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Sassòli, Marco

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THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: CURRENT AND INHERENT CHALLENGES¹

Marco Sassòli²

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2. Marco Sassòli is professor of international law at the University of Geneva, Switzerland and associate professor at the Université du Québec à Montréal, Canada. He chairs the boards of the Geneva Academy of International Humanitarian Law and Human Rights and of Geneva Call, an NGO with the objective to engage armed non-State actors to adhere to humanitarian norms. He thanks his research assistants, Ms. Lindsey Cameron and Ms. Julia Grignon for their invaluable research and challenging remarks in preparing this paper and for revising the text.

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1. INTRODUCTION

On the tenth anniversary of this Yearbook, which is also the thirtieth anniversary of the 1977 Additional Protocols and the hundredth anniversary of the 1907 Hague Conventions, it may be appropriate to step back for a moment and to analyse the main problems International Humanitarian Law (IHL) is facing in the contemporary world. Although there are some old and some new controversies on the substantive rules, including some claims that IHL is no longer adequate for the reality of contemporary armed conflicts, there is near unanimity among States and scholars that the main challenge is effective implementation on the ground, during armed conflicts. Even controversies about the substance of some rules are more often than not due to difficulties in implementing uncontroversial norms in certain 'new' situations or overshadowed by the fear that some as such reasonable exceptions or interpretations will give rise to abuse when applied in a self-applied system.

Implementation mechanisms can be divided into three categories: the preventive measures to be taken in peace-time, those ensuring respect during armed conflicts, and those repressing violations. Significant progress has been made with respect to the first category, in particular national legislation, training and dissemination, during recent years, *inter alia*, thanks to the advisory services offered to States by the International Committee of the Red Cross (ICRC) and to the impetus given to national legislation by the Statute of the International Criminal Court (ICC). As for the third category, the breathtaking development of international criminal law and in particular of international criminal justice in the last 15 years has certainly provided IHL a new credibility and increased effectiveness. However, clear successes are still lacking in the second category, though it is the crucial test for the war victims; the other two categories simply contribute to the desired overall result, which is respect during armed conflict. The challenges IHL meets when it comes to its respect (and which explain why it is not sufficiently respected) are manifold and difficult to categorize. Many are interlinked. Many are old, inherent to the law, the situation to which it applies or to human nature. Few challenges are really new. Some are due to reality, others to perception of reality. Some challenges could be

overcome by a minimum of political will, others would need profound changes in the international society, or, worse, human nature. Some, I fear, will necessarily persist as long as armed conflicts exist.

The challenges I deal with are a selection, but this selection is not arbitrary. If I do not mention the often complicated and sophisticated character of the rules, the reason is that I believe that the principles behind those rules are easy to understand, that the fighter on the ground does not have to understand all the complicated distinctions and that only a few officials have to be aware of the latter. Neither do I mention the unity and universality of IHL as threatened. Contemporary reality shows that people unwilling to respect IHL, whether they have been trained at Harvard University or at a Pakistani Madrassa, may find sophisticated arguments for not respecting IHL, just as those willing to respect it may find arguments for respect in all cultures, religions and systems of thought. As for technology, it constantly influences ways in which developed States fight armed conflicts, it may require changes in the IHL rules on means and methods of warfare and it could in the future challenge many rules of IHL.³ However, in today's armed conflicts, in my view it is not yet a major challenge to the implementation of existing rules.

Before discussing those challenges – an overview which will inevitably provide a rather bleak picture of IHL – it is essential to recall the unexpected successes of IHL in recent years. When the author of these lines joined the legal division of the ICRC 22 years ago, IHL was largely a secret science dealt with in closed circles by a few ICRC lawyers, a few (mainly Western) military lawyers and the veterans of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 1974 to 1977. To the best of my knowledge, the only university world-wide where a regular IHL course was offered was that of Geneva. The UN still referred to IHL as human rights in armed conflicts. Today, the expectations of belligerents and the arguments made, including the hypocrisies adopted by governments, rebels, terrorists, politicians, diplomats, NGO activists, demonstrators, journalists constantly refer (correctly or not – but increasingly correctly) to IHL. It is omnipresent in UN Security Council resolutions, in UN Human Rights Council discussions, in political pamphlets of opposition movements and in reports of NGOs, in the training of soldiers and in non papers of diplomats. The US President himself had to classify conflicts and captured enemies,⁴ the US Supreme Court has disagreed with that classification⁵ and the US Secretary of Defence had to answer sophisticated ques-

3. See L. Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars', 71 *International Law Studies* (1998) pp. 39 at 42-45.

4. See for a legal explanation of the US position on Afghanistan: The White House, *Memorandum of February 7th*, 2002, Appendix C to *Independent Panel to Review DoD Detention Operations*, Chairman The Honorable James R. Schlesinger, August 24, 2004, to US Secretary of Defense Donald Rumsfeld, at <<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>>.

5. See *Hamdan v. Rumsfeld*, 548 US (2006), 126 S. Ct. 2749.

tions by journalists on IHL.⁶ Prime ministers and presidents have disagreed over the proportionality evaluation for some envisaged aerial bombardments. Doctoral students and scholars write an indigestible amount of theses and articles on IHL. More importantly, IHL is now an important parameter for many military commanders, advised on the ground by lawyers. Finally, IHL is referred to daily by defence lawyers and prosecutors in international and – to a still more limited extent – domestic tribunals and forms the basis for well reasoned verdicts. Even sceptics on whether IHL is law must recognize that some people are serving prison sentences because they violated that law.

This article focuses, however, upon the challenges. Some of them are inherent to IHL for the following reasons: because it applies to such violent situations as are armed conflicts; because it is not sufficiently understood or, conversely, it is well understood but manipulated; because a situation must be classified as armed conflict before it can be applied; because its existing implementation mechanisms either do not function, or, if they do function (such as the ICRC and criminal prosecution) nevertheless have their limits; and finally, because the structures of authority necessary to enforce any legal order are lacking. Additional challenges exist in certain conflicts and with regard to certain players. These include asymmetric conflicts; parties whose very war aim is incompatible with IHL; conflicts in which the fundamental principle that parties of armed conflicts are equal before IHL is challenged in discourse and reality; and non-State armed groups, which make up more than half of all parties of all armed conflicts. Beyond those challenges that arise simply from the reality of armed conflicts, there is a perhaps even more dangerous challenge in perception. The gap between the ever-growing promises of protection by the law made by doctrine, jurisprudence and sometimes even by States, and the systematic non-respect of that law, which (in my view wrongly) transpires from the media and NGO reports, undermines the credibility of the law and the willingness to respect it. I will try to comment in this contribution, in this order, upon these challenges

2. CHALLENGES INHERENT TO INTERNATIONAL HUMANITARIAN LAW

2.1 **IHL applies to armed conflicts, situations not very conducive to the respect of rules**

At the outset, I have to state the obvious: IHL applies to armed conflicts. Armed conflicts are illegal (for at least one of the parties) and are a chaotic situation, the very opposite of a situation facilitating the rule of law. It would be highly astonish-

6. US Department of Defense News Briefing, Secretary Rumsfeld and Gen. Myers, Washington, 8 February 2002, <<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2624>> (last accessed 3 September 2007).

ing if IHL were perfectly respected in such a situation. If our world were marked by the respect of international law, there would be no international armed conflicts. If domestic law (and, many would add, international human rights law) were complied with in all countries, no non-international armed conflicts would exist. IHL would therefore never apply. Furthermore, IHL is a part of international law. Like most other branches of international law, IHL is marked by the absence of third party adjudication and enforcement. There is no judge and no police. Its respect depends on self-application by the addressees – states, armed groups and individuals involved in armed conflicts. In armed conflicts, however, the very survival of those addressees is at stake. It is therefore not astonishing that their behaviour is less law-abiding than, for example, the behaviour of states and individuals in the field of international telecommunications. The usual mix of negotiations, mutual promises of advantages and inherent threats of disadvantages, which lead to most rules of international law being respected most of the time, does not work between belligerents who are trying to defeat each other. Reciprocity, an important sociological factor and legal argument for the respect of international law, does not work in asymmetric conflicts and inevitably affects the few rules still in force between belligerents, i.e. it results in belligerent reprisals which often lead in practice to a ‘competition in barbarism’⁷ rather than inducing the enemy to cease violations.

2.2 **Like all of (international) law, IHL is threatened by ignorance and manipulation**

For all law, but in particular for a branch of international law like IHL lacking efficient third-party enforcement mechanisms, the major obstacles to its respect in good faith are ignorance and manipulation.

