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Challenges to International Humanitarian Law

By Marco Sassòli and Yvette Issar

A. Introduction

Efforts to reduce the suffering unleashed by war through rules of conduct for belligerents are not a uniquely modern phenomenon. They have been with humanity for centuries, and as such, the origins of present-day International Humanitarian Law (IHL) can be traced to ancient times. However, the manner in which these efforts have been articulated has undergone significant changes over time. Taking stock of the corpus of IHL today it is clear that, as it has developed, IHL has enjoyed significant successes. Although this contribution deals with contemporary challenges to IHL, we will nevertheless first summarise some impressive successes achieved over the last 150 years, to avoid painting too bleak a picture of this branch of law which aims at ensuring a minimum of humanity in such fundamentally inhumane situations as armed conflicts. We will then discuss contemporary challenges to IHL, some of which result from the very nature of the situations to which it applies, while others may arguably be ascribed to certain problematic characteristics of modern warfare. Challenges concerning the substance of the law will be treated first, followed by what, in our opinion, is the main challenge, namely the insufficiency of mechanisms to ensure respect for already existing and largely adequate rules. To a large extent, these failings can be ascribed to a lack of political will on the part of States (and other actors) to follow through with effective implementation mechanisms. This article, written by lawyers and not political scientists, will focus on the legal challenges and attempt to offer suggestions that may help to effect change on, at least, the legal plane. As such, the final section will explore potential avenues for, and obstacles to, addressing the substantive and procedural challenges highlighted.

B. Successes of International Humanitarian Law

I. Substantive Progress

Firstly, as IHL has developed, it has experienced incredible growth. An increasing number of IHL treaties have come to regulate a greater number of issues in greater depth, meaning that the protection offered by IHL treaties has increased both horizontally and vertically. For example, the 1864 Geneva Convention,¹ considered by many to represent the birth of modern, codified IHL,² covered wounded and sick soldiers on the battlefield, and contained ten Articles. Intervening years (and the horrific armed conflicts accompanying them) saw the development of additional treaties regulating the treatment of additional categories of persons in the power of the enemy and additional issues, such as the conduct of hostilities and the use of certain weapons. Besides this horizontal expansion, the rules of IHL have, in all areas, become more detailed, with the experience of previous conflicts providing insight into aspects requiring further regulation.

Early IHL treaties, including the 1864 Convention, were limited to international armed conflicts (IACs). With the adoption of Common Article 3 to the four Geneva Conventions of 1949 (Geneva Conventions, GCs),³ it was accepted that international law regulated what were previously considered domestic affairs. The adoption of Additional Protocol II (AP II)⁴ in 1977 provided further confirmation of this and the trend has continued to date, with the effect that today, a greater number of rules of international law are applicable in times of non-international armed conflicts (NIACs). Today's armed conflicts are predominantly non-international in character and are responsible for a staggering amount of devastation. Fortunately, it has become almost a matter of course for

¹ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.

² Marco Sassòli/Antoine Bouvier/Anne Quintin, *How Does Law Protect in War?* 3rd ed. 2011, 139.

³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, UNTS Vol. 75, 31 (GC I); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, UNTS Vol. 73, 85 (GC II); Convention relative to the Treatment of Prisoners of War of 12 August 1949, UNTS Vol. 75, 135 (GC III); Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, UNTS Vol. 75, 287 (GC IV).

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, UNTS Vol. 1125, 609 (AP II).

present-day IHL instruments to regulate NIACs.⁵ Some instruments prohibiting weapons – such as the 1997 Ottawa Convention on Landmines⁶ and the 2008 Convention on Cluster Munitions⁷ – result inevitably in exactly the same regime for NIACs and IACs. Others regulate both types of conflicts, but contain different, albeit similar, provisions for each type. An example is the Rome Statute of the International Criminal Court, which contains separate lists of war crimes for IACs and NIACs.⁸

Secondly, not only are there a greater number of IHL rules governing NIACs, but the substance of that law tends increasingly towards the law of IACs, the latter being historically the more detailed, and therefore often (but not always) the more protective, of the two branches. This is one of the greatest triumphs in the development of IHL, and has mainly occurred through the discovery of customary rules, which are claimed to be largely the same in both IACs and NIACs. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) is particularly noteworthy in this regard, its approach being summed up in the famous dictum from the *Tadić* case, in which the Tribunal held that “what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.⁹ Building on this, the ICRC’s 2005 Study on Customary IHL,¹⁰ based upon the most comprehensive analysis of official State practice ever made in this field, has identified 161 rules of customary IHL, out of which at least 136 (if not 141) are considered applicable to NIACs, despite the fact that many of the customary rules identified resemble the treaty rules of Additional Protocol I (AP I),¹¹ which was drafted for IACs.

⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 2012, in particular 61-65.

⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997, UNTS Vol. 2056, 211.

⁷ Convention on Cluster Munitions of 30 May 2008, UNTS Vol. 2688, 1.

⁸ Rome Statute of the International Criminal Court of 17 July 1998, UNTS Vol. 2187, 3; Compare Articles 8(2)(a) and (b) of the Statute on IACs against Articles 8(2)(c) and (e) of the same on NIACs.

⁹ ICTY, *The Prosecutor v. Duško Tadić aka “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (Case No. IT-94-1-AR72), para. 119.

¹⁰ Louise Doswald-Beck/Jean-Marie Henckaerts (eds.), *Customary International Humanitarian Law, Volume I: Rules*, 2005. The Study is now available as a database, which is hosted by the International Committee of the Red Cross (ICRC) and regularly updated. The database is online at <https://www.icrc.org/customary-ihl/eng/docs/home>.

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, UNTS Vol. 1125, 3 (AP I).

This proliferation of (alleged) customary rules itself marks the third major development of IHL. It is “notoriously difficult”¹² to identify customary rules, as the constituent elements of custom are generally uniform State practice and *opinio iuris*. One scholar correctly notes that, unlike in general public international law, in determining customary IHL we pay more attention to what States *say* rather than to what they actually *do*.¹³ Not only are the pronouncements of States actually involved in a conflict taken into account, but those of non-involved States are also significant and usefully serve to “demonstrate the views of the outside state on the law.”¹⁴

Prior to the mid-1990s, it was difficult to argue for the existence of more than a handful of customary rules applicable in times of NIACs.¹⁵ It would have been even more difficult to argue that those customary rules were identical in content to their counterparts governing IACs. Today, this has changed dramatically, facilitated in part by ICTY jurisprudence, supported by the ICRC Study, but also accepted by States in their official pronouncements. The significance of the identification of these customary rules, in both IACs and NIACs, transcends the realm of IHL and is particularly relevant from the point of view of the principle of legality in international criminal law.

The fourth area in which great strides have been made concerns the regulation of certain weapons. From its earliest beginnings, rules on warfare have regulated weapons. In ancient India, for example, the use of poisoned weapons was prohibited.¹⁶ The first modern codification of this rule found expression in a set of national instructions, the Lieber Code.¹⁷ Shortly after, States adopted the St. Petersburg Declaration – the world’s first weapons treaty – prohibiting the use of explosive bullets in warfare.¹⁸ It codified the “balancing logic” of

¹² *Sivakumaran* (note 5), 104.

¹³ *Ibid.*, 102: “[I]n highly areas such as the law of armed conflict, greater regard is had for *opinio juris* and for what ought to be the law than is otherwise the case.” (footnotes omitted).

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 55.

¹⁶ *George Bühler* (translator), *Sacred Books of the East: The Laws of Manu*, Volume 25, Chapter VII, Point 90, “When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.”

¹⁷ Instructions for the Government of Armies of the United States in the Field of 24 April 1863 (Lieber Code), Section I, Art. 16.

¹⁸ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes in Weight, St. Petersburg, 1868 (See, in particular, the ICRC’s introduction to the Declaration), available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=3C02BAF088A50F61C12563CD002D663B&action=openDocument> (accessed on 16 December 2014).

IHL and paved the way for the concepts of military necessity, superfluous injury and unnecessary suffering, which continue to operate to this day and have led to the adoption of a range of instruments regulating specific means of warfare, including asphyxiating gases,¹⁹ biological²⁰ and chemical²¹ weapons, and also conventional weapons,²² including those which leave non-detectable fragments,²³ incendiary weapons,²⁴ blinding laser weapons,²⁵ explosive remnants of war,²⁶ landmines²⁷ and cluster munitions.²⁸ In addition, IHL criteria have been incorporated into the recently adopted Arms Trade Treaty, requiring States not to authorise transfers of certain weapons if they are aware that such weapons would be used to commit war crimes.²⁹ Furthermore, exporting States are required to assess the potential that their exports could be used to commit or facilitate serious violations of IHL.³⁰ The adoption of these weapons treaties, many of which are also applicable to NIACs, represents an important step forward in protecting civilians *and combatants* from the ravages of unrestrained warfare.

¹⁹ Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925, League of Nations Treaty Series, Vol. XCIV, 65.

²⁰ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972, UNTS Vol. 1015, 163.

²¹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992, UNTS Vol. 1974, 45.

²² UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980, UNTS Vol. 1342, 137 (CCW).

²³ Additional Protocol to the CCW: Protocol I on Non-Detectable Fragments of 10 October 1980, UNTS Vol. 1342, 168.

