

The influence of humanitarian principles in the negotiation of arms control treaties

by
ROBERT J. MATHEWS and **TIMOTHY L.H. McCORMACK**¹

IT is fitting in this centenary year of the First Hague International Peace Conference of 1899 to reflect on the influence of humanitarian principles on the negotiation of multilateral arms-control treaties. Two of the three themes of the 1899 conference were the *laws of war* (or international humanitarian law) and *arms control and disarmament*. There is no question that part of the motivation in 1899, and indeed at the Second Hague International Peace

ROBERT J. MATHEWS is a principal research scientist in the Australian Defence Science and Technology Organisation and a visiting fellow in the Faculty of Law at the University of Melbourne, Australia. He is a member of the Australian Red Cross National Advisory Committee on International Humanitarian Law.

TIMOTHY L.H. McCORMACK is the Australian Red Cross Professor of International Humanitarian Law in the Faculty of Law at the University of Melbourne. He chairs the Australian Red Cross National Advisory Committee on International Humanitarian Law.

¹ The views expressed in this article are those of the authors and do not necessarily reflect the position of the Australian government. The authors

wish to acknowledge, with thanks, the assistance of Jessica Howard and Sharon Pimm in the preparation of this article.

Conference of 1907, in considering these two themes was humanitarian concern to alleviate the suffering of victims of armed conflict.² After 100 years of international law-making in both fields, 1999 is an opportune anniversary to evaluate the extent to which humanitarian principles have continued to impact upon efforts to regulate the effects of particular weapons.

In 1899, Czar Nicholas II was concerned about technological advances in weaponry and saw an international peace conference as a way of promoting a general limitation on armaments. Even 100 years ago, the Czar's initiative was possibly prompted as much for strategic security reasons as for humanitarian ones.³ However, he did suggest that an International Peace Conference focusing on armaments and on the laws of war was an appropriate way to implement the general prohibition on "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable", articulated in the preamble to the St Petersburg Declaration 30 years before.⁴ The States participating at the 1899 Conference refused to commit themselves to a general limitation of armaments but did agree to several specific instruments prohibiting the use of, for example, projectiles for the diffusion of asphyxiating or deleterious gases and expanding — or "dum-dum" — bullets.⁵

Developments in the international legal regulation of weapons subsequent to 1899 focused on consequences for combatants — at least until 1945. In World War II, with its new technological developments in weapons, the international community witnessed the relative proportions of military to civilian casualties in armed conflict beginning to reflect dramatic increases in the incidence of civilian casualties. The so-called principle of "distinction" — prohibiting, *inter alia*, the deployment of weapons which are incapable of discriminating between military and civilian targets and the

² Hans Blix, *Development of International Law relating to Disarmament and Arms Control since the First International Peace Conference of 1899*, preliminary report prepared for the 1999 centennial of the First International Peace Conference pursuant to UN GA res. 52/154 of 15 December 1997 and UN Doc. A/C.6/52/3 (1999), paras 9-21. See also Arthur Eyffinger (ed.), *The International Court of Justice 1946-1996*, 1996, pp. 40-44.

³ *Ibid.*

⁴ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes*

Weight, 29 November/11 December 1868, Schindler/Toman (eds.), *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988, p. 101 (Declaration of St Petersburg).

⁵ *Declaration Concerning Asphyxiating Gases* (Hague Declaration II), 29 July 1899, Schindler/Toman, *op. cit.* (note 4), p. 105; *Declaration Concerning Expanding Bullets*, (Hague Declaration III), 29 July 1899, Schindler/Toman, *op. cit.* (note 4), p. 109. As at 24 March 1999, there were 32 States Parties.

deployment of weapons in a discriminatory manner — was developed to increase protection for civilians.

Few would suggest that humanitarian principles determine the outcome in multilateral arms-control negotiations. The purpose of this article is to examine the extent to which humanitarian principles have influenced negotiations. We commence with an analysis of the various objectives of arms-control agreements and then attempt to answer our principal query with a series of case studies on specific multilateral agreements in the latter part of the 20th century. The particular role of the International Committee of the Red Cross (ICRC) in promoting and encouraging the development of arms-control treaties is also discussed.

The regulation of weapons through arms-control regimes

Unfortunately, any objective analysis of the last 100 years must lead to the conclusion that the general humanitarian principles prohibiting the deployment of weapons which exert their effects indiscriminately or cause superfluous injury or unnecessary suffering have had very limited success. Jozef Goldblat, the noted arms-control expert, has suggested that “[a]ll laws of war suffer from one common weakness: the rules of conduct established for belligerents in time of peace may not resist the pressure of military expedience generated in the course of hostilities, and the attempts to ‘humanise’ war may sometimes prove futile. The danger that the weapons prohibited may, under certain circumstances, be resorted to — as has occurred on several occasions — will not disappear as long as these weapons remain in the arsenals of States. Hence the intrinsic link between the development of the humanitarian laws of war and progress in the field of disarmament.”⁶

Indeed, one could argue that if the principle of distinction or the prohibition on the use of weapons which cause superfluous injury or unnecessary suffering had been respected by all belligerents, disarmament and arms-control treaties would be less necessary.

Disarmament is the traditional term for the elimination, as well as the limitation or reduction (through negotiation of an international agreement) of the means by which nations wage war. The term *arms control* was

⁶ Jozef Goldblat, *Agreements for arms control — a critical survey*, International Peace Research Institute, Stockholm, 1982, p. 89.

coined in the 1950s to denote an international agreement to limit the arms race, in particular the nuclear arms race between the USA and the Soviet Union, following recognition that general and complete nuclear disarmament would not be readily achieved. Arms control originally was meant to denote internationally agreed rules limiting the arms competition rather than reversing it; it had a connotation distinct from the reduction or elimination of armaments (i.e. disarmament). Indeed, the term “arms control” was not popular with a number of supporters of disarmament.⁷ Subsequently, however, the meaning of the term has become significantly broadened,⁸ and is now commonly used to denote international agreements which are intended to:

- freeze, limit or abolish specific categories of weapons;
- prevent certain military activities;
- regulate the deployment of forces;
- proscribe the transfers of militarily important items;
- reduce the risk of an accidental war;
- constrain or prohibit the use of certain arms in war; or
- build up confidence among States through greater openness in the military field, and thereby produce an international climate conducive to disarmament.