As for ignorance, those who do not know the rules cannot respect them. This also applies to those who erroneously think that the rules do not apply to them because their cause is noble and just and the enemy evil; to those who think that the situation they are confronted with is so new that the ‘old’ law cannot be applied; and to those who think that in exceptional circumstances the rules do not have to be complied with. All those people will not respect the rules. This is why relentless dissemination efforts are crucial. As for manipulation, there are two categories: some brilliant lawyers, trained in the best law schools, try to argue IHL away, claiming through sophisticated legal constructions that IHL does not apply, that it provides their side only rights and their enemies only obligations, or even that some places or individuals are outside the law. Those lawyers may have passed their exams with high marks, but they will not pass the exam of humanity, of the object and purpose of IHL. The second category of manipulators may deserve more sympathy, but is equally dangerous for IHL: those who claim that every one of their humanitarian wishes is already fulfilled by the existing law bind-

7. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict* (London, Stevens 1968) p. 99.

ing upon the states. To increase protection of war victims, they interpret rules extensively, they apply all rules of international armed conflicts to non-international armed conflicts and they claim that all treaty rules are customary. As will be discussed later in the context of the widening credibility gap, I think that such manipulations are also dangerous, because they weaken the rules which are actually accepted by states by giving belligerents the impression that IHL is the agenda of professional do-gooders, which cannot be respected in actual warfare. In reality, IHL is a compromise between humanity and military necessity, a compromise which cannot always satisfy humanitarian agendas, but which has the immense advantage that it has been accepted by states as law which can be respected, even in war. Those who want to over-extend it or make wars impossible through their interpretations of IHL will, in my view, simply deprive those victims who are actually protected by the existing rules of their protection.

2.3 **IHL applies only to armed conflicts: the challenges of ‘underclassification’ and ‘overclassification’**

Traditionally, when states were confronted with armed conflicts, the first line of defence against the restraints of IHL to which some of them resorted was denying it applied. They applied national criminal laws and tried to deal with the transnational aspect of the challenge through judicial cooperation in criminal matters. They insisted that they were not engaged in hostilities, but in law enforcement. Although they were reluctant to admit it, those states could not deny that international human rights law and domestic constitutional guarantees applied to the situation. This, for example, was for decades the position of the Turkish government, which considered that the situation in Eastern Turkey was not an armed conflict, but simple law enforcement against PKK terrorists.⁸ Today, this is the position of the Russian government concerning Chechnya.⁹

One of the few genuinely new challenges of IHL is the reverse phenomenon: States try to ‘overclassify’ a situation as an armed conflict in order to apply IHL even where it does not apply. Following the great shock of September 11, 2001, the US administration, challenged by the nebula of international terrorism, personified by Al-Qaeda and Osama Bin Laden, but consisting in reality rather of a loose network or simple franchises using the name of Al-Qaeda, declared that it was engaged in a single worldwide international armed conflict against a non-state actor (Al-Qaeda) or perhaps also against a social or criminal phenomenon, terrorism. All those considered to be involved on the enemy side in this ‘war on terrorism’, even those who are – rightly or wrongly – denied the benefit of full protec-

8. For an example of this position, consistently re-affirmed by Turkish government officials, see the text of a report in English by the Turkish news agency Anatolia, ‘Turkish premier re-iterates determination to combat terrorism’, *BBC Monitoring Europe* 11 May 2008.

9. See A. Alexandrov, ‘Military Ministerial Saga’, *What the Papers Say Weekly Review (Russia)*, 21 July 2008 (Press Extract no. 17).

tion by IHL of international armed conflicts, were not dealt with under domestic criminal legislation or international human rights law, because, as the US administration claimed, their treatment was entirely and exclusively ruled by some mysterious rules of customary 'laws of war'.¹⁰

Intended as the branch of international law providing protection to all those affected by or involved in armed conflicts, IHL has thus become the justification for denying persons not involved in armed conflicts any protection afforded by human rights law and domestic legislation. Fortunately, US courts are increasingly dismantling this line of argument.¹¹ However, today, such 'overclassification' is no longer a privilege of the US, but it seems also to be used by some Latin American military to justify more robust methods in fighting social unrest.

Many humanitarians who were previously convinced that IHL should be applied as broadly as possible¹² were led to conclude that an 'overapplication' of that law has at least four negative effects. First, it deprives persons of the better protection they would benefit from under the law of peace, in particular against the use of force and deprivation of freedom. Indeed, under IHL, enemy combatants may be attacked until they surrender, independently of whether they represent an immediate threat to those who attack them and whether it would be possible to arrest them, while such a practice would be qualified as an extrajudicial execution in the law of peace, i.e. human rights law applicable to law enforcement. Under IHL, captured enemy combatants may be held as prisoners of war for a time not determined at the time of capture, i.e., until the end of active hostilities, without trial and without judicial review, while in peacetime even the worst criminal has a right to be tried as rapidly as possible and the most dangerous terrorist has access to *habeas corpus*. Second, not astonishingly, when applied to a situation for which it was not made IHL appears inadequate (e.g., if it meant to grant the full protection of the Third Geneva Convention on prisoners of war to 'terrorists' arrested in Chicago¹³). Therefore, it is applied selectively. Indeed, third, while the US claimed in the 'war on terror' all the prerogatives that IHL of international armed conflicts confers upon a party to such a conflict, it denied the enemy the protection afforded by most of that law. Fourth, this pick-and choose approach inevitably weakens the willingness to respect IHL entirely, unconditionally and independently of conflicting contrary interests even in situations where IHL actually and uncontroversially

10. See for a discussion and criticism of this position, M. Sassòli, 'Terrorism and War', 4 *J Int. Criminal Justice* (2006) pp. 959-981, especially at 963-964 and 971-974.

11. See in particular United States Supreme Court, *Rasul v. Bush* (28 June 2004) 542 US 466; *Hamdan v. Rumsfeld* (29 June 2006) 548 US 557; *Boumediene v. Bush* (12 June 2008) 553 US.

12. Such as those following the arguments of J.S. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC 1958) p. 36.

13. For the US administration's desire to invoke the laws of war concerning José Padilla, a US citizen arrested at Chicago Airport, see *Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, Padilla v. Rumsfeld*, 02 Civ. 4445 (MBM), 2002 US Dist. (S.D.N.Y. August 27, 2002), also at <http://news.findlaw.com/hdocs/docs/padilla/padilla_bush82702grsp.pdf>.

applies. Many consider that the cases of torture in Abu Ghraib would not have been possible without the corrupting influence of the selective application of IHL in Guantánamo, although for the former, contrary to the latter, the US never denied the full applicability of Geneva Conventions III and IV.¹⁴

2.4 **IHL applies in an international society of states not willing to uphold the rule of international law**

2.4.1 *Many implementation mechanisms do not work due to lack of political will*

To overcome the lack of respect for IHL, many have thought about new, additional mechanisms of implementation. In 2003, the ICRC organized several regional expert meetings on this question.¹⁵ I have also made some suggestions.¹⁶ The basic problem about all such ideas is that they would only be accepted by states and could only actually function if states were willing to accept the rule of international law, including efficient third-party enforcement, in international society, which is – as we all know – not the case. If, however, it were the case, we would not need new mechanisms of implementation, because the existing ones could do the job perfectly.¹⁷

Out of the mechanisms which are on the books, some, such as protecting powers and the International Humanitarian Fact-Finding Commission, never function because the political will to use them is lacking. Other mechanisms, such as the obligation of third states to ensure respect of IHL by belligerents and the United Nations collective security and human rights mechanisms, function only in some cases and selectively. They have an insufficient impact or other priorities than an impartial enforcement of IHL (for example, the Security Council hopefully has as its priority putting an end to the fighting). What remains is often the ICRC and individual criminal responsibility. Both have an invaluable function for the war victims. However, both also have their limits.

14. See for example, K.J. Greenberg and J.L. Dratel, eds., *The torture papers: the road to Abu Ghraib* (Cambridge, Cambridge University Press 2005).

15. See *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and the Red Crescent, Geneva, 2003, Annex III [hereinafter, ICRC Report].

16. See M. Sassòli, Armed Groups Project, 'Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law', at <http://www.armedgroups.org/_media/Sassoli%20Armed%20Groups%20paper.doc> (last accessed 13 January 2006) pp. 18-19.