²⁴ Additional Protocol to the CCW: Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons of 10 October 1980, UNTS Vol. 1342, 171.

²⁵ Additional Protocol to the CCW: Protocol IV on Blinding Laser Weapons of 13 October 1995, UNTS Vol. 1380, 370.

²⁶ Additional Protocol to the CCW: Protocol V on Explosive Remnants of War of 28 November 2003, UNTS Vol. 2399, 100.

²⁷ Additional Protocol to the CCW: Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices of 10 October 1980, UNTS Vol. 1342, 168; Amended Protocol II to the CCW of 3 May 1996, UNTS Vol. 2048, 93; Ottawa Convention Banning Anti-Personnel Land Mines (note 6).

²⁸ Note 7.

²⁹ UN Arms Trade Treaty of 2 April 2013 (cf. General Assembly, Resolution 67/234 of 4 January 2013, UN Doc. A/RES/67/234), Art. 6 para. 3.

³⁰ *Ibid.*, Art. 7 para.1 lit. b (i).

Finally, we must mention recent work by the International Committee of the Red Cross (ICRC) to clarify IHL. In its role as “the guardian of IHL”,³¹ the ICRC, among other things, works to clarify key substantive issues. Due to the reluctance of States to accept new treaty rules and in view of the risk that new rules may weaken rather than strengthen the existing legal framework, ICRC initiatives limit themselves to developing improved understandings of existing IHL provisions and claim not to aim at establishing new obligations for belligerents.

One such initiative – an expert process that ran for six years between 2003 and 2008 – produced the ICRC’s Interpretive Guidance on the notion of direct participation in hostilities.³² The Guidance aimed to clarify the principle of distinction for the purposes of conduct of hostilities. It was responding to the twin challenges that a) over time, it has become increasingly difficult to distinguish between civilians and fighters in contemporary warfare, as the latter do not seek to identify as such; and b) additionally, the increasing “civilianisation” of warfare, with the employment of private military and security companies, translators for security forces, civilian intelligence agents among others, has made it extremely unclear whether an individual civilian’s acts constitute “direct participation in hostilities” which would make it lawful to target that civilian while he/she was engaged in such direct participation.³³ The Guidance, through its 10 recommendations, provides clarification on these issues, has been cited by international bodies,³⁴ and “is likely to have a significant influence on international and national tribunals considering the meaning of direct participation in hostilities [...]”.³⁵ The fact that it has also come under severe

³¹ *Yves Sandoz*, The International Committee of the Red Cross as Guardian of International Humanitarian Law, 31 December 1998, available at <https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm> (accessed on 16 December 2014).

³² *Nils Melzer*, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 2009. The Interpretive Guidance and materials produced during the expert process are available online at <https://www.icrc.org/eng/resources/documents/publication/p0990.htm> (accessed on 16 December 2014).

³³ AP I, Art. 51 para. 3; AP II, Art. 13 para. 3.

³⁴ Human Rights Council (rapp. *Philip Alston*), Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings of 28 May 2010 (UN Doc. A/HRC/14.24/add.6), paras 62-69.

³⁵ *Damien van der Toorn*, ‘Direct participation in hostilities’: A legal and practical evaluation of the ICRC Guidance (2009) 1, available at http://www.works.bepress.com/damien_van_der_toorn/1 (accessed on 16 December 2014).

criticism from some quarters³⁶ does not detract from the largely useful work of the ICRC in clarifying the concept of direct participation in hostilities.

A similar process was undertaken with respect to the law on occupation. Several contemporary challenges linked to the exercise of military authority on foreign territory prompted the ICRC to launch consultations to investigate whether the law of occupation is adequate in four main areas: the beginning and end of occupation, the rights and duties of an occupying power, the relevance of occupation law for UN administration of foreign territory and the use of force in occupied territory. The results of the consultations have been presented in a Report³⁷ which found generally that the law of occupation is adequate, but identified areas where further clarification would be useful.

Continuing its tradition of strengthening IHL through such non-binding “clarifications”, the ICRC has launched a project to strengthen legal protection for victims of armed conflict³⁸ and “is currently leading a major consultation process on how to strengthen legal protection for persons deprived of their liberty in relation to NIAC”.³⁹ This is because it is generally considered that IHL of NIACs is particularly insufficient in the following areas: “conditions of detention, protection for especially vulnerable groups of detainees, grounds and procedures for internment and transfers of detainees to another authority.”⁴⁰ It is not currently clear what form the results of the process will take, but an update on work done so far is scheduled for 2015, and it is hoped that the process will provide much needed guidance for parties that hold detainees in NIACs. We sincerely hope that despite the reluctance of States, the perspective of armed groups and the legal regulation of detention by such groups will not be forgotten in this process.