It is in this broad sense that the term “arms control” will be used throughout this article. It should be noted that, with this definition, arms control includes the complete prohibition of possession of a category of weapons (that is, disarmament has come to be regarded as a subset of arms control). Likewise, various international agreements (for example, the 1925 Geneva Protocol⁹) which were originally regarded as being international humanitarian law agreements, also fall within the arms-control rubric.

As far as its basic purpose is concerned, arms control serves four objectives:¹⁰

- reducing the likelihood of war, especially by trying to impose limits on the evolution and proliferation of weapons that may destabilize strategic relationships and thus create incentives for preventive attacks;
- reducing suffering and damage in the event of war;

⁷ Alva Myrdal, *The Game of Disarmament*, 1977.

⁸ Goldblat, *op. cit.* (note 6), p. xv.

⁹ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and of Bacteriological Methods of Warfare* (Geneva

Protocol), 17 June 1925, Schindler/Toman, *op. cit.* (note 4), p. 115.

¹⁰ Daniel Frei, “International humanitarian law and arms control”, *IRRC*, No. 267, November-December 1988, p. 491.

- reducing the expenditure on armaments and saving resources; and
- contributing to conflict management by providing a framework for negotiation between opposing sides, by reducing suspicion and by generally contributing to an atmosphere conducive to relaxation of tensions.

Traditional arms control and disarmament has for the most part concentrated on containing the threat caused by nuclear, chemical and biological weapons. However, within the broad definition already referred to, arms control includes the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects¹¹ which covers a number of specific conventional weapons, as well as the recently concluded 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.¹² More recently, international attention has been drawn to the dangers of unregulated trade in conventional weapons, although current responses to these dangers are limited to a voluntary register of the transfer of certain conventional weapons. We turn now to a series of case studies on specific weapons categories.

Case studies on specific weapons

Chemical weapons

The First Hague Peace Conference in 1899 prohibited the use of “asphyxiating or deleterious gases”,¹³ a ban bolstered by prohibitions on the use of “poisons or poisoned weapons” at the Second Hague Conference in 1907. These agreements failed to prevent the extensive use of chemical weapons in World War I, during which approximately 125,000 tonnes of toxic chemicals resulted in 1,300,000 casualties, more than 100,000 of them

¹¹ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols I-III* (1980 Certain Conventional Weapons Convention), of 10 October 1980, 1342 UNTS 137; 19 ILM 1523, Schindler/Toman, *op. cit.* (note 4), p.179. As at 24 March 1999, there were 73 States Parties.

¹² *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (Ottawa treaty), of 18 September 1997, 36 ILM 1507, *IRRC*, No. 320, September-October 1997, p. 563. As at 24 March 1999, there were 67 States Parties.

¹³ *Declaration Prohibiting the Use of Asphyxiating Gases* (‘Hague Declaration II’), *loc. cit.* (note 5).

fatal – a major human tragedy.¹⁴ In an appeal to the belligerents on 6 February 1918, the ICRC stated that:

“We wish to-day to take a stand against a barbaric innovation ... This innovation is the use of asphyxiating and poisonous gas, which will it seems increase to an extent so far undreamed of ... We protest with all the force at our command against such warfare which can only be called criminal.”¹⁵

In the immediate aftermath of World War I, chemical weapons were described as “a fundamentally cruel method of carrying on war” and “criminal” and their deployment against non-combatants was described as “barbarous and inexcusable”.¹⁶ In 1920, there were preliminary discussions within the League of Nations on the feasibility of developing a chemical disarmament treaty, which was strongly supported by the ICRC.¹⁷ However, on the issue of verifying “non-production” of chemical weapons by the chemical industry, it was concluded that “it would be useless to seek to restrict the use of gases in wartime by prohibiting or limiting their manufacture in peacetime”.¹⁸ So diplomats settled for an easier option based on the principles of international humanitarian law. The International Conference on the control of the international trade in arms, munitions, and implements of war convened in Geneva in 1925 under the auspices of the Council of the League of Nations and adopted the text of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.¹⁹ Under the terms of the Protocol, the States Parties “so far as they are not already Parties to Treaties prohibiting such use” were prohibited from the use in war of “asphyxiating, poisonous or other gases, all analogous liquids, materials or devices ... [and] bacteriological [weapons]”.

The 1925 Geneva Protocol, like most of its contemporary multi-lateral instruments, represented a mixed achievement. The instrument did

¹⁴ United Nations, *Disarmament Yearbook*, Vol. 11, 1986, p. 241.

¹⁵ Cited in Stockholm International Peace Research Institute, “The problem of chemical and biological warfare”, *CB Disarmament Negotiations, 1920-1970*, Vol. IV, 1974, p. 41.

¹⁶ *Ibid.*, p. 44.

¹⁷ For example, in November 1920 the ICRC addressed a letter to the General Assembly of the League of Nations proposing an absolute prohibi-

tion on the use of asphyxiating gas, and in 1921, the 10th International Conference of the Red Cross urged governments to come to an agreement on the absolute prohibition of “the use of gas as a weapon, however delivered, whether by drift, missiles or otherwise”. J. Mirimanoff, “The Red Cross and biological and chemical weapons”, *IRRC*, No. 111, June 1970, p.301.

¹⁸ *Op. cit.* (note 15), p. 44.