17. See ICRC Report, *supra* n. 15, at p. 47.

2.4.2 *Limits of the ICRC*

The ICRC's assets are its independence, its humanitarian action, its impartiality and its principled approach. However, the ICRC is not without its own limitations. First, despite its independence from states, the ICRC exists on a planet dominated by them. Its leverage on powerful states like India (Kashmir) and Russia (Chechnya) is so limited that it may not even try to put pressure on them publicly. Even if from a legal and humanitarian point of view it should probably have done otherwise, one can understand that the ICRC accepted the (rather counter-factual and counter-intuitive) determination by the unanimous UN Security Council that the occupation of Iraq had ended on 30 June 2004.¹⁸ Second, when confronted with the alternative of either getting access to persons in need of its protection and assistance or insisting on the respect of the law, the ICRC will generally choose the former. Third, even where the ICRC insists upon the respect of the law, it will most often do so confidentially and bilaterally, which may have positive effects for those protected by the rules, but increases the public perception that the law does not matter. Fourth, having faced repeated attacks against its personnel, the ICRC must unfortunately be increasingly concerned about the security of its own staff. Thus it is obliged to balance the protection of those it has a mission to protect against the risks of fulfilling such mission. In more and more situations (Eastern Congo, Iraq, Chechnya), it is no longer able to be fully present in midst of the fighting and therefore cannot directly monitor the respect of IHL where it is most violated.

2.4.3 *Limits of international criminal justice*

As for international criminal law, the regular prosecution of war crimes could have an important preventive and deterrent effect: it clarifies that IHL is law, it has a stigmatizing effect in the eyes of public opinion, and it places responsibility and punishment on the individual. However, IHL provisions on the prosecution of war crimes were largely ignored until 1990. It is only with the development of international criminal justice, first through and by the two *ad hoc* tribunals for the former Yugoslavia and Rwanda and then with the establishment of the ICC, that war crimes prosecutions began to be perceived as a reality. A lot more still has to be done, however, in particular at the domestic level. As for the international level, which remains crucial in terms of perception and deterrence, until recently, international criminal courts existed for only two of the many situations requiring them. Once the ICC Statute has been universally accepted and the ICC functions effectively without too much direct interference by the UN Security Council and its permanent members, this geographical limitation will be overcome. The very credibility of international justice depends on this: justice which is not the same for everyone is not justice. IHL cannot be fully credible, in the eyes of international

18. SC Res. 1546 (2004); K. Doermann and L. Colassis, 'International Humanitarian Law in the Iraq Conflict', 47 *GYIL* (2004) p. 293, at 307-312.

public opinion and in particular in the eyes of those who sympathize with the perpetrators in the former Yugoslavia and Rwanda or with the victims in Palestine, Lebanon or Chechnya, as long as war criminals from Israel, Lebanon, or Russia are not equally brought to trial. Another, material limitation is a result of the understandable policy of the ICC Prosecutor to concentrate upon the most large-scale and most representative crimes.¹⁹ One may only hope that prospective perpetrators envisaging attacking ‘only’ hundreds of civilians or torturing ‘only’ tens of prisoners do not study the ICC website.

Anyway, even apart from the limitations to which it is subject in reality, criminal justice cannot be the only mechanism ensuring the implementation of IHL. Criminal lawyers have known for a long time that criminalization and punishment are not the only answer to socially deviant behaviour. The increasing focus of public opinion on criminal prosecution of violations of IHL may also have increased the reluctance of states and of their military to use existing mechanisms for fact-finding, such as the International Humanitarian Fact-Finding Commission.²⁰ Although the ICRC stresses that it will not provide information for the purpose of the prosecution of perpetrators and it has obtained corresponding immunities,²¹ states and armed groups may also have become more reluctant to give the ICRC access to victims of IHL violations – in places of detention and in conflict areas. Certain proposals to develop new mechanisms for the implementation of IHL may also meet resistance in military circles because they could facilitate criminal prosecution, although this is not their aim. This may explain the reluctance of the military to suggestions that states must keep records to operationalize the proportionality principle, that they should ensure a minimum of transparency about precautionary measures taken in the conduct of hostilities or that they should conduct, in conformity with international human rights law, enquiries in case of civilian deaths and make their results publicly accessible.²²

An exclusive focus on criminal prosecution may also give the impression that all behaviour in armed conflict is either a war crime or lawful. That impression increases frustration and cynicism about IHL and its effectiveness, which in turn facilitates violations. More importantly, that impression is simply wrong. Indeed, an attack directed at a legitimate military objective which must not be expected to cause excessive incidental harm to civilians is not a war crime, even if many civilians die. Except in case of recklessness, mistakes in targeting are not war crimes. For the protection of the civilian population it is however crucial that all those

19. International Criminal Court, The Office of the Prosecutor, *Letter to Senders re Iraq*, 9 February 2006, <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>.

20. See Art. 90 of Protocol I.

21. See *The Prosecutor v. Simić and others*, IT-95-9-T, Decision on the Prosecution Motion under Rule 73, 27 July 1999, and Art. 73 of the ICC Rules of Procedure and Evidence.

22. See M. Sassòli and L. Cameron, ‘The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*’, in N. Ronzitti and G. Venturini, eds., *Current Issues in the International Humanitarian Law of Air Warfare* (Utrecht, Eleven 2006) pp. 35-74, especially at 63-64 and 71.

launching attacks take all feasible measures to minimize incidental civilian harm or mistakes, e.g., by verifying targets, selecting tactics, timing and ammunition and giving the civilian population an effective warning,²³ although a violation of that obligation is not a war crime. Similarly, it is crucial for war victims that occupying powers do not legislate as if they were at home, that the ICRC is provided access to protected persons, that detainees may exchange family news, that families separated by frontlines are allowed to reunite, that (former) parties to a conflict cooperate to clarify the fate of missing persons, that mortal remains are if possible identified, that humanitarian organizations are provided access to persons in need or that children are provided with appropriate education and that civilians both in occupied and on enemy territory get an opportunity to find employment. All the aforementioned is prescribed by IHL, but the violation of such prescriptions is not a war crime.

The great civilizing impact of international criminal law is that it individualizes responsibility, guilt and punishment. Nevertheless, war is preponderantly a collective phenomenon. Given modern technology, military structures and political oversight, hostilities may be planned and executed in a system in which no one has full knowledge and control, yet IHL will only be respected if everyone takes it into account. Individualization of such complex processes is essential, but it is, first, not easy conceptually to criminalize all its aspects; second, it is often impossible to obtain sufficient evidence to prosecute all those involved; and third, individual responsibility is only half of the truth. The other, indispensable part of every effort to improve respect for IHL lies in establishing the responsibility of the state or armed group and in sanctioning it.

Criminal justice furthermore inevitably adopts a retrospective, legalistic, procedural and confrontational perspective about behaviour in war. Despite all contemporary efforts to integrate the victims' perspective, the perpetrator remains and must remain at the centre of any trial. IHL, however, must also be implemented through preventive action, immediate reactions to violations, and providing immediate redress to victims (often without distinction between those who are mere war victims and those who are victims of violations of IHL). A co-operative and pragmatic approach often leads to better immediate results, while in the long run it is equally important that the law is reaffirmed and the perpetrators are confronted. There exists a great complementarity and mutual reinforcement between the increasing impact of criminal justice and the traditional way in which IHL is implemented. The only risk is that in the perception of public opinion, third states, NGOs and those who fight, criminal justice becomes so dominant as a solution that cooperation and humanitarian action are neglected. For third states and the international community, international criminal justice must not be an alibi for not engaging in diplomatic action and sometimes (as a last resort) in military action for the purpose of stopping violations (and the conflict itself).

23. See Art. 57 of Protocol I.

2.5 IHL is law and therefore needs a minimum of structure to be implemented

All law needs a minimum of structure of authority within the society to which it applies. As will be discussed later, international law is still centered on states. IHL is certainly also addressed to individuals, but its implementation depends heavily on 'parties' of armed conflicts: states and, in non-international armed conflicts, organized armed groups. This raises problems in failed states, where formal structures of authority have collapsed and informal structures are non-transparent, transient and based upon interpersonal relations rather than rules.²⁴ In such situations, a legal question of applicability and a practical problem of application appear.