³⁶ *Bill Boothby*, “And for Such Time As”: The Time Dimension to Direct Participation in Hostilities, *JILP* 42 (2010), 741; *Michael Schmitt*, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, *HNSLJ* 1 (2010), 5; *William Hays Parks*, Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect, *JILP* 42 (2010), 769.

³⁷ ICRC, Occupation and Other Forms of Administration of Foreign Territory (Expert Meeting Report), March 2012 (prepared and edited by *Tristan Ferraro*), available at <https://www.icrc.org/eng/resources/documents/publication/p4094.htm> (accessed on 16 December 2014).

³⁸ ICRC, Strengthening legal protection for victims of armed conflicts, available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-protection-victims-armed-conflict.htm> (accessed on 16 December 2014).

³⁹ ICRC, Detention in non-international armed conflict: the ICRC’s work on strengthening legal protection, available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm> (accessed on 16 December 2014).

⁴⁰ *Ibid.*; See also, *infra*, text accompanying notes 97 and 98.

II. Development of Implementation Mechanisms

In addition to this substantive progress, there have been important developments as regards implementation of IHL. The law cannot be correctly applied if few are aware that it exists, and even fewer are aware of its contents. Therefore the first significant development is related to increased interest in and dissemination of IHL. Thirty 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, which drafted the 1977 Additional Protocols. To the best of our knowledge, the only university in the world to offer a regular IHL course to civilians was in Geneva. The UN still referred to IHL as “human rights in armed conflicts”.⁴¹ Today, however, the picture is quite different. The statements and other arguments of belligerents, both the hypocrisies and well-founded claims made by governments, rebels, terrorists, politicians, diplomats, NGO activists, demonstrators and journalists, constantly refer (correctly or not – but increasingly correctly) to IHL. It is omnipresent in UN Security Council resolutions, UN Human Rights Council discussions, political pamphlets of opposition movements, NGO reports, training materials of soldiers, commitments of armed groups, non-papers of diplomats, and the staggering number of theses and articles produced by doctoral students and scholars.

Significant progress has been made with respect to the preventive measures to be taken in peacetime, in particular the development of appropriate national legislation, education, training and dissemination of IHL. This has been, in part, thanks to the ICRC’s Advisory Service, which provides specialised legal advice to States (and which, as we argue in section D.VIII. below, should be extended to armed groups), and to the impetus given to the development of national legislation by the Statute of the ICC. While the latter formally requests only legislation to ensure co-operation with the Court, many States have taken this opportunity to finally implement their obligation to criminalise grave breaches of the Geneva Conventions⁴² and other war crimes in their domestic legislation.

The United Nations, for its part, has changed its discourse on IHL issues, and now contributes significantly to the implementation of IHL in a number of

⁴¹ International Conference of Human Rights (Tehran), Resolution XXIII on Human Rights in Armed Conflict of 12 May 1968 (UN Doc. A/CONF.32/41), at p. 18; UN General Assembly, Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflicts of 19 December 1968 (Supp. N°18, U.N. Doc. A/7218).

⁴² GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146.

ways, and through different organs.⁴³ Firstly, the UN Security Council has, on several occasions, called upon parties to armed conflicts to abide by IHL,⁴⁴ verbally condemned⁴⁵ and even sanctioned⁴⁶ violations of IHL, established peace operations with robust mandates to protect civilian populations against violations of IHL,⁴⁷ and authorised the creation of fact-finding missions and international criminal tribunals with mandates to investigate violations of IHL.⁴⁸ The Security Council has also set up a monitoring and reporting mechanism to combat six grave violations committed against children in armed conflict. The mechanism operates by identifying and formally listing parties responsible for the six violations and requesting them to formulate action plans that lead to compliance with international law. As such, the mechanism not only serves to “name and shame”, but also functions as a regular “follow up” mechanism, as parties are only removed from scrutiny and “delisted” once it has been verified that activities listed in the action plan are fully implemented.⁴⁹

Secondly, the UN General Assembly and, more importantly, UN human rights mechanisms are proving increasingly relevant in promoting compliance with and implementation of IHL. Within the UN Human Rights Council (HRC), the review of a State’s human rights record in the context of the Uni-

⁴³ See generally, *Sivakumaran* (note 5), 465-467; UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, 2011, 92-117, available at http://www.ohchr.org/documents/publications/hr_in_armed_conflict.pdf (accessed on 25 November 2014).

⁴⁴ E.g., Security Council, Resolution 1181 of 13 July 1998 (UN Doc. S/RES/1181), para. 12.

⁴⁵ E.g., Security Council, Resolution 2134 of 28 January 2014 (UN Doc. S/RES/2134).