¹⁹ *Supra*, note 9.

represent a collective response to the horrors of the use of chemical weapons in World War I and was intended to achieve more than its predecessors in relation to that particular category of weapons.²⁰ However, the Protocol also suffered from some major limitations which rendered it, in effect, no more than a prohibition on the first use of chemical weapons.²¹

Even at the time of agreement there was a view that the 1925 Geneva Protocol was inadequate because a mere declaration of determination not to have recourse to the prohibited means of warfare might not stand the strain of actual hostilities, and also that the envisaged convention on the reduction and limitation of armaments should include more stringent measures. In 1926, a disarmament conference was organized by the League of Nations and held several sessions between 1926 and 1930 but was unable to even commence serious negotiation of a chemical disarmament treaty.²²

Chemical weapons have been used at various times since World War I despite the existence of the 1925 Geneva Protocol. The most blatant recent example of this was in the 1980s by Iraq against Iranian soldiers and against Kurds in northern Iraqi villages.²³ Although visual images of Kurdish inhabitants of Halabja, lying dead in the streets of that otherwise non-descript village, provoked humanitarian outrage and did contribute to the momentum for serious negotiations to ban chemical weapons, it is also the case that in the years since World War I the military utility of chemical weapons has diminished. States have developed effective protective equipment against chemical attack and other weapons have been developed which are less dependent upon favourable climatic conditions such as wind speed and direction, and the absence of rain. Most States have reached the conclusion that chemical weapons are not indispensable to their strategic military

²⁰ The ICRC recognized the potential of the 1925 Geneva Protocol to reduce the suffering caused by chemical weapons, and vigorously and repeatedly encouraged States to sign and ratify the Protocol, including through resolutions adopted by the International Conferences of the Red Cross. "The ICRC and disarmament", *IRRC*, Vol. 203, March-April 1978, p. 90.

²¹ For a more detailed discussion about the limitations of the 1925 Geneva Protocol see Timothy L.H. McCormack, "International law and the use of chemical weapons in the Gulf War", *California*

Western International Law Journal, Vol. 21, 1990-91, pp. 5-10.

²² See Robert J. Mathews and Timothy L.H. McCormack, "The relationship between international humanitarian law and arms control", in Helen Durham and Timothy L.H. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (in press, 1999).

²³ A team led by a special envoy of the ICRC visited Halabja and confirmed the use of poisonous gases. See News Chronology, *Chemical Weapons Convention Bulletin*, 31 March 1988.

capabilities. Further, the Iraqi use of chemical weapons against unprotected civilians demonstrated the dangers posed by proliferation of chemical weapons. This combination of diminished strategic value and the potential proliferation threat has facilitated a greater level of multilateral agreement than had been possible hitherto.

An additional factor complemented the confluence of circumstances facilitating the conclusion of a comprehensive treaty ban on chemical weapons. In 1987, the Soviet Union (with the advent of *glasnost* and *perestroika*) accepted the concept of challenge inspection for verification of compliance with a chemical weapons convention, admitted possessing chemical weapons, and hosted an international meeting of arms-control negotiators at one of its chemical weapons facilities. All of these developments would have been inconceivable prior to the improvement in East-West relations in the mid-1980s.

Negotiation of the Chemical Weapons Convention (CWC)²⁴ commenced in 1969 in Geneva and was not concluded until 1992. Although this 23-year process was a slow and tortuous one, it was ultimately rewarding. Unlike the 1925 Geneva Protocol, the CWC requires the complete elimination of chemical weapons (within 10 years of entry into force) and has introduced a verification regime which will ensure compliance by the States Parties, but which will not hinder the development of peaceful chemical industry. Verification under the CWC includes compulsory national declarations about relevant industrial and military activities, and a regime of routine inspections of declared industrial and military facilities. A particularly important feature is the provision for a “challenge inspection” whereby a State party can request an inspection of any site in another State party at short notice.

The CWC entered into force on 29 April 1997. There are currently 121 States Parties and an additional 48 States signatories. Perhaps most importantly, the States Parties include both the USA and the Russian Federation — the two largest possessors of chemical weapons — the major chemical producing and exporting States of Western Europe and some of the major developing States with chemical production capability. Several key Middle Eastern States have still refused to participate in the Convention but an increasing number of States are choosing to do so. The Organisation for

²⁴ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC)*, of 13 January 1993, 32 ILM 800.

the Prohibition of Chemical Weapons (OPCW), which has been established in The Hague to administer the CWC, is responsible for the verification regime.²⁵ There are now more than 200 inspectors employed by the OPCW and they have already undertaken many of the inspection tasks outlined in the verification regimes to ensure compliance with CWC obligations by the States Parties.²⁶

At the time the Convention was opened for signature and again, at the first Conference of States Parties after the Convention had entered into force, many representatives of States and of international organizations acknowledged the significance of the multilateral achievement to ban these weapons that have such terrible consequences — that cause superfluous injury and unnecessary suffering to those unfortunate enough to be exposed to them.²⁷ While many of these sentiments were undoubtedly genuine, the principal motivation for concluding the Convention had less to do with deleterious consequences of the weapons from a humanitarian point of view, and more to do with other strategic security factors — most importantly the growing concerns about horizontal proliferation of chemical weapons and the recognition by both the USA and Russia that they did not need to retain their chemical weapons stockpiles following the Cold War.

Biological weapons

As already mentioned, the 1925 Geneva Protocol prohibited *inter alia* bacteriological methods of warfare. However, as with asphyxiating, poisonous or other gases, the Geneva Protocol prohibited neither the production nor the stockpiling of biological weapons. Again, the limitations of the Geneva Protocol resulted in extensive use of biological weapons by

²⁵ For details of the verification measures of the CWC, see Robert J. Mathews, “Verification of chemical industry under the Chemical Weapons Convention”, in John B Poole and Richard Guthrie (eds.), *Verification 1993: Arms Control, Peacekeeping and the Environment*, 1993, p. 41.

²⁶ Robert J. Mathews, “Entry into force of the Chemical Weapons Convention”, Stockholm International Peace Research Institute, *SIPRI Yearbook 1998: Armaments, Disarmament and International Security*, 1998, pp. 490-500.