IHL of non-international armed conflicts does not apply to every act of violence within a state. To apply, the situation must meet a minimum threshold in terms of intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect IHL, collective, open and coordinated character of the hostilities, and *de facto* authority by the non-state actor over potential victims.²⁵ As regards the armed group(s) involved, it is important to note that they must have a minimum degree of organization, but the exact degree is not settled in law. Article 1(1) of Protocol II sets a relatively high threshold for a group to be an addressee of it (and which at least one anti-governmental armed group must meet to make Protocol II applicable). The group must 'under responsible command, exercise such control over [a High Contracting Party's] territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol.' The criteria a group must fulfill to make Article 3 common (and presumably the parallel customary law²⁶) applicable are lower, but controversial, as the text itself does not clarify anything. For humanitarian reasons, the ICRC pleads that 'the scope of application of the article must be as wide as possible'.²⁷ The UN Security Council and the former UN Human Rights Commission have applied IHL to thirty very fragmented groups in a situation of chaos in Somalia.²⁸ On the other hand, the international *ad hoc* criminal tribunals and the Inter-American Commission on Human Rights are more restrictive and put emphasis on a minimum degree of organization of a

24. See D. Thürer, 'The "Failed State" and International Law', 81 *IRRC* (1999) pp. 731-761.

25. See L. Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press 2002) pp. 30-52, and J.-F. Quéguiner, 'Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', 85 *IRRC* (2003) p. 278.

26. The recently published ICRC study on customary IHL is silent about the material field of application of the many customary rules applicable to non-international armed conflicts, despite its length of more than 5000 pages. See J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge, Cambridge University Press 2005).

27. See *supra* n. 12.

28. See L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, Cambridge University Press 2002) pp. 138-141.

group.²⁹ One may adopt a functional approach and consider any group to be subject to some rules formulated in terms of absolute prohibitions (such as the prohibition of torture), while not necessarily also to rules requiring a minimum degree of organization (such as the respect of judicial guarantees). This approach may be appropriate once an armed conflict already exists. However it defies logic if it is used to determine whether at least two groups have the necessary degree of organization to make the situation an armed conflict, as IHL cannot only partly apply in a situation. For that purpose, I argue, it is preferable to require from an armed group the minimum degree of organization necessary to comply with all rules of IHL of non-international armed conflicts – which are anyway mostly formulated in prohibitory terms. Anyway, once IHL of non-international armed conflicts applies because the threshold is met, including at least two parties having the necessary degree of organization, it applies to every act committed with a nexus to the conflict,³⁰ even if the perpetrator of the act does not belong to any party to the conflict and acts outside any structure of authority.

Even independently of those questions of applicability, it is simply practically much more difficult for third parties (such as humanitarian organizations) to convince, train, monitor, every (perhaps drug addicted) child soldier concerning the respect for IHL, than if a commander exists who can commit his subordinates to respect IHL, instruct them, monitor their respect, repress violations receive and deal with allegations of non-respect.

3. CHALLENGES DUE TO THE NATURE OF CERTAIN CONFLICTS AND OF CERTAIN ACTORS

3.1 Particular difficulties in obtaining respect of IHL in asymmetric warfare

IHL as it stands is best suited to armed conflicts between equally powerful parties. The more asymmetric a conflict is, the more difficulties arise for the implementation of IHL and for humanitarian action.³¹ At least when the US is involved, every conflict is asymmetric, because of the incredible technological superiority and military strength of US armed forces. In non-international armed conflicts, those fighting against the government are, at least in the initial phase, nearly by definition inferior in power and would have no chance to overcome governmental armed forces in an open battle between clearly distinguished fighters, which is the situation for which IHL is best suited.

29. Ibid., pp. 134-138.

30. *The Prosecutor v. Dušan Tadić*, Case No. IT-94-1-A, Decision on Jurisdiction, 2 October 1995, para. 70, and ICTR, Judgement, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras. 425-446.

31. See T. Pfanner, 'Assymetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', 87 *IRRC* (2005) pp. 149-174.

In such asymmetric wars, both sides are convinced that they cannot win the war without violating or at least ‘reinterpreting’ IHL. Concerning the ‘war against terrorism’, an official US commission of inquiry has concluded that the US could not defeat the ‘enemy’ if captured enemies had to be treated according to the Third Geneva Convention as interpreted by the ICRC.³² Implicitly, the claim is that the necessary intelligence information about terrorist networks can only be obtained by treating those who are supposed to have such information inhumanely. As for the enemy, armed groups are classified as ‘terrorist’ because they regularly resort to terrorist acts. Such resort is in my view not simply due to a lack of humanity and motivated by hate, but based on a very rational calculation. ‘Terrorist groups’ believe that their only chance to overcome their enemy, who is so much superior in equipment, technology and often manpower, is by demoralizing the civilian population through terrorist acts. In my view, both calculations are wrong. Inhumane treatment of suspected ‘terrorists’ will only contribute to recruiting others and put democratic states on the same moral level as the terrorists. Terrorist attacks only contribute to the determination of the public in democracies to stand behind their governments and to favour military solutions rather than to eradicate the root causes of terrorism (but this may be precisely what the terrorists aim at, because it guarantees them continuing support by their constituencies).

Furthermore, in asymmetric wars, most rules of IHL are in fact addressed to only one side. Only one side has prisoners, only one side has an air force and only one side could possibly use the civilian population as shields. Whereas under IHL reciprocity is not a legal justification for violations, positive reciprocity, i.e., the wish that the enemy would respect the rules in a similar situation in which the roles were inverted, certainly plays an important role as a non-legal factor contributing to the respect of IHL. A combatant treats captured enemy combatants humanely because he or she hopes that he would also be treated humanely if captured. Such motivation is obviously lacking in asymmetric conflicts.

Beyond that, the very philosophy of humanitarian law is challenged by such conflicts. The St. Petersburg Declaration of 1868 has laid down that ‘the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy’.³³ While the aim of a conflict is to prevail politically, acts of violence for that purpose may only aim at the military. This basic philosophy is beside the point in asymmetric wars. One of the strongest arguments used to convince belligerents to respect IHL is that they can achieve victory

32. J.R. Schlesinger (Chairman), *Final Report of the Independent Panel to Review DoD Detention Operations* (August 2004) p. 85 <<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>>.

33. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St. Petersburg, 29 November/11 December 1868, Georges Frédéric de Martens, *Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international*, Gottingue, 1ère série 1843-1875, Vol. XVIII at 474-475; reproduced in D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts: a collection of conventions, resolutions, and other documents*, 4th edn. (Leiden, Martinus Nijhoff 2004) p. 91.

while respecting IHL and that IHL will even make victory easier, because it ensures that they concentrate on what is decisive, the military potential of the enemy. This argument is not fully true in asymmetric conflicts. Finally, the weaker side in an asymmetric conflict often lacks the necessary structures of authority, hierarchy, communication between superiors and subordinates and processes of accountability, all of which are necessary, as discussed above, to enforce IHL or any other rules. Legally, one may obviously consider that such groups do not possess the minimum structure of organization necessary to be a party to an armed conflict discussed above, and that IHL therefore does not apply to such conflicts. In practice, this would however mean that IHL does not apply at all to asymmetric conflicts, not even to the more organized governmental side.

3.2 **IHL is humanitarian; thus, its respect is particularly difficult to obtain when the very aim of belligerents is inhumane**

It has just been mentioned that one of the factors traditionally contributing to the respect of IHL is that such respect does not hinder a belligerent from achieving its aim to overcome the enemy, but may even facilitate victory. This argument presupposes, however, that, as for the first time codified in St. Petersburg in 1868, acts of violence may only be directed at the military potential of the enemy. Anchored in the principle of military necessity,³⁴ as a restraint to warfare, this curbs 'total war'. Acts of violence against persons or objects of political, economic, or psychological importance may sometimes be more efficient to overcome the enemy, but are never necessary, because every enemy can be overcome by sufficiently weakening its military forces. Once its military forces are neutralized, even the politically, psychologically, or economically strongest enemy can no longer resist. Today this line of reasoning is not simply called 'oversimplistic' by some scholars,³⁵ but its very basis is at odds with what many engaged in warfare want to achieve. If their aim is genocide, ethnic cleansing, looting and rape, from their point of view it is logical that they do not aim at the military. Their very aim is incompatible with IHL. Furthermore, if belligerents do not want to win the conflict but to perpetuate it because only the conflict environment allows them to live from what they steal from the civilian population and to loot the resources of the country, if they want to rape with impunity, to feel powerful with their weapons, the respect of IHL would make the achieving of any of those aims largely impossible. In such situations, where IHL is incompatible with the very aim pursued by a belligerent, it is particularly difficult to obtain its respect.

In other situations, IHL does not prohibit the achievement of the aim pursued by a belligerent, but it may prohibit what the belligerent perceives as the only or ea-

34. See G. Venturini, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale* (Milano, Giuffrè 1988) in particular pp. 145-150.