⁴⁶ E.g., Security Council, Resolution 2161 of 17 June 2014 (UN Doc. S/RES/2161).

⁴⁷ E.g., the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO). For the adjusted mandate of MONUSCO, see Security Council, Resolution 2147 of 28 March 2014 (UN Doc. S/RES/2147), in particular para. 4.

⁴⁸ E.g., International Criminal Tribunal for the Former Yugoslavia (Security Council, Resolution 827 of 25 May 1993 (UN Doc. S/RES/827)); International Criminal Tribunal for Rwanda (Security Council, Resolution 955 of 8 November 1994 (UN Doc. S/RES/955)); International Commission of Inquiry for Darfur (Security Council, Resolution 1564 of 18 September 2004 (UN Doc. S/RES/1564)).

⁴⁹ For more information, consult the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict: Monitoring and Reporting, available at <https://childrenandarmedconflict.un.org/our-work/monitoring-and-reporting/> (accessed on 12 November 2014).

versal Periodic Review also encompasses applicable IHL.⁵⁰ In both its regular and special sessions, the Council has condemned violations of IHL in particular contexts,⁵¹ and has also set up fact-finding mechanisms, many of which have a mandate to look into potential violations of IHL.⁵² The establishment of such fact-finding missions has become nearly systematic in the event of major armed conflicts and they have to a large extent replaced the ineffective International Humanitarian Fact-Finding Commission discussed below.⁵³ The HRC's Special Procedures, such as the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on arbitrary detention, also refer regularly to IHL in their work. In particular, they have helped shed light on the relationship between IHL and IHRL obligations in times of armed conflicts.⁵⁴ Finally, human rights treaty bodies such as the Committee on the Rights of the Child and the Committee against Torture also contribute to the monitoring and implementation of IHL.⁵⁵ For instance, under the Optional Protocol to the Convention on the Rights of the Child,⁵⁶ States are required to report on measures they have taken to implement its provisions, including how they have defined "compulsory recruitment and use of children in hostilities" and what constitutes "direct participation in hostilities".⁵⁷

A great boost to implementation has come through the development of international criminal law and, even more so, of international criminal justice. To-

⁵⁰ UN Human Rights Council, Resolution 5/1, Institution-building of the United Nations Human Rights Council of 18 June 2007 (UN Doc. A/HRC/RES/5/1), para. 2; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Israel of 8 January 2009 (UN Doc. A/HRC/10/76), paras. 24, 34, 35, 39, 55, 57, 59, 100 (not an exhaustive list of relevant paragraphs); UN Human Rights Council, Report of the Sudan Human Rights Council Working Group on the Universal Periodic Review of 11 July 2011 (UN Doc. A/HRC/18/16), Section II, paras. 83.124 and 83.130.

⁵¹ E.g., UN Human Rights Council, Resolution S-21/1, Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem of 23 July 2014 (UN Doc. A/HRC/RES/S-21/1), para. 3.

⁵² See *ibid.*, para. 13; UN Human Rights Council, Resolution 14/1, The grave attacks by Israeli forces against the humanitarian boat convoy of 2 June 2010 (UN Doc. A/HRC/RES/14/1), para. 8; although not a Human Rights Council initiative, see also, OHCHR, Nepal Conflict Report, October 2012.

⁵³ See *infra*, text accompanying notes 121 and 122.

⁵⁴ OHCHR, International Legal Protection of Human Rights in Armed Conflict (note 43), 109.

⁵⁵ *Ibid.*, 107; Sivakumaran (note 5), 467.

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000, UNTS Vol. 2173, 222.

⁵⁷ UN Committee on the Rights of the Child, Revised Guidelines Regarding Initial Reports to be submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict of 19 October 2007 (UN Doc. CRC/C/OPAC/2), paras 18-19.

day, IHL is referred to on a daily basis by defence lawyers and prosecutors in international and – unfortunately to a lesser extent – domestic tribunals, and forms the basis for well-reasoned verdicts. This has greatly contributed to the clarification – although not always in a realistic manner⁵⁸ – of substantive rules of IHL. It has also demonstrated – though still with too few examples – that IHL is an enforceable legal regime. Those sceptics who question whether IHL is really law must accept that certain individuals are currently serving prison sentences for having violated its provisions. The regular prosecution of war crimes can be expected to deter future violations. Such criminal processes have a stigmatising effect and individualise guilt and repression, thereby avoiding the vicious circle of collective responsibility in which atrocities by one party lead to counter-atrocities, most often against innocent people, by the opposing party. For as long as responsibility is attributed to States and nations, violations carry the seeds of future wars. This is, then, the civilising and peace-seeking mission of international criminal law and of international criminal justice.