²⁷ See, for example, the statement by Boutros Boutros-Ghali, Secretary-General of the United Nations, Paris, 13 January 1993: “(...) je veux ouvrir

le volumineux dossier qui nous réunit ici sur sa pièce essentielle : l'angoisse d'hommes, de femmes, d'enfants devant des armes imparables ; des armes qui détruisent et tuent sans qu'il soit possible ni de combattre, ni de fuir, ni même de se défendre. Leurs effets fulgurants sur les soldats qui y étaient exposés, les séquelles irrémédiables qu'elles laissent aux combattants qui avaient la chance d'en réchapper, les souffrances et la terreur que leur emploi engendraient chez les hommes des tranchées, disent l'horreur de cette arme. Nous sommes rassemblés ici pour dire que nous ne l'acceptons plus. — Copy on file with authors.

Japan against China in the early 1940s, in clear violation of international legal norms. Apparently the biological agents deployed by Japanese forces included cholera, anthrax and plague. Estimates of the number of biological weapons-related deaths in China range from several thousand²⁸ to “hundreds of thousands”.²⁹

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction³⁰ (BWC) was negotiated between 1969 and 1971 and opened for signature in 1972. It entered into force in 1975. It now has 140 States Parties. The BWC was the first true multilateral disarmament treaty, being the first convention to ban an entire class of weapons. States Parties to the BWC undertook never to develop, produce, stockpile or otherwise acquire or retain biological agents or toxins, or their delivery systems. The BWC has now been in force for over 20 years. Though it constitutes an important landmark in arms control, a number of developments since 1975 have resulted in assessments that the BWC is seriously weak and lacks credibility because it contains no effective verification provisions.³¹

Unresolved allegations of clandestine production or use of biological weapons since 1975 have caused the BWC a serious loss of credibility. In 1980, the USA claimed that an outbreak of anthrax at Sverdlovsk, in the Soviet Union, raised questions concerning compliance by the Russians with their BWC obligations. In 1992, President Yeltsin admitted that there had been an offensive biological weapons programme over the previous 20 years, and acknowledged that the Sverdlovsk anthrax outbreak was the result of military research to make biological weapons.³²

The recent revelations from the UN Special Commission for Iraq (UNSCOM) concerning an offensive biological weapons programme in Iraq, in which Iraq had spent several years developing, producing, weaponizing and testing a number of biological agents, provides further evidence of

²⁸ SIPRI Yearbook 1996: *World Armaments and Disarmament*, 1996, p. 687.

²⁹ News Chronology, *Chemical Weapons Convention Bulletin*, 31 July 1995.

³⁰ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (BWC), of 10 April 1972, 11 ILM 3320, Schindler/Toman, *op. cit.* (note 4),

p. 137. As at 24 March 1999, there were 141 States Parties.

³¹ For a critique of the BWC see Jozef Goldblat, “The Biological Weapons Convention: An overview”, *IRRC*, No. 318, May-June 1997, p. 251.

³² SIPRI Yearbook 1993: *World Armaments and Disarmament*, 1993, pp. 287-288.

the need to strengthen the provisions of the BWC.³³ In addition, intelligence assessments from the USA³⁴ and the Russian Federation³⁵ have concluded that about eight countries either have, or are seeking, an offensive biological weapons capability. Most States Parties to the BWC now accept that the Convention does require additional strengthening through the development of verification or compliance-monitoring procedures.³⁶ Progress towards that goal is well under way.³⁷

The analysis of the influence brought to bear by humanitarian concerns in negotiations for the BWC is similar to that for the CWC. No one doubts the potentially diabolical effects of germ warfare. Hence it is entirely justified to acknowledge the significance of concluding a multilateral agreement to prohibit any effort to attain an offensive biological weapons capability, let alone to use such weapons. The argument here, however, is that the BWC was not concluded primarily because of the deleterious consequences of biological weapons in humanitarian terms but because of concerns about horizontal proliferation of these weapons and of the difficulties of effective defence against biological attack. Similarly, in current negotiations for a Verification Protocol to the BWC, the principal motivation is national security, with humanitarian concerns a complementary coincidence.

Nuclear weapons

The devastating effects of the atomic bombs dropped on Hiroshima and Nagasaki stunned the international community and caused many, including the ICRC, to respond with grave concerns for the deleterious effects in humanitarian terms of further use of such weapons.³⁸ Those

³³ Iraq's BW programme embraced a comprehensive range of agents and munitions. These included lethal agents (e.g. anthrax, botulinum toxin and ricin), incapacitating agents (e.g. aflatoxins, mycotoxins and rotavirus) and "economic" agents (e.g. wheat cover smut).

³⁴ USA Congress, Office of Technology Assessment (OTA), *Proliferation of Weapons of Mass Destruction: Assessing the Risks*, OTA-ISC-559, 1993, p. 65.

³⁵ Yevgeny Primakov, *New Challenge after the Cold War: The Proliferation of Weapons of Mass Destruction*, a report by the Foreign Intelligence Service of the Russian Federation, 1993.

³⁶ Based on the decisions taken at the 1994 Special Conference of States Parties to the BWC.

³⁷ Annabelle Duncan and Robert J Mathews, "Development of a verification protocol for the Biological Weapons Convention", in Richard Guthrie (ed.), *Verification 1996: The VERTIC Yearbook, 1997*, pp. 151-70.