35. M. Schmitt, 'Targeting and Humanitarian Law: Current Issues', 34 *Israel YB HR* (2004) pp. 59-104 at 68.

siest means to achieve that end. If an armed group thinks it may achieve the aim of getting a numerically and technologically superior enemy to withdraw only by terrorizing the civilian population, it must perceive IHL as making the achievement of its aim (which is as such fully compatible with IHL) impossible. Similarly, a belligerent wishing to oust an enemy government (as such an aim fully compatible with IHL) may do so under IHL only by fighting against that government's armed forces. Once those armed forces are defeated, but the government still does not want to give up, technologically superior armed forces may 'run out of targets' for their air force and missiles.³⁶ The only option remaining under IHL is then to occupy the enemy country to physically arrest the members of that government. The experience of the US and its allies in occupying Iraq may strongly discourage future belligerents to choose that way; in fact, it may have provided them with even greater incentive to take short-cuts and to try to provoke the local (enemy) population to oust the enemy government. If this is done through propaganda, including disinformation, it raises no problems with IHL. If this is achieved by attacking that population or the infrastructure it uses, or even by making that population's life impossible, it is incompatible with IHL. Respect of IHL by such a belligerent may therefore imply the necessity to choose a strategy costing the lives of more of its soldiers. This is more challenging than to convince a traditional belligerent to attack ammunition factories rather than holiday resorts.

3.3 The equality of belligerents before IHL is challenged in discourse and reality

Perhaps the most important principle of IHL is the absolute separation between *ius ad bellum* (the law on the legitimacy of the use of force) and *ius in bello* (the law on how force may be used) and the resulting equality of the belligerents before IHL, independently of the justification of the cause for which they are fighting.³⁷ This equality of the belligerents is also a crucial difference between an armed conflict to which IHL applies and a crime to which criminal law and the rules of human rights law on law enforcement apply. It is frequently challenged or ignored by those who are convinced that they have a particularly 'just' cause.³⁸

36. J. Baker, 'When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict', 55 *Naval War College Review* (2002) p. 11; A. Roberts, 'The Law of War After Kosovo', in A. E. Wall, ed., *Legal and Ethical Lesson of NATO's Kosovo Campaign*, Volume 78 U.S. Naval War College's International Law Studies (2002) at p. 416.

37. See generally M. Sassòli, '*Ius ad bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?', in M.N. Schmitt and J. Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Leiden, Martinus Nijhoff 2007) pp. 241-264, with references.

38. That *ius ad bellum* and *ius in bello* are blurred in those parts of the 'war on terror' which are armed conflicts is confirmed by at least one expert, who writes, 'contemporary IHL absolutists, by eliding distinctions between lawful and unlawful combatants and adopting an interpretive approach absolute with respect to observance of ... the *ius in bello* ... but agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the *ius ad bellum*), privilege terrorists at the

Even if only at the level of perception – and not of legal argument – international armed conflicts appear to become law enforcement actions directed by the international community against ‘outlaw States’, it is more difficult to obtain respect for the rules of IHL in such situations.

From the perspective of the UN Charter, the contemporary world can be perceived as ruled by a collective security system. Others may see it as developing towards a hegemonic system in which the sole superpower will ensure international law and order with coalitions of the willing.³⁹ From both perspectives, international armed conflicts between states can no longer be perceived as conflicts between equals. Both from the point of view of the means at the disposal of the two sides and from a moral point of view, they are asymmetric. On the one side there is the international community and those who represent it, or at least who claim to represent it; on the other side there is generally one single ‘outlaw’ state (in recent years, for instance, Yugoslavia or Iraq).

In such an environment, the separation between *ius ad bellum* and *ius in bello*, and the application of the same IHL rules to both sides, becomes less and less acceptable for those who perceive themselves as enforcing the common interest. In my view this is one of the main reasons why the UN is so reluctant to recognize that it is not only bound by the principles and spirit, but also by all rules of IHL.⁴⁰

At the same time, equal application corresponds less and less to reality because the militarily weaker ‘outlaw’ does not respect IHL, but rather sees the resort to acts prohibited by IHL, such as terrorist attacks or acts of perfidy, as his only chance of avoiding total defeat.

The major disadvantage of such erosion of the equality of the belligerents in both arguments and reality is that it leads to a self-fulfilling prophecy and an *ex-post* justification for IHL violations. IHL applies to armed conflicts between equals. Law enforcement concerns a relation between unequals, the state and the criminals. Once armed conflicts become a kind of law enforcement between unequals, there will be no rules on how the outlaws may fight against law enforcers. If the enemy is simply perceived as a criminal, his killing of women and children indiscriminately and targeting members of armed forces become legal equivalents. As for the enemy, if he perceives himself as a mere criminal and not as a party to an armed conflict with rights and obligations, he will not even feel bound by IHL (rather than simply acting in violation of IHL). As for the ‘law enforcers’, they can no longer be bound by the full set of IHL rules, including, e.g., combatant status and combatant immunity for the members of the ‘outlaw’ armed forces. Nor can the ‘law enforcers’ tolerate the resistance that IHL puts up in situations of military

expense of their fettered targets.’ W. Bradford, ‘Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War’, 73 *Mississippi LJ* (2004) p. 639 at 860.)

39. D. Vagts, ‘Hegemonic International Law’, 95 *AJIL* (2001) pp. 843 et seq. and J.E. Alvarez, ‘Hegemonic International Law Revisited’, 97 *AJIL* (2003) pp. 873-888.

40. Sassòli, *supra* n. 37, p. 242 at 259.

occupation to changes of laws and institutions by an occupying power.⁴¹ At most, they will accept being bound by a new set of *temperamenta belli*,⁴² human rights-like restraints addressed to those who are engaged in international law enforcement – but not to their enemies.⁴³ Thus, the historical cycle, which started with *temperamenta belli* for those engaging in a *bellum iustum*, would be closed and we would return to the starting point.

It may be that this development is inevitable. I would hope it would take place in the form of strengthened international institutions able and willing to enforce the rule of international law. In such an environment, there could indeed be inequality before the law as between those who enforce international law and the subjects of that enforcement. Yet, I contend that contemporary reality remains very far from the utopia just described – and from a genuine hegemonic world order. First, the world is still made up of sovereign states. Even when they violate international law, states cannot yet be perceived as simple criminal gangs, comprised of criminal individuals. In particular, the freedom of combatants, and even more so of civilians, to ‘join’ an ‘outlaw’ state is incomparably less than the freedom an individual has to join a criminal gang at the domestic level. Second, despite all the progress made in recent years, the possibility of holding responsible individuals who decide upon a course of action resulting in their state’s violation of international law is still underdeveloped. It depends to a great extent on the willingness of states to co-operate. This implies that behaviour contrary to the international community’s common interest (including law and order) cannot yet be dealt with exclusively as individual behaviour. It must still in addition be attributed to states to generate the necessarily collective reaction. Third, in the absence of an efficient international system of adjudication, there may, in a given armed conflict, still be *bona fide* divergences of view over which side is the outlaw and which is fighting for the common interest.

As long as these realities remain unchanged, armed conflicts will continue to have more in common with traditional wars than with domestic law enforcement. Law that attempts to protect those involved in, and affected by, a social phenomenon should not disappear before the phenomenon to which it applies disappears. This truism applies to IHL, including the separation which must be drawn between it and the legitimacy of the cause of the parties involved.

41. See M. Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *EJIL* (2005) pp. 661 at 668-682.

42. For the *temperamenta belli*, which Grotius holds applicable to those fighting for a just cause, see P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, PUF 1983) at pp. 597-604.

43. See D. Scheffer, ‘Beyond Occupation Law’, 97 *AJIL* (2003) p. 842; N. Bhuta, ‘The Antinomies of Transformative Occupation’, 16 *EJIL* (2005) p. 721 and S. Ratner, ‘Foreign Occupation and International Territorial Administration’, 16 *EJIL* (2005) p. 695.

3.4 Engaging non-state armed groups

In 1930, a British author wrote: '[I]n spite of the modern theories...international law ... nevertheless has something to do with states.'⁴⁴ Despite all changes the world and international law have undergone since then, this dictum is still true today. International law is mainly made by states, it is mainly addressed to states; its implementation mechanisms are even more state-centred. While the rules on state responsibility are today well codified, the international responsibility of non-state actors is still largely uncharted land. Even when rules apply to non-state actors or are claimed to apply to them, in most cases no international forum exists in which the individual victim, the injured state, an international intergovernmental or non-governmental organization or a third state could invoke the responsibility of a non-state actor and obtain relief.