This modest overview does not seek to highlight all of IHL's successes over the past decades, but highlights what, to the authors, are some of the most important positive developments in the field. As we move forward to consider some of the challenges to IHL, it is worth keeping these areas of progress in mind.

C. Substantive Challenges

I. Non-challenges Often Seen As Challenges in Public Discussion

A number of issues do not, in our view, present substantive challenges as such, but are often viewed as problematic, particularly because they relate to novel means and methods of warfare, or approaches to armed conflict.

1. Drones

The use of drones – or unmanned aerial vehicles (UAV) – is one such issue. The authors do not believe that their use constitutes a new challenge to the substantive rules of IHL. Rather, the use of drones simply highlights many general challenges, such as determining the limits of the geographical scope of the battlefield,⁵⁹ the relationship between IHL and IHRL and the lack of trans-

⁵⁸ Marco Sassòli/Julia Grignon, *Les limites du droit international pénal et de la justice pénale dans la mise en oeuvre du droit international humanitaire*, in: Abdelwahab Biad/Paul Tavernier (eds.), *Le droit international humanitaire face aux défis du XXIe siècle*, 2012, 133.

⁵⁹ See *infra*, text accompanying notes 89-94.

parency that often accompanies drone use as much as other forms of hostilities. As long as they are under human control, drones do not actually raise problems that are different from those encountered with other weapon systems. In fact, the use of drones may, in some cases, make it easier to respect the principles of distinction, proportionality and precautions.⁶⁰ They are capable of observing their targets over long periods, permitting attacks to be undertaken at a point in time that would minimise harm to civilians. In addition, they make certain precautionary measures more feasible, as their operators are often remotely located and hence face no risks, thereby “making possible attacks on alternative targets that might not otherwise be viable”.⁶¹ Moreover, operators are not in combat situations and therefore more likely to calmly assess situations before they make decisions. Finally, as drones are equipped with recording devices, they may facilitate investigations, as well as disciplinary and criminal sanctions in case of violations (assuming that the attacking party wants to sanction violations).

2. Terrorism

In recent years, many have claimed that terrorism constitutes a fundamental challenge to IHL, or that IHL is out-dated in the face of the threat of terrorism.⁶² However, terrorism does not constitute a separate category of situations to which IHL applies. IHL only applies to and in armed conflicts and therefore covers terrorist acts only when they are committed as part of an armed conflict. In very extreme situations, terrorist acts alone may trigger an armed conflict, but what counts for such classification is the level of organisation of the group that committed the acts and the intensity of the violence involved, not whether the acts themselves were lawful or terrorist acts.

In an armed conflict, IHL prohibits the most common and typical acts of terrorism, even if committed for the most legitimate cause: attacks against civil-

⁶⁰ *Christopher Markham/Michael Schmitt*, Precision Air Warfare and the Law of Armed Conflict, ILS 89 (2013), 669, 689.

⁶¹ *Ibid.*

⁶² *Claudia Rosett*, The Red Cross needs to get real, Wall Street Journal of 23 January 2002, available at <http://www.wsj.com/articles/SB1011754375965762560> (accessed on 16 December 2014); *Ruth Wedgwood*, Personal View: Prisoners of a different war: The Geneva convention applies to conventional soldiers, not to the terrorists being held at Camp X-Ray, Financial Times of 30 January 2002, available at <http://www.law.yale.edu/news/3345.htm> (accessed on 24 March 2015): “were not negotiated to govern wars against piratical groups that operate internationally”; *David Montgomery*, Geneva Convention’s Gentility, Treaty Stresses Civil Treatment of Prisoners, Washington Post of 17 February 2002; see also certain comments of the then US Defence Secretary, Donald Rumsfeld, during a press conference on 8 February 2002, excerpts available in *Sassòli/Bouvier/Quintin* (note 2), 2338.

ians,⁶³ indiscriminate attacks,⁶⁴ acts or threats the main aim of which is to spread terror among the civilian population⁶⁵ and acts of “terrorism” aimed against civilians in the power of the enemy.⁶⁶ In most cases, such acts are considered war crimes that must be universally prosecuted.⁶⁷

Beyond this, there is no universally recognised definition of terrorism. The two main controversies preventing States from reaching consensus on this point are related to armed conflicts.⁶⁸ Some States want to exclude acts committed in struggles for national liberation and against foreign occupation from the definition. This approach conflates *ius ad bellum* and *ius in bello*. Others suggest that the definition should not only cover attacks against civilians and indiscriminate acts, but also those against government agents (including soldiers) and property (including military objectives) if their purpose is to compel the government to act or refrain from acting. As this is the essence of warfare, the consequence would be to label as “terrorist” – and subsequently criminalise – acts that are not prohibited in armed conflicts by IHL. This, in turn, would discourage armed groups from complying with IHL, as their conduct would always be labelled as terrorist.

