty, see Doswald-Beck, supra note 13, at 272.
44. An important publication on this subject is HUMAN RIGHTS WATCH ARMS PROJECT & PHYSICIANS FOR HUMAN RIGHTS, LANDMINES: A DEADLY LEGACY (1993).
46. The ICRC was particularly active in this regard, with the considerable help of other components of the Red Cross and Red Crescent Movement. It made more use of the media and the press than for any other issue.
47. See, for example, the conclusions of the ICRC-mandated military study ANTI-PERSONNEL LANDMINES: FRIEND OR FOE (1996), and the open letter to the same effect signed by 15 retired United States generals (including Norman Schwarzkopf) to President William Clinton in April 1996.
48. The attacks on the Ameriyya air raid shelter by U.S. forces during the second Gulf War and on the Qana UN compound by Israeli forces are commonly attributed to mistakes.
50. Anti-personnel Landmines, supra note 47, concl. 3 (for the difficulties).
51. “With this distance between the user and the victim, the user feels less responsible for his or her actions.” GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995).

54. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (with explanation) (Doswald-Beck ed., 1995).


56. This is not always the case. For example, the lack of such personal hatred helped the implementation of the law in the South Atlantic conflict of 1982 between the United Kingdom and Argentina.

57. A general analysis of combat stress disorder and its effects was made in the context of the Second Group of Experts convened by the ICRC in November 1990, one of the four meetings of experts relating to battlefield laser weapons. See Blinding Weapons, Reports of the Meetings of Experts Convened by the International Committee of the Red Cross on Battlefield Laser Weapons (Doswald-Beck ed., 1993), in particular the report by Dr. A. Shalev, Emotional Health Problems Arising from Battle Situations and Injuries Suffered in Battle, id. at 272–6.

58. A thorough analysis of stress factors on soldiers and measures to be taken to reduce excessive and debilitating combat stress has been made by a military officer: DINTER, HERO OR COWARD: PRESSURES FACING THE SOLDIER IN BATTLE (1985).


60. Id. See also DINTER, supra note 58, at 73.

61. ICAO Doc. C-W P/8708; Report of July 28, 1988 from Rear Admiral Fogarty, USN, to the Commander in Chief, U.S. Central Command, endorsed on 5 August 1988 by the Commander in Chief and on 18 August 1988 by the Chairman of the Joint Chiefs of Staff, at E-59, 60 & 62.


64. Study requested by the 26th International Conference of the Red Cross and Red Crescent, Resolution 1, which approved the recommendations of the Meetings of the Intergovernmental Group of Experts for the Protection of War Victims, January 1995, reprinted in INTL REV. RED CROSS, No. 310, 1996, at 83–84.

65. Colombian Proposal of Sept. 3, 1997, Doc. APL/CW.46. Another complication was that the conference did not want any language that could give the impression that the scope of application was other than in all circumstances.


69. Id., annex.

70. Id.


72. This point was made forcefully by the delegate of the government of the Netherlands.

73. Statute for the International Tribunal for Rwanda 35 I.L.M. 1598 (1940).
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74. For example, Afghan rebel groups were successfully persuaded not to kill enemy soldiers when captured, and quite a major change in the behavior of rebel forces in El Salvador was also achieved. See, e.g., HAMMER, DEVELOPING A HUMANITARIAN AWARENESS: A CASE-STUDY OF EL SALVADOR IN THE 1980'S, (Henry Dunant Institute, 1987). However, it does not always work. For example, a rebel group in Colombia specifically declined to apply Common Article 3, because it wished to continue to take hostages.

75. Resolution 1, supra note 61, at 88.


77. See, e.g., Broker of War and Death, MAIL AND GUARDIAN, Feb. 28–Mar. 6 1997, at 12.

Executive Outcome states that it only works for recognized governments.


79. For a description of these kinds of activities, see BALENCIE & DE LA GRANOE, 1 MONDES REBELLES: ACTEURS, CONFLITS ET VIOLENCES POLITIQUES (Amériques, Afrique) (1996). The criminal and financial activities of Colombian rebels, and measures resorted to by private companies, are described on page 105.

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

81. The situation is even more acute when State structures have broken down. The 26th International Conference of the Red Cross and Red Crescent asked the ICRC to prepare a report on this problem, and the subject was briefly considered during the first Periodical Meeting on international humanitarian law that was convened by the Swiss government in January 1998. The preparatory document on this subject was prepared by the ICRC.


83. Id. at 80.

84. Peacekeeping forces were first involved in combat in the Congo, but since then problems have occurred elsewhere, particularly when their mandate and instructions were not totally clear. For a short history of the various peacekeeping operations, see Liu, The Use of Force in U.N. Peacekeeping Operations: A Historical Perspective (June 20, 1996) (paper delivered at the International Peace Academy in Vienna, July 1996). At present, there are sixteen UN peacekeeping operations active around the world (see http://www.un.org/Depts/DPKO/c_miss.htm).

85. For more information and references to further literature on this issue, see Tittemore, supra note 81, at 87–89.


88. The experts included governmental, academic and UN personnel, all acting in their personal capacities.


90. The issue of how to use its own peacekeeping forces has also arisen in the context of the Organization for Security and Cooperation in Europe. Such forces have not yet been used, although there was a long negotiation in 1993–1994 about their possible use in Nagorno-Karabach. The precise nature of such forces has not yet been established, and therefore they could face the same kind of difficulty as do those of the United Nations. For a description of how such operations could work, see GHEBALI, L’OSCE DANS L’EUROPE POST-COMMUNISTE, 1990–1996, 243–4 (1996).


92. The ECOWAS Monitoring Group was set up by decision of a summit of African States that met in Banjul. See BALENCIE & DE LA GRANGE, supra note 79, at 284.

93. The Treaty’s full title: Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts.

94. In particular, it gave to the presidency of the European Union in September 1996 a proposal of wording. For Article 1.4 it suggested the following: “All decisions relating to a common defence policy and actions of the Union which have defence implications shall be in conformity with international humanitarian law and help ensure its respect.”


96. Created on the recommendation of the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, supra note 64, at 84.


98. A report of a meeting of experts on this issue was published as Committees or Other National Bodies for International Humanitarian Law (Pellandini ed., 1997).

99. A meeting of experts was convened by the Advisory Service in September 1997 to discuss this issue in the context of civil law systems, and another is due to be held in 1998 for the context of common law systems.

100. By Special Rapporteur Mr. Theo Van Boven. See note 30 supra.

101. For example, cases presently being heard by the Tokyo district court relating to ill treatment of Dutch prisoners of war and the abuse of so-called “comfort women.” Professor Friths Kalshoven was asked to appear as an expert witness for these cases in order to render his opinion as to whether victims of violations were entitled to reparations by virtue of Article 3 of Hague Convention IV of 1907. His opinion was in the affirmative. Information given by Prof. Kalshoven during the Fourth Hague Joint Conference of the American Society of International Law and the Nederlandse Vereniging voor Internationaal Recht, July 3, 1997.

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


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105. Examples given in notes 33–36 supra.

106. During the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims referred to in note 64 supra. The proposal was made by the Netherlands and supported by several States but did not command sufficient support to be included in the meeting’s recommendations.

107. A variety of factors are responsible for the mixed results. These were thoroughly analyzed in a report entitled “A Comparison of Self-Evaluating State Reporting Systems” prepared by E. Kornblum for the meeting. Reprinted in INT’L REv. RED CROSS, Nos. 304 and 305, 1995, at 39 and 134 respectively. The whole text is also available as an offprint.

108. Article 36 of Protocol I obliges States to make such an evaluation, but this provision is only an articulation of what States are obviously bound to do in a bona fide implementation of humanitarian law.


110. Bullets that exploded on contact with the human body, banned by the St. Petersburg Declaration of 1868.

111. This was done to some degree in the context of the Second Group of Experts on Battlefield Laser Weapons, supra note 57, at 179–183, 244–257, and 289–292.

112. As a result of expert meetings, the ICRC drafted a document entitled “Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflicts,” 1994, submitted pursuant to G.A. Res. A/RES/48/30, Dec. 9, 1993. However, these guidelines merely indicated the present content of humanitarian law having the function of protecting the environment; the problem of how to make the scientific evaluation still remains. It is also worth noting the Advisory Opinion of the International Court of Justice, which indicated the general requirements of States in this regard under customary law. Nuclear Weapons, supra note 171, paras. 29–30.


114. Nuclear Weapons, supra note 171, para. 105 F.


116. Particularly pertinent cases are those of Ergi against Turkey before the Commission, and Aydin against Turkey before the Court. The case of Ergi is especially interesting as it concerns actions by security forces against Kurdish groups resulting in deaths of civilians. The Commission found a violation of Article 2 (the right to life), because the security forces did not take enough care in their operations to avoid civilians and because they did not thoroughly investigate the death which was the subject of this case: Muhammed Ergi v. Turkey, Report of the Commission, May 20, 1997, paras. 144–156. The case of Aydin concerned the ill treatment of a girl detained by security forces in the context of “serious disturbances” between members of the security forces and members of the PKK which, according to the government, had claimed the lives of 4,036 civilians and 3,884 members of the security forces. The Court found that there was a violation of Article 3 and that the treatment she suffered, including rape, amounted to torture. Aydin v. Turkey, Judgment of the European Court of Human Rights, Sept. 25, 1997, paras. 14 & 80-87. Another interesting case concerned the situation in northern Cyprus, where the court found a violation to the right to property and the Turkish government responsible because of its military occupation of the area. Loizidou v. Turkey, Judgment of the European Court of Human Rights, Dec. 18, 1996, paras. 16-23 & 41-64.
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117. Protecting Powers, formal complaints, investigations by the U.N., etc. The International Fact-Finding Commission would not be a governmental mechanism as such, for its members act in their personal capacities. Additional Protocol I, supra note 75, art. 90(1)(c).


120. Third Geneva Convention, supra note 118, art. 123, and Fourth Geneva Convention, supra note 119, art. 140.

121. Statutes of the International Red Cross and Red Crescent Movement, as updated at the Twenty-fifth International Conference of the Red Cross (at which all signatories participate), art. 5, para. 2.g, Oct. 1995 (for the ICRC role in developing international law).

122. Mine Convention, supra note 43, 8th pmbl. para.

123. This author was present throughout the negotiations on the wording of this preambular paragraph.

124. For example, their active observer status at the UN Human Rights Commission.