International reality, however, is less and less state-centred. NGOs, trans-national enterprises and armed groups have one thing in common: they are important international players, but they are still largely non-existent for international law. When asked how the law should deal with this reality, we are confronted with genuine dilemmas. Shall international law engage those non-state actors, giving them inevitably a certain international standing (but with the advantage of being able to require them to comply with certain international standards) or shall it ignore them? For trans-national enterprises and NGOs, the law has an alternative, which is to let the domestic law of the territorial state on the territory of which they act deal with them. For armed groups, this alternative by definition is not practicable, because they would not be armed groups engaged in an armed conflict if they were within the practical reach of the law and the law enforcement systems of the state on whose territory they are fighting. Therefore, the only possibility to engage them is to engage them by international law and by mechanisms of international law.⁴⁵

IHL applicable to armed conflicts not of an international character has, since 1949, been more progressive than the rest of international law. Armed groups are specifically mentioned as addressees of international humanitarian law by Article 3 common of the 1949 Geneva Conventions, which reads: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties *each Party* to the conflict shall be bound to apply, as a minimum, the following provisions' (emphasis added). That article makes it absolutely clear that *both* sides of a non-international armed conflict are bound by these rules. Nevertheless, the mechanisms of implementation for non-international armed conflicts remain very limited and some IHL treaties other than the Geneva Conventions, such as the Ottawa Convention banning landmines, are still only

44. Baty, *The Canons of International Law* (London, Murray 1930) p. 1, quoted by C. Parry, *The Sources and Evidences of International Law* (Manchester, University Press 1965) p. 8.

45. See for a more developed version of my argument with references Sassòli, *supra* n. 16.

addressed to states.⁴⁶ In addition, even when armed groups are bound – as they are by Article 3 common to the Geneva Conventions – it is necessary to engage them to obtain a sense of ownership by them.

In my view, this process starts already when drafting new rules. Today, many people suggest that IHL is no longer adequate for modern conflicts and should be revised. One of the inadequacies mentioned is precisely situations of armed conflicts with armed groups – in particular when they are trans-national armed groups. In the present international environment, I am rather sceptical about the chances of obtaining consensus on new rules genuinely improving the protection for war victims. But let us assume we should revise the law applicable to the fighting between states and armed groups. If we want to revise IHL in a certain area, we have to discuss with the actors, which, in the area of non-international armed conflicts, include the armed groups. No one would suggest revising the law of naval warfare without speaking with the navies. This is the essence of IHL. It has to be applied by parties and with the parties and it has to be based on an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts. This is the big difference compared to criminal law. Criminal law does not have to accommodate the aspirations of the criminals, allow them to reach their aims, or be realistic for them. For criminal law, however, there is vertical, hierarchical enforcement while international law is still basically enforced horizontally, by the parties.

More importantly, the law has to be disseminated to those who have to apply it. How does one disseminate to armed groups, taking their specificities into account? Certainly not by power point presentations! Members of armed groups do not receive, as do members of regular armed forces, months of basic training. Most of the time, once they become members of the armed group, they are immediately sent into action. We should at least be able to suggest some realistic ways in which such people can be trained to respect IHL.

To get a commitment by the armed group is already an important step because this creates somehow a constituency within the armed group. Some members and leaders, who undertook the commitment, will to a certain extent become advocates of IHL within the armed group. They do not want to lose face by showing that they do not have any influence on the group and that the group continues to violate IHL as much as before the commitment was undertaken.

For this purpose, it is even more useful to negotiate a code of conduct with the armed group. In my view, a declaration by an armed group that it will comply with ‘the Geneva Conventions and Additional Protocols’ deserves scepticism. There are some 500 articles in those treaties! Often, a two page code of conduct is preferable, which really addresses the genuine humanitarian issues that arise for a given armed group in the field.

46. This is precisely one of the reasons why Geneva Call, an NGO trying to engage non-state armed groups not to use landmines, tries to get a *Deed of Commitment* from such armed groups not to use landmines: without such a commitment they would simply not be bound. See for Geneva Call, at <<http://www.genevacall.org/home.htm>>.

In my view, armed groups should even be provided advisory services. The ICRC has a specific unit within its legal division which advises states how to implement international humanitarian law, how to adopt legislation in conformity with IHL, and which advises them to create inter-ministerial commissions looking into IHL issues, for example. Such advice is also needed for armed groups. Obviously, armed groups are confronted with other difficulties in implementing IHL than states. Many would be reluctant to see them 'legislating'. However, how else than based upon general and abstract regulations can they obtain compliance by their members, punish those who do not comply or require certain conduct from those who are under their *de facto* control? An inter-ministerial commission – or something akin to it – is probably not what armed groups need. If we want to obtain respect for IHL by armed groups, we should put ourselves into the shoes of their leaders and assume that they genuinely wish to respect it. How should they do it? In my view, it is more difficult for them than for a government with a structure and institutions in place. How does a clandestine, illegal group ensure compliance with IHL? It would probably have to punish members who do not comply. But can it do that, while respecting international human rights law? How could it provide a fair trial? Based on what legislation? Obviously our advice will be based upon the assumption that the group wants to respect IHL and this assumption may often be wrong. This assumption is however equally often wrong for states, which does not hinder us to provide them advice based upon that assumption. Experience shows that such advice will often contribute to making its beneficiaries want to comply with IHL even if initially they did not want to do so. I do not think the ICRC has a list of states to which it does not provide advisory services on the basis that it considers that in any case they are not willing to respect IHL.

The next step is to reward the respect of IHL. In an international armed conflict a combatant will be a prisoner of war once he falls into the power of the enemy. Thanks to combatant immunity he cannot be punished for having killed enemy soldiers. If he commits war crimes, he must be punished. He therefore has a definite interest in complying with IHL. Such a reward does not exist for non-international armed conflicts. If a citizen starts a non-international armed conflict against the government, and kills only soldiers, he or she will nevertheless be prosecuted for murder once captured by governmental forces. Even perfect respect for IHL will not avoid such prosecution. There are probably only very few countries where it is a mitigating circumstance to have only killed soldiers and not civilians. Although this fundamental difference between international and non-international armed conflicts cannot be fully overcome within the Westphalian system, we should nevertheless develop some incentives for those who comply with IHL in its own corpus, in international criminal law, refugee law and international anti-terrorism law. This is one of the major reasons why acts that are committed in an armed conflict and are not prohibited under IHL should never fall under any definition of terrorism.⁴⁷

Commitment, advice and rewards are never sufficient. The respect of the law also has to be monitored. Under Article 3 common to the Geneva Conventions, the ICRC may offer its services to armed groups and if the armed group accepts,

the ICRC may monitor the group's respect in exactly the same way it monitors states involved in international armed conflicts. Similarly, when Geneva Call, an NGO engaging non-state armed groups not to use landmines, obtains a *Deed of Commitment*, this is not the end of the story, but the beginning of a process in which Geneva Call also monitors whether the commitment corresponds to the reality in the field.⁴⁸

Finally, with armed groups as with states, there must be (and there is) responsibility for violations. International criminal law is as much addressed to those fighting for armed groups as to those fighting for states. In international private law the possibility to construe and sanction a violation of IHL as a tort has to be explored and implemented in domestic courts. In this field, the United States is a pioneer with its Alien Tort Claims Act.⁴⁹ Furthermore, the international responsibility of an armed group has already been addressed by sanctions taken by the Security Council against armed groups.⁵⁰ Another area which I think deserves exploration is how humanitarian organizations should react to violations of IHL by armed groups. How should they make sure that armed groups do not take advantage of the competition between humanitarian organizations which face a considerable dilemma when confronted with violations by armed groups? On the one hand, those organizations want to help the people who are in the hands of the armed groups – which necessitates continuing cooperation with the group. On the other hand, it is essential that there be some reaction to violations and that humanitarian organizations do not simply tolerate all violations to ensure access.

There are two main objections in trying to engage all non-state armed groups. First of all, many object that when armed groups are engaged by international actors, they are somehow encouraged to continue violence, which inevitably creates human suffering. I agree that a world without armed groups would be a better world. However, armed groups are simply a reality, just as armed conflicts are a reality. Those who developed IHL did not like armed conflicts, but they did not simply state that armed conflicts should not exist. They also accepted that armed conflicts are a reality and tried to design rules applicable to this reality, accepted by those involved in this sad reality. Similarly, I do not think the unhappy reality of armed groups will disappear because we ignore them. We have to deal with this reality and the first step towards gaining respect of some rules is to speak with the people involved and to have mechanisms engaging with these people.