II. IHL of Non-international Armed Conflicts Is Different and Less Developed Than IHL of International Armed Conflicts

The application of different rules in IACs and NIACs obliges belligerents, humanitarian actors and victims to classify conflicts before they can invoke IHL rules. This can be theoretically difficult and is always politically delicate.⁶⁹ In addition, from a humanitarian point of view, the victims of NIACs should be protected by the same rules as the victims of IACs. Both sets of victims face similar problems and therefore need similar protection. In both situations, fighters and civilians are arrested and detained by “the enemy”; civilians are forcibly displaced; attacks are launched against towns and villages; food sup-

⁶³ AP I, Art. 51 para. 2; AP II, Art. 13 para. 2.

⁶⁴ AP I, Art. 51 para. 4 and para. 5.

⁶⁵ See AP I, Art. 51 para. 2; AP II, Art. 13 para. 2.

⁶⁶ See GC IV, Art. 33 para. 1. In non-international armed conflicts AP II, Art. 4 para. 2, extends this protection to all individuals who do not or no longer directly participate in the hostilities.

⁶⁷ GC IV, Art. 147; AP I, Art. 85 para. 3 lit. a; ICC Statute, Art. 8 para. 2 lit. e (i).

⁶⁸ For details, see *Marco Sassòli*, *La définition du terrorisme et le droit international humanitaire*, RQDI (2007) (hors série), Études en hommage à Katia Boustany, 29, 41-44.

⁶⁹ *Elizabeth Wilmshurst* (ed.), *International Law and the Classification of Conflicts*, 2012.

plies must cross front lines; and finally, similar means and methods of warfare are used in both types of conflicts.

As we noted above, despite the reluctance of States to accept the same rules for both situations, the law of NIACs *has* in the last few decades indeed gotten closer to that of IACs. Despite this convergence, there are two issues for which there still exists a marked difference between IACs and NIACs: The first is status (combatant and prisoner of war (POW) status only exist in IACs, and combatants may not be punished in IACs for the mere fact of having committed acts of hostility), and the second is occupied territory, a concept difficult to extend to NIACs, and for which IHL rules protecting civilians in IAC are much more detailed. The corresponding challenges in NIACs then revolve around identifying which persons may be legitimately targeted, and which obligations armed groups are bound by in the event that they control territory.

To address these and other problems arising in NIACs, it is common to use IHL of IACs as a starting point. However, before drawing, *qua* customary law or otherwise, analogies between the IHL of IACs and NIACs, a serious reality check from the perspective of armed groups should be made, as the IHL of NIACs, unlike that of IACs, is not only addressed to States, but also to armed groups. In addition, it should be borne in mind that if a given situation or issue is not regulated by the IHL of non-international armed conflicts applying as the *lex specialis*, IHRL applies, although possibly limited by derogations. Therefore, applying rules of IACs to NIACs by analogy necessarily leads to crowding out, in NIACs, the more protective rules of IHRL.

III. The Threshold of Application of IHL

1. Over-classification: The “War on Terror” as an Armed Conflict

One of the few genuinely new challenges to IHL is the relatively recent tendency of certain States to “over-classify” situations by labelling them as armed conflicts, thus extending the scope of application of IHL to situations for which it was never intended. Following 11 September 2001, the US administration, facing the nebula of international terrorism generally and Al-Qaeda more specifically, declared that it was engaged in a single, worldwide IAC against a non-state actor. Despite its initial claim that the conflict was international,⁷⁰ the US position was to deny its enemies the full protection of IHL of IACs. At the

⁷⁰ *George W. Bush*, Address to the Joint Session of the 107th Congress, 20 September 2001, in *Selected Speeches of President George W. Bush: 2001- 2008*, 65 – 73, at 68-69, available at http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf (accessed on 16 December 2014).

same time, the administration also held that such persons could not be dealt with under domestic criminal legislation or international human rights law, their treatment being entirely and exclusively governed by some mysterious rules of customary “laws of war”.⁷¹ IHL – the branch of international law that seeks to provide protection during armed conflicts – was thus used to justify the denial of protection under human rights law and domestic legislation to certain persons. Fortunately, US courts have increasingly, but not completely, dismantled this line of argument.⁷² However, the Obama administration still considers that the US is engaged in one worldwide armed conflict against the Taliban, Al Qaeda and their associates, and that enemies may be targeted and detained in that conflict as the rules of IAC, presumably applied by analogy, would permit.⁷³ Even if the situation is a NIAC, as the Obama administration argued before the UN Human Rights Council,⁷⁴ this is likely an over-classification, because Al Qaeda does not at present fulfil the organisational requirement to qualify as a party to a NIAC.⁷⁵ Such “over-classification” is – unfortunately – no longer limited to the US, but seems to be used by certain Latin American militaries to justify more robust methods in combatting social unrest.