³⁸ For example, less than one month after the atomic weapons were used, the ICRC sent a circular to the central committees of the National Societies which stressed the considerable concern it felt with respect to the use of atomic weapons. In 1948, the 22nd International Conference of the Red Cross called on all States to forbid "the use of atomic energy or any similar force for purposes of warfare". *Op. cit.* (note 20), p. 90.

humanitarian concerns have not proved to be a major force in encouraging serious efforts at nuclear disarmament. Following various unsuccessful attempts in the early post-World-War-II years to negotiate a treaty to eliminate nuclear weapons, negotiations focusing on the less ambitious objective of non-proliferation of nuclear weapons were commenced by the Eighteen Nation Disarmament Committee in 1962. The negotiation of the Nuclear Non-Proliferation Treaty³⁹ (NPT) was concluded in 1968 and the treaty entered into force in 1970. It now has 183 States Parties and can claim broad and diverse membership. It is unique among key global multilateral treaties in that it establishes a discriminatory regime among States Parties. The NPT distinguishes between nuclear-weapon States Parties and non-nuclear-weapon States Parties. Nuclear-weapon States are those States (coincidentally the permanent five members of the UN Security Council) which had “manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967”.⁴⁰ Under the provisions of the NPT, the former are entitled to retain their existing nuclear weapons stockpiles and are not prohibited from developing new weapons systems or from testing and stockpiling any such weapons. The only NPT obligation purporting to limit the right of States Parties possessing nuclear weapons to continue an indefinite nuclear arms build-up is the obligation to undertake negotiations for an agreement for nuclear disarmament.⁴¹

The NPT has proved largely successful as an effective regime in controlling horizontal proliferation of nuclear weapons. A former Australian Foreign Minister, Gareth Evans, has described the NPT as “the single most effective and widely supported arms-control agreement in existence: without it we would by now be facing a world with perhaps twenty or thirty

³⁹ *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT), of 1 July 1968, 729 UNTS 161, 7 ILM 809. As at 24 March 1999 there were 183 States Parties.

⁴⁰ Article IX(3) of the NPT.

⁴¹ Article VI of the NPT requires States Parties to “pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament” leading to the negotiation of a treaty banning nuclear weapons. It should be noted, however, that the USA and the Russian Federation have agreed to substantial reductions to their nuclear

arsenals in bilateral treaty arrangements — particularly the Treaties on the Reduction and Limitation of Strategic Offensive Arms (START I and II). There have also been recent attempts to encourage the nuclear-weapons States to reduce their nuclear weapons stockpiles — for example, by the Canberra Commission — which will hopefully assist in working towards the ultimate objective of elimination of nuclear weapons. See *Report of the Canberra Commission on the elimination of nuclear weapons*, Australian Department of Foreign Affairs and Trade, 1996.

nuclear weapons States.”⁴² It should be noted, though, that the NPT has clearly not prevented horizontal proliferation altogether. A number of key States have been able to produce nuclear weapons or have at least reached a “threshold nuclear weapons capability” outside the NPT regime.⁴³ Subsequently, there have been calls for the strengthening of the NPT safeguards regime established by the International Atomic Energy Agency, although these calls have been made primarily for security reasons rather than out of humanitarian concerns. The conclusion of the negotiation of the Comprehensive Test Ban Treaty (CTBT) in 1996 was seen as a positive development in promoting the non-proliferation of nuclear weapons.⁴⁴

In contrast to the situation with chemical and biological weapons, there has still been no agreement on a general prohibition on nuclear weapons. Many of the non-nuclear States parties to the NPT, particularly many non-aligned States, had become frustrated with the lack of progress by the permanent members of the Security Council in fulfilling their obligations under Article VI of the NPT towards a comprehensive treaty ban on nuclear weapons. The UN General Assembly resolution requesting an advisory opinion from the International Court of Justice on the legality of the use or threat of use of nuclear weapons was adopted by a substantial majority.⁴⁵ The request for an advisory opinion was a controversial strategy but one clearly designed to advance the cause of nuclear disarmament.

In July 1996, the International Court of Justice handed down the long awaited advisory opinion.⁴⁶ The Court determined that, despite the lack of a specific prohibition on the threat or use of nuclear weapons in conventional or in customary international law, the general principles of customary law, particularly the principles of international humanitarian law, would apply to any use of nuclear weapons or threat to use them. Although the Court was able to conclude that the use of nuclear weapons “seems scarcely reconcilable with respect for such requirements”, the judges felt compelled to reach a qualified conclusion because of their perceived lack of “sufficient elements to enable [the Court] to conclude with certainty that

⁴² Gareth Evans and Bruce Grant, *Australia's foreign relations in the world of the 1990s*, 2nd ed., 1995, p. 84.

⁴³ *Loc. cit.* (note 22).

⁴⁴ CTBT, 24 September 1996, UN Doc. A/50/1027/Annex (1996), adopted by UNGA res. 50/245; (1996) 35 ILM 1439 (not yet in force). As at 24 March 1999, there were 29 States Parties.

⁴⁵ UNGA res. 49/75 K (1995).

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 226. For a detailed analysis of the international humanitarian law implications of the opinion see *IRRC*, No. 316, January-February 1997, pp. 3-118.

the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in any circumstance”.⁴⁷ The unwillingness of the majority of the Court to declare the use or threat of use of nuclear weapons illegal in all circumstances only serves to emphasize the need for a comprehensive multilateral treaty prohibition — a fact not lost on all fourteen judges in the case.⁴⁸

Paradoxically, the lack of agreement on a comprehensive treaty prohibition of nuclear weapons contrasts with, and yet is entirely consistent with, the situation in relation to chemical and biological weapons. Humanitarian principles may have had some influence in the negotiation of treaties to comprehensively prohibit chemical and biological weapons but those humanitarian principles have always been secondary to strategic national security concerns. The major world military powers have been prepared to forego the possession of chemical and biological weapons but are not yet prepared to do the same in respect of nuclear weapons. In this respect, the influence of humanitarian principles has been consistent across all three categories of weapon.

Anti-personnel landmines

The ICRC has estimated that as many as 27,000 people are either killed or severely injured by anti-personnel landmines every year. The overwhelming majority of these victims are civilians because most landmines remain active in the ground long after the cessation of armed conflict — in some cases for sixty years or longer. It has also been estimated that there exists unknown millions of landmines laid in 64 countries around the world. While these landmines are being cleared at a rate of 100,000 per year, millions of new landmines are being sown every year. Even if from today no new mines were laid, at current rates of clearance it would still take at least 1,000 years to remove the mines currently in the ground, at a cost of approximately US\$ 33 billion.⁴⁹

Concerns were expressed during the 1970s about the problem posed by anti-personnel landmines and there were calls to negotiate a treaty

⁴⁷ *Ibid.*, Joint Opinion, para. 105(2)E.