Second, more moderate opponents accept engaging some armed groups but not all armed groups. I think we have to engage all armed groups. The only limitation

47. See for a more detailed discussion M. Sassòli, 'La définition du terrorisme et le droit international humanitaire', *Revue québécoise de droit international* (2007) (hors série), *Études en hommage à Katia Boustany*, pp. 127-146.

48. See *supra* n. 46.

49. 28 U.S.C. § 1350.

50. See SC Res. 1127 (1997), 1173 (1998), and 1221 (1999) (concerning UNITA), 942 (1994) (concerning the Republika Srpska), 1171 (1998) (concerning rebels in Sierra Leone), and to a certain extent, SC Res. 792 (1992) (concerning the Khmer Rouge).

is that such a group must be a genuine armed group engaged in a genuine armed conflict. Both terms are admittedly not very clearly defined in IHL.⁵¹ Beyond that, I do not see how we could distinguish between ‘good’ and ‘bad’ armed groups. Whether they are ‘serious’ or not, or whether they are willing to comply with restraints, will be shown by the result of the process and therefore cannot be a precondition to the process. From a humanitarian point of view such distinctions would mean that those in need of the greatest protection would be deprived of any protection efforts just because they are in the hands of a group we utterly reject. Next there is a diplomatic problem. If we refuse, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how can we justify with the Government of Sri Lanka that we engage the LTTE or with the Government of Colombia that we engage the FARC? Those governments would never accept that their opponents are ‘better’, more ‘serious’ or more willing to comply with rules than other armed groups. Therefore, I think the only chance is to try to engage all armed groups and to develop mechanisms, not only for the ideal inter-state world under the UN Charter, but also for the real world in which armed conflicts are as much fought by armed groups as by governments. This is the new frontier of IHL. If this law does not develop on that frontier, it will become slowly, but increasingly, irrelevant.

4. THE CHALLENGE OF PERCEPTION: THE CREDIBILITY GAP BETWEEN THE LAW AND REALITY IS GROWING

A recent report on transitional justice in Sub-Saharan Africa by the International Center for Transitional Justice bears the title, ‘Overpromised, Underdelivered’.⁵² Unfortunately, this diagnosis is true for most aspects of the implementation of IHL. In addition, on both sides of the equation, the gap is wider in perception than in reality. All this runs the risk of decreasing the respect of the applicable rules in reality.

4.1 The law increasingly promises protection and respect

On the level of promises made by scholars, international tribunals, international organizations and even by states in their discourse in international fora, substantive IHL is at an enviable level and its rules have developed at a breathtaking speed for the benefit of war victims. We were told that nearly all rules of IHL treaties and many more are customary law and therefore not only binding upon all states, but also based upon state practice.⁵³ In addition, most rules of IHL applicable to international armed conflicts were also found to apply, based upon state practice, to

51. See *supra*, section 2.5.

52. L. Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa* (International Center for Transitional Justice, July 2006).

53. See ICRC Study on Customary IHL, *supra* n. 26.

non-international armed conflicts.⁵⁴ To take just one example, the recent ICRC Study on customary IHL ‘restates’ the rule: ‘The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted’, and, regarding non-international armed conflicts, the commentary states ‘No official contrary practice was found’.⁵⁵ Excellent news for those in need of assistance in the Congo, Sri Lanka, Chechnya or the Sudan! The crux is obviously the term ‘official’ which qualifies the practice and which refers not to what states actually do but to what they say, including when they hypocritically claim that their forces, on the facts, always comply with the highest possible humanitarian standards, while everything their enemies do violates the law. This corresponds to the jurisprudence of the ICJ,⁵⁶ but it will not contribute to the belief in IHL of those deprived in actual practice from humanitarian assistance.

What is more, we are told that most rules of IHL have a *jus cogens* character,⁵⁷ are intransgressible,⁵⁸ and no one provides an example of a rule of IHL that does not have this character. Although some scholars still do not understand the importance of such classification (because treaties derogating from IHL rules⁵⁹ are not the main obstacle for the respect of IHL in today’s world),⁶⁰ it must be satisfactory for the tens of thousands of women raped in armed conflicts around the world, that they are not victims of simple violations of IHL, but of violations of *jus cogens*.

Some states and scholars traditionally postulated a ‘devoir d’ingérence’; the father of this concept is today the foreign minister of France.⁶¹ Today, following a Canadian initiative, one rather refers to the ‘responsibility to protect’, without really clarifying who has this responsibility and how it has to be implemented.⁶²

54. See *ibid.*, and ICTY, *Tadić*, Decision on Jurisdiction, *supra* n. 30, paras. 96-136.

55. ICRC Study on Customary IHL, Vol. I: Rules, *supra* n. 26, at p. 201 (Rule 56).

56. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Judgment (Merits), ICJ Rep. (1996) para. 186.

57. ILC, Commentary, Draft Articles on Responsibility of States for internationally wrongful acts, United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001)*, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), p. 284 (para. 5 to Art. 40); *The Prosecutor v. Zoran Kupreskic and others*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 520.

58. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) p. 226, at 257, para. 79.

59. Which would be void under Arts. 53 and 64 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

60. The consequences laid down in Arts. 40 and 41 of the Draft Articles on State Responsibility adopted by the ILC (see *supra* n. 57) in case of serious breaches of peremptory norms anyway apply under Art. 1 common to the four Geneva Conventions to all violations of IHL.

61. See M. Bettati and B. Kouchner, *Le devoir d’ingérence, peut-on les laisser mourir?* (Paris, Denoel 1987).

62. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre 2001).

More conservative IHL experts simply recall that all states have an obligation to 'ensure respect' of IHL.⁶³ Victims of violations of IHL in Chechnya, however, are still waiting for France to comply with its 'devoir d'ingérence', for Canada to take up its 'responsibility to protect' and wonder whether Germany, Switzerland and Sweden are actually doing all in their power (and that is compatible with the UN Charter) to ensure the respect of IHL by Russia. As for those benefiting, according to some, from international protection against inhumane regimes and armed groups in Afghanistan and Iraq, they simply hope that they will not be too frequently bombed by mistake, as incidental effects, or as human shields during such protection. Under consistent UN Security Council practice applauded by the unanimous college of scholars, violations of IHL, including in non-international armed conflicts, constitute threats to international peace and security. Victims of violations of IHL in Chechnya, Palestine and Iraq are simply still waiting for the Security Council to comply with its 'duties'⁶⁴ in such a case.

We have already dealt above with the progress that international criminal law and international criminal justice have made in fighting impunity and with the difficulties and double standards such fight is still subject to. The international community promised to put an end to impunity.⁶⁵ We were told that there is 'no peace without justice'. Many war victims are simply still deprived of both – in many armed conflicts not even one single perpetrator has been punished, and even where a serious international and domestic effort of criminal prosecutions has been made, most war criminals continue to benefit, *de facto*, from impunity. The case of the former Yugoslavia has simply shown that it is materially, socially and politically impossible to prosecute all those who have committed war crimes according to the very broad interpretation adopted by the ICTY of concepts such as international armed conflict, protected civilian, common purpose or joint criminal enterprise. However, should the war victims not have been told from the very beginning that 'their' perpetrator will very probably not be prosecuted? The gap is perhaps even wider concerning reparations. The UN General Assembly has promised full reparation to all victims of violations of IHL in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁶⁶ Whenever *restitutio in integrum* is not possible, compensation 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case ...'.⁶⁷ Examples mentioned are physical or mental harm, lost opportunities, includ-

63. See Art. 1 common to the four Geneva Conventions.

64. See Art. 24 of the UN Charter.

65. Secretary-General Kofi Annan, Statement on International Human Rights Day, 8 December 2006, at <<http://www.un.org/News/Press/docs/2006/dec/20061208.sgsm1206.doc.html>>.

66. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA A/RES/60/147, 20 March 2006.

67. *Ibid.*, rule 20.

ing employment, education and social benefits, costs required for legal or expert assistance, medicine and medical services, and psychological and social services. An enormous gap remains between such reparation foreseen by public international law, including by the *Basic Principles* in case of mass violations, and practice in actual post-conflict situations. Not only is it often the case that no indemnity is ever provided (Haïti, El Salvador), but, even where compensation programmes exist, the procedures, calculation of the compensation, restrictive definition of violations leading to compensation and sometimes even the link between the violation and compensation depart significantly from the norms prescribed by both international and internal law for individual cases of violations.⁶⁸ In not one single case has full compensation been offered to all victims of violations of IHL. Would it not have been more humane not to create false (and financially completely unrealistic) expectations among those who have already suffered?