Many humanitarians who were previously convinced that IHL should be applied as broadly as possible⁷⁶ have discovered that its “over-application” has at least three negative consequences. First, it deprives persons of the greater degree of protection they would benefit from under the law of peace, in particular considering 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 the same would be qualified as an extrajudicial execution under human rights law applicable to law enforcement operations. Under IHL, captured enemy combatants may be held as

⁷¹ See, for a discussion and criticism of this position, *Marco Sassòli*, Terrorism and War, JICJ 4 (2006), 959, especially at 963-64 and 971-74.

⁷² See, in particular, United States Supreme Court: *Rasul v. Bush*, Judgment of 28 June 2004, 542 U.S. 466; *Hamdan v. Rumsfeld*, Judgment of 29 June 2006, 548 U.S. 557; *Boumediene v. Bush*, Judgment of 12 June 2008, 553 U.S. 723.

⁷³ United States District Court for the District of Columbia, *In Re: Guantanamo Bay Detainee Litigation, Misc No 08-442 et al.*, Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay of 13 March 2009.

⁷⁴ National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 by the United States of America on 23 August 2010 (UN Doc. A/HRC/WG.6/9/USA/1), para. 84.

⁷⁵ See *infra*, text accompanying notes 82 and 83.

⁷⁶ Such as those following the arguments of *Jean Pictet* (ed.), ICRC Commentary on the Geneva Conventions of 12 August 1949, Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1958, 36.

prisoners of war for a period that is undetermined at the moment of their 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 even the most dangerous terrorist has access to *habeas corpus*.

Second, not astonishingly, when applied to situations for which it was not designed, IHL appears inadequate. The consequence of this, unfortunately, is that it is applied selectively (e.g. through arguments that IHL gives States fighting terrorists the same rights but not the same obligations that they have towards “regular” enemy combatants). Thirdly, this pick-and-choose approach inevitably results in a reduced willingness to respect IHL entirely, unconditionally and independently of conflicting interests, even in those situations where IHL actually and uncontroversially applies! Many consider that it would not have been possible for the cases of torture in Abu Ghraib to occur without the corrupting influence of the selective application of IHL in Guantánamo, although for the former, unlike the latter, the US never denied the full applicability of Geneva Conventions III and IV.⁷⁷

2. Under-classification: The Frequent Denial That IHL Applies

Traditionally, when States were confronted with armed conflicts, their first line of defence against the restraints imposed by IHL was simply to deny it applied. They relied instead on national criminal laws, to which, today, they add international anti-terrorism law. Such was, for decades, the position of the Turkish government, which considered that the situation in Eastern Turkey did not amount to an armed conflict, but simple law enforcement against PKK “terrorists”. India, Pakistan, Russia, and Thailand argue similarly with respect to the conflicts they were or are still facing.

3. The Minimum Threshold for IHL to Apply (IACs)

It has long been said that IHL begins to apply as soon as there is resort to armed force, no matter the intensity, between States. This traditional view implies – for IACs – a very low threshold of application of IHL, with the entire corpus of the law being activated by the firing of the first shot pitting two States against each other. Is it realistic for IHL to apply to all inter-State violence, or are there situations – for example the recent border skirmishes between India

⁷⁷ See, for example, *Karen J. Greenberg/Joshua L. Dratel* (eds.), *The torture papers: the road to Abu Ghraib*, 2005.

and Pakistan⁷⁸ – that do not trigger the immediate application of (all of) IHL? In the latter case, what criteria must be used to decide at what point the situation crosses the threshold to become an IAC, and what rules protect people in the interim period? There are good legal reasons - in particular based upon a teleological and contextual interpretation of Common Article 2 of the Conventions – and good policy reasons for maintaining a low threshold for the applicability of IHL of IACs.⁷⁹ However recently, a Committee of the International Law Association has suggested that there exists a single definition of armed conflict applicable to both IACs and NIACs, and that State practice demonstrates that in both cases, a certain level of intensity is required for IHL to apply.⁸⁰

4. *The Minimum Threshold for IHL to Apply (NIACs)*

IHL does not apply in the case of internal tensions and disturbances, such as riots.⁸¹ According to the ICTY in the *Tadić* case, two basic cumulative criteria need to be met in order to be able to distinguish a situation of NIAC from these other situations that do not trigger the application of IHL.⁸² Firstly, the violence involved must reach a certain level of intensity, and, secondly, the non-state party/parties must exhibit a certain degree of organisation. While the ICTY has provided indicators that are helpful in making determinations based on