⁴⁸ *Ibid.*, para. 105(2)F.

⁴⁹ These UN-based figures are cited in ICRC (ed.), *Landmines must be stopped*, ICRC, Geneva, 1995, p. 4. More recently, some sources have claimed that the total number of landmines

deployed worldwide is closer to half of the estimated 110 million or more. See Zdzislaw Lachowski, “The Ban on Anti-Personnel Mines”, *SIPRI Yearbook 1998: Armaments, Disarmament and International Security*, 1998, pp. 545-558.

to prohibit both them and other “inhumane weapons”. In 1973, the ICRC convened a group of experts on weapons and humanitarian law.⁵⁰ In response to requests, the ICRC subsequently organized a conference of government experts, held in two sessions — in Lucerne in 1974⁵¹ and Lugano in 1976.⁵² At the conference, some experts advocated total bans on specific weapons. Others considered that total bans were beyond reach and that more progress would be achieved if the conference were to concentrate its efforts on restrictions of use. This more pragmatic view was shared by the ICRC.⁵³

The reports of these meetings formed the basis of a special UN conference convened in 1979 to discuss the problem of ‘inhumane weapons’. At the conclusion of its second session in 1980, the UN conference adopted the text of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.⁵⁴ This Convention, often referred to as the “Convention on Certain Conventional Weapons” (CCW), was opened for signature in New York on 10 April 1981 and entered into force on 2 December 1983 (i.e. six months after the 20th ratification).⁵⁵

Protocol II to the CCW placed restrictions on the use of anti-personnel landmines, booby traps and similar devices.⁵⁶ The Protocol also prohibited, in all circumstances, the deployment of anti-personnel landmines against the civilian population; prohibited the indiscriminate use of mines; specified that all feasible precautions must be taken to protect civilians from the effects of mines; restricted the use of mines (other than remotely delivered mines) in populated areas; prohibited the use of remotely delivered mines unless their locations can be accurately recorded or an effective neutralizing mechanism is used; specified that effective early warning must be given of any delivery or dropping of remotely delivered mines which may

⁵⁰ *Weapons that may cause unnecessary suffering and have indiscriminate effects*, ICRC Report on the Work of Experts, ICRC, Geneva, 1973.

⁵¹ Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne 24.9 - 18.10.1974), ICRC Report, Geneva, 1975.

⁵² Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session - Lugano, 28.1 - 26.2.1976), ICRC Report, Geneva, 1976.

⁵³ At the second session, the Vice-President of the ICRC stated (*ibid.*, p. 78): “Moreover, I think relatively minor results which meet with general agree-

ments are far better than projects which look dazzling on paper but which are worthless in practice and likely, when all is said and done, to undermine humanitarian law as a whole”.

⁵⁴ *Supra*, note 11.

⁵⁵ See J. Ashley Roach, “Certain Conventional Weapons Convention: Arms control or humanitarian law?”, *Military Law Review*, Vol. 105, 1984, p. 3.

⁵⁶ See Burrus M. Carnahan, “The law of land mine warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons”, *Military Law Review*, Vol. 105, 1984, p. 73.

affect the civilian population, unless circumstances do not permit this; specified that the parties to a conflict must record the location of all pre-planned minefields laid by them and endeavour to ensure the recording of the location of all other minefields.

The CCW may, arguably, have raised international standards regarding the inhumane use of certain types of weapons. However, given the relatively low rate of participation in the CCW, this is less than certain.⁵⁷ Furthermore, given the terrible suffering and devastation currently being caused by anti-personnel landmines, the CCW has clearly been ineffective in reducing the deployment of anti-personnel landmines. Unfortunately, the attempts to strengthen Protocol II to the CCW with the Revised Protocol II negotiated through the 1995/1996 CCW Review Conference⁵⁸ (e.g. application of Revised Protocol II to non-international armed conflicts; prohibition on the use of non-detectable, non-self-destructive or non-deactivating mines) are unlikely to significantly ease the problem.

Many see the conclusion of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction⁵⁹ as a major victory for arms control, particularly regarding a weapon which causes incredible suffering primarily to innocent civilians. The Convention was negotiated in record time and demonstrates what can be achieved when the requisite political will exists. Others are more circumspect. The Ottawa treaty may be a step in the right direction but it has two major limitations. Firstly, it will not change the reality of the devastation caused by the anti-personnel landmines still in the ground and waiting to explode and, secondly, several significant producers, users and exporters of anti-personnel landmines did not participate in the negotiations and have stated that they will not become parties to the treaty.⁶⁰

In recognition of these limitations, some States, including Australia, which has recently ratified the Ottawa treaty,⁶¹ have suggested that other supplementary measures are required. The conclusion of the Ottawa treaty cannot be allowed to turn attention away from the enormous

⁵⁷ For example, there were only 31 States Parties to the CCW at the beginning of 1992. This number rose to 57 in the lead up to the CCW Review Conference in 1995.

⁵⁸ *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, as amended on 3 May 1996 (Revised Protocol II to

the 1980 Convention on Conventional Weapons), (1996) 35 *ILM* 1209.

⁵⁹ *Supra*, note 12.

⁶⁰ See Lachowski, *supra* (note 49).

⁶¹ *Australia ratifies Landmines Ban Convention*, Media Release (15 January 1999).

challenge of mine clearance. Increased resources for mine clearance and rehabilitation for victims are essential worldwide. Additionally, it has been suggested that the UN Conference on Disarmament negotiate a ban on the *transfer* of anti-personnel landmines that might include some States which have refused to participate in the Ottawa process.⁶² One thing is certain: future developments in arms control and disarmament that increase protection for the victims of armed conflict will not happen overnight. There is a role for 'creeping incrementalism' as there also is for 'dramatic progress' and one should not be viewed as ruling out the other.

Perhaps the most significant aspect of the Ottawa treaty for the purposes of this discussion is that its conclusion represents the first occasion on which an arms-control agreement banning an entire category of weapons has been motivated primarily by humanitarian concerns. The instruments of international humanitarian law purporting to regulate the use of anti-personnel landmines were demonstrably ineffective in alleviating the suffering of huge numbers of civilian casualties.⁶³ Here, complete disarmament has been widely acknowledged as a fundamental step in the process of improving protection for victims of armed conflict. The Ottawa treaty thus represents an unprecedented causal link between the negotiation of arms-control regimes and actual enhancement of respect for fundamental principles of international humanitarian law.⁶⁴

Other conventional weapons

One of the most encouraging recent developments in the whole area of controlling the weapons of war has been the new Protocol IV to the

⁶² *Two Swords for the Beating*, Address by the Hon. Alexander Downer MP, Minister for Foreign Affairs, to the Conference on Disarmament, in Geneva on 3 February 1998, *Peace and Disarmament News*, March 1998, pp. 12-13.

⁶³ For example and as discussed above, the imperatives of intense human suffering forced the traditionally apolitical ICRC to adopt anything but a neutral position in the campaign to ban anti-personnel landmines. Of course, neutrality was not jeopardized as the ICRC was not critical of specific States during this campaign.

⁶⁴ The argument that disarmament regimes are the most effective means of ensuring respect for general principles of international humanitarian law relating to the deployment of weapons is discussed (in relation to the specific example of the CWC) by Christopher Greenwood, *International Humanitarian Law and the Laws of War*, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899 pursuant to UN General Assembly resolution 52/154 of 15 December 1997 and UN Doc. A/C.6/52/3 (1998), para. 93, p. 41.

CCW, adopted in 1995, to prohibit laser and blinding weapons.⁶⁵ This category of weapons was discussed at ICRC conferences convened in the 1970s, but at that time there was no agreement that such weapons should be banned.⁶⁶ Protocol IV is unique in arms-control history because the prohibition was negotiated before the weapons were actually used in battle. A number of countries had been developing laser weapons to inflict blindness and in some circumstances these weapons had gone into production. To have reached agreement on prohibition before the weapons were deployed in battle situations is a landmark development. It would seem that concerns about proliferation of such weapons technology and about development of effective defence combined with humanitarian concerns to enable this unprecedented prohibition to be adopted.

By contrast, as noted with concern in a recent ICRC report,⁶⁷ achievements in regulating the use of other conventional weapons have been much more modest, despite the increasingly deleterious consequences, particularly for civilians, of the unrestrained transfer of conventional weapons. The UN Register of Conventional Arms is currently the only global cooperative security regime dealing with the transfer and accumulation of major conventional weapons. The idea of an international register may be traced at least as far back as the aftermath of World War I, and such a register was kept for a number of years by the League of Nations. More recently, there have been repeated proposals in the UN to establish a register of arms transfers, but it was only in 1991 that the idea gained wide international support. In December 1991, the UN General Assembly agreed to establish the Register.⁶⁸ In December 1992, the details of its initial design were agreed. It first came into operation in April 1993, which was the date by which states were requested to supply data on their arms transfers in 1992.

The UN Register is a transparency measure. Participation is voluntary, includes both suppliers and recipients, and does not involve any controls on arms transfers. The Register aims to improve transparency relating to conventional arms transfers and holdings in the hope that this may

⁶⁵ *Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Protocol IV on Blinding Laser Weapons)*, of 13 October 1995; 35 ILM 1218. As at 24 March 1999, there were 31 States Parties.

⁶⁶ *Loc. cit.* (note 51), pp. 73-74.

⁶⁷ See, for example, *Arms Availability and the Situation of Civilians in Armed Conflict*, ICRC, Geneva, 1998.

⁶⁸ UNGA Res. 46/36 L (6 December 1991).

achieve the following: contribute to the timely identification and prevention of excessive and destabilizing accumulations of arms; promote confidence and restraint; and provide a basis for regional or global confidence and security-building measures. The rate of participation in the Register has been encouraging. Most major importing and exporting States now provide data. It has been concluded that the Register already has the potential to contribute to regional and international security and domestic accountability, and may have already done so on a modest scale. However, it is far from achieving its full potential.

With respect to comprehensive multilateral treaty prohibitions on other conventional weapons there is little cause for optimism, at least in the immediate future. This point was succinctly made by former Australian Foreign Minister Gareth Evans in 1991:

“It has to be acknowledged that the international community has yet to come to grips with the problem posed by the huge volumes of conventional arms transfers. While agreements are in place or under negotiation to control or eliminate weapons of mass destruction, there is as yet no remotely comparable process for conventional weapons. We need to acknowledge openly the difficulties which stand in the way of conventional arms control: compared with weapons of mass destruction, they are relatively readily available; trade is well established and lucrative; and considerations of national sovereignty, and the legitimate responsibility of any government to ensure national security, mean that countries are reluctant to forgo the right to acquire conventional arms.”⁶⁹

Unfortunately, very little has happened since 1991 to warrant a more promising prognosis.

Thus, with respect to conventional weapons other than those specifically covered by the 1980 CCW, international humanitarian law instruments are all that is currently available to minimize the risk of these types of weapons causing superfluous injury or unnecessary suffering. The ongoing lack of a definition for superfluous injury or unnecessary suffering makes the ICRC's current project to define the concept all the more significant.⁷⁰

⁶⁹ “Seize the moment”, speech by Senator Gareth Evans to the UN Conference on Disarmament Issues, Kyoto, Japan, 27 May 1991, and extracted in Stockholm International Peace Research Institute, *SIPRI Yearbook 1992: World Armaments and Disarmament*, 1992, p. 291.

⁷⁰ Robin M. Coupland (ed.), *The SIRUS project: Towards a Determination of Which Weapons Cause Superfluous Injury or Unnecessary Suffering*, ICRC, Geneva, 1997.

Conclusions

Historically, humanitarian concerns have initiated the negotiation of prohibitions on the use of certain weapons by international humanitarian law agreements. Unfortunately, these agreements have often failed during actual conflict. As discussed in this article, examples include:

- (i) massive casualties caused by chemical weapons during World War I, despite the prohibition of chemical weapons by the First Hague Conference;
- (ii) extensive use of both chemical and biological weapons since 1925, despite the prohibitions enshrined in the 1925 Geneva Protocol; and
- (iii) extensive casualties caused by the deployment of anti-personnel landmines in methods prohibited under Protocol II of the CCW.

In each case, the humanitarian concern at the massive suffering caused by these weapons, in spite of existing agreements based on international humanitarian law, led to calls for disarmament treaties. However, while the initial motivation for arms control and disarmament has often been based on humanitarian concerns, the actual negotiations of most of the recent arms control and disarmament treaty regimes have been motivated primarily by national and international security concerns. Arms-control treaties have generally been difficult to negotiate because of the need for balanced reductions and verification of compliance (and the associated concerns about loss of national security or other sensitive information). Thus, despite recent political events including the collapse of the Soviet Union and the end of the Cold War which have provided new opportunities for substantial developments in arms control, negotiation of arms-control treaties is likely to remain a slow, tortuous process through the “conventional” fora of the Conference on Disarmament or ad hoc groups.

Also, in the past, the ICRC has recognized that direct action by it to bring about disarmament is — like any action to achieve peace — difficult, for the choices it implies are open to challenge, which prompts some States to contest the organization’s neutrality. So while the ICRC has played a very supportive role in the development of arms-control treaties, it has consistently adopted a position of neutrality on disarmament negotiations,

arguing that this is a political question for the States participating in the negotiation process.⁷¹

However, the recently concluded Ottawa treaty provides a significant exception to previous treaties, both in the way that it was negotiated and in the role of the ICRC. The international community was confronted with the reality that the convention negotiated through the UN machinery (the 1980 Conventional Weapons Convention) had failed to significantly reduce the extent of superfluous injury and unnecessary suffering caused by antipersonnel landmines. This led to a very strong humanitarian quest which resulted in the negotiation of a disarmament treaty (the 1997 Ottawa treaty) in record time, using a “fast-track approach” external to the UN-based arms-control negotiation machinery. In this case, the community of States was subjected to an unprecedented level of influence from humanitarian concerns in the initiation of the negotiation process, and humanitarian concerns remained the major motivating force throughout the negotiation of the treaty. In what was for the ICRC an unprecedented move, the imperative imposed by the devastating consequences for non-combatants of antipersonnel landmines forced the organization to adopt a political position in pushing not just for international humanitarian law standards on the deployment of anti-personnel mines but for complete disarmament — a comprehensive prohibition which extends to transfer and destruction of existing stockpiles.⁷²

While the Ottawa treaty has only recently entered into force and has yet to demonstrate a significant impact on reducing the suffering caused by anti-personnel mines, the significance of the impact of

⁷¹ For example, in a policy document entitled *The ICRC and Disarmament, loc. cit.* (note 20), the ICRC stated *inter alia* that “the Red Cross is aware of the fact that it is of the utmost priority for mankind that the disarmament cause be vigorously defended and that it must take up its position in the vanguard of this battle ... However, it can take no stand on the methods to be used in achieving disarmament without endangering one of its basic principles, that of neutrality. So it has to act in a general way as it has already done by associating itself, through various resolutions adopted by its international conferences, with the desire for general and complete disarmament which has so often been expressed at the UN”.

⁷² While some within the ICRC might question the validity of the role played by the ICRC in the landmine debate, no one would question that the primary reason that significant progress was achieved in recent years in relation to more comprehensive limitations on landmines was the mobilization of public opinion against the effects of these weapons. A number of organizations, including several international humanitarian relief organizations, professional medical associations, other non-governmental organizations, as well as the ICRC, combined to influence the outcome of the “Ottawa” negotiations.

humanitarian concerns in the conclusion of the Ottawa treaty deserves special recognition. In particular, it emphasizes the importance of the ICRC and other interested organizations continuing to express their concerns about superfluous injury and unnecessary suffering caused by particular weapons, and continuing to be active in supporting efforts to conclude appropriate arms-control treaties relating to such weapons.

Résumé

L'influence des principes humanitaires sur la négociation de traités relatifs au contrôle de l'armement

par ROBERT J. MATHEWS et TIMOTHY L.H. McCORMACK

La Conférence de la Paix de La Haye (1899) a tenté de rendre la guerre moins cruelle par deux sortes de mesures : l'adoption de règles internationales qui protègent les victimes de la guerre, d'une part, et l'interdiction de certaines armes particulièrement cruelles ou la limitation de leur emploi, d'autre part. Les auteurs examinent l'impact de ces mesures — qu'ils qualifient d'« approche humanitaire » — sur les négociations pour un contrôle de l'armement par le désarmement. Souvent, l'interdiction pure et simple d'une arme ou la limitation de son emploi n'ont pas réussi à faire disparaître l'arme en question (par exemple, l'arme chimique). Ceci a amené la communauté internationale à chercher une solution dans le cadre des négociations pour le désarmement. Cependant, celles-ci obéissent principalement à des considérations politiques et de sécurité. Mais les auteurs font la démonstration que des réflexions d'ordre humanitaire jouent parfois un rôle important dans l'élaboration de mesures de désarmement. Des chapitres sur les décisions internationales prises en matière d'armes chimiques, biologiques et nucléaires, ou encore par rapport aux mines antipersonnel et à quelques autres armes particulièrement cruelles, mettent cette thèse en évidence.