4.2 **The perceived reality is increasingly dominated by deliberate, widespread and systematic violations**

4.2.1 *Consequences of the credibility gap*

The widening gap between IHL and the reality in armed conflicts, but even more so the much wider gap between alleged rules and reality perceived through the media and NGO reports, have negative effects on the implementation of IHL. The perceived gap concerning some rules has a contagious effect on other rules. If the postulated customary rule on humanitarian access is not always respected, why should the clear, uncontroversial treaty ban on torture be respected? If the rule providing for full compensation is never fully respected, why should the prohibition of deliberate attacks upon civilians always be respected? Sometimes the promises have also served as an alibi for not acting. According to some sources, this was the hope of some in the Security Council when it set up the ICTY.⁶⁹ Thanks to the first president of the ICTY, the alibi, however, became a reality. Perceiving the gap between promises and the reality they suffer from, the victims are frustrated, no longer believe in the law and, what is worse, those who fight for them are even less likely to comply with IHL. Placing their trust in the promises of the international community, victims may even take wrong decisions, which may be fatal for them. If the inhabitants of Srebrenica had known from the beginning that the UN was unable or unwilling to deliver on the promise inherent in constituting Srebrenica a protected zone, they may not have tolerated Bosnian Muslim forces' occasional provocation of the Bosnian Serb forces through raids on the surrounding

68. See different country studies in P. de Greiff, ed., *The Handbook of Reparations* (Oxford, Oxford University Press 2006).

69. P. Hazan, *Justice in a Time of War: the True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, translated by J. Snyder, E. & H.M. Stewart Series on Eastern Europe (College Station TX, Texas A&M University Press 2004).

villages⁷⁰ and they would likely either have stayed in their villages of origin or have fled to real safety rather than concentrated in the place where they would be massacred. Finally, and most importantly, no fighter, combatant or commander wants to risk his life, freedom, health, efforts, to forego the easiest solution or even victory to be the only one who respects IHL if he is convinced (or suspects) that no one else respects IHL, or that IHL is not appropriate for the actual conflict he or she is fighting.⁷¹

4.2.2 *How to reduce the credibility gap?*

The main way of reducing the gap between promises and reality is to respect IHL as promised. Next, those who claim that IHL as it stands was developed at another time and is not adequate for the new challenges raised by the contemporary kind of conflicts should be clear that they advocate a change in the law and do not suggest that in the meantime the existing rules are no longer valid. I am not aware of many concrete proposals by those labelling the Geneva Conventions ‘outdated’ as to which provisions of IHL treaties should be amended with what new wording. If scholars and politicians say that IHL is not adequate without immediately adding which rules *are* adequate in what situation, this has catastrophic results in the field. Every soldier, policeman or interrogator, pressed hard by the enemy or the need to avoid terrorist attacks, may consider ‘inadequate’ those rules of IHL he was trained to comply with (e.g., not to torture or to take feasible precautions in attack), but that hinder him from taking short-cuts or oblige him to engage in additional work, be more patient or take additional risks.

As suggested above, in some instances it may also be wise to nuance promises. True, law always lays down in Kantian categories a ‘Sollen’ (what ought to be) and therefore a promise. If it was simply describing reality, a ‘Sein’, it would lose its normative character and therefore be useless. When Henry Dunant came back from the battlefield of Solferino, he suggested a promise (by states) that the wounded and sick should be respected, protected and cared for, ‘to whatever nation they belong’. Till today, this promise has not been entirely fulfilled. If Henry Dunant had not advocated that promise because he was not sure that states would actually deliver on it, there would be no Geneva Conventions. Those promises, although never entirely fulfilled, nevertheless clearly influenced reality to the benefit of war victims. The challenge described in this chapter is therefore not a qualitative criticism. My suggestion is not ‘Don’t promise what you are not certain will be delivered.’ I rather describe a quantitative challenge: We should avoid that the gap becomes too wide, mainly by bringing reality closer to our promises, but also by avoiding promises we can never deliver on and which are, in addition, often made by those who cannot deliver.

70. *Prosecutor v. Oric* IT-03-68-T 30 June 2006, paras. 104 – 105.

71. See for the importance of the belief in the appropriateness of IHL, Doswald-Beck, *supra* n. 3, at pp. 45-49.

Another way of reducing the credibility gap and the disadvantages it implies is to bring the perceived reality of systematic violations closer to the actual reality of frequent respect. Those who consult the media and NGO reports probably believe that IHL is almost never respected. This is indeed the perception I sense when discussing with students all around the world, but also with some military and with individuals wounded by a profound sense of being the victims of historical injustice, e.g., in the Middle East. This feeling that IHL is systematically violated is inaccurate and extremely dangerous for the credibility of IHL and for war victims. Only a few individuals are ready to respect rules protecting those they perceive as enemies even if they are convinced that their enemies do not respect those rules. As the youth in the Middle East is convinced that the US was deliberately attacking civilians during aerial bombardments in Iraq, they do not condemn suicide attacks directed at civilians. As they are convinced that the torture pictures from Abu Ghraib show a deliberate policy of the US, they are not shocked by the taking of hostages and indiscriminate attacks by Iraqi resistance groups. This vicious circle of non-respect has to be broken. First by an attitude of respect by well-organized, powerful, democratic states. Second, states – often falsely – accused of violations should make serious enquiries and make their results public in every instance, in order to convince those who consider them as the enemy of their general willingness to respect IHL and their honest endeavour to ensure respect by their forces. In my view, this would contribute much more to winning the ‘war on terrorism’ than any doubtful intelligence information which can be extracted from suspected terrorists. Third, all of us should whenever possible and when it is true, show that IHL is most often respected. This is not an easy task. It is not easy to get the facts of real-life examples of respect. My own examples all date back more than ten years, not because the world has become worse since then, but because I left the ICRC in 1997. In the field, fortunately one becomes aware of examples of respect daily – and I imagine soldiers fighting actual wars have had the same experience. The ICRC, guardian of IHL, would certainly have an interest and the necessary raw material to regularly publicize instances of respect. But imagine the reaction of Palestinians if the ICRC were producing a list of instances of respect by Israeli soldiers in the occupied territories, the reaction of Chechen groups when aware of a film showing instances of IHL respect by Russian forces and the mood in the UN Security Council if the ICRC reports instances of respect of IHL by the Janjaweed days before the Council wants to adopt a resolution on Sudan. And imagine the mood in the Colombian government if no instance of respect in Colombia is reported for a whole year. Too much hope cannot be placed upon the media either. A world in which they would report even-handedly and proportionately about respect and violations would be an Orwellian world. The fact that public opinion perceives violations as a scandal to be reported and respect as normal as the fact that water runs out of the tap and electricity comes from the socket in Geneva or the Hague is a sign that IHL is profoundly anchored in the public conscience.

5. CONCLUSION

IHL should disappear upon the disappearance of the phenomenon it regulates: armed conflicts. This is not dreaming of a utopian world without violence. It is hoping for an international society and for states in which violence and behaviour contrary to community interest are dealt with as they are within peaceful, functioning states: through law enforcement. Unfortunately, we are not at that stage. The mere fact that international armed conflicts exist is evidence that international law does not function. Wherever non-international armed conflicts exist, domestic law and international law on the coordination of the jurisdiction of sovereign states do not function. In such an environment, it is normal that the law applicable to this extraordinary situation which should not exist – IHL – is not perfectly respected. Even if we take this inherent limitation into account and subtract the distortions that arise from misperception, we must admit that IHL is insufficiently enforced. This is the greatest challenge for IHL. To meet it necessitates the creation of political will by states and armed groups – which means first and foremost convincing individuals who decide and fight for states and armed groups. Dissemination, training and education are crucial but not sufficient. Depending on the individual to be convinced, diverse political, moral, religious or utilitarian arguments can be used. The role of law in all this is limited. This contribution has nevertheless shown that some of the challenges for the implementation of IHL are related to – if not caused by – legal argument. I have not found recipes for meeting all these challenges, but I tried to advocate some: faithful application of IHL where it applies, without manipulation, be it for political or humanitarian purposes or even to ensure victory for a just cause; ensuring that as few causes as possible cannot be fought for while respecting IHL; engaging all those who are supposed to respect IHL; and reducing the credibility gap, not only by enforcing IHL, but also by putting the emphasis on the existing rules instead of developing endlessly new ones – or, worse, pretending that they already exist – and by convincing TV-viewers, fighters and their constituencies that IHL is much more respected than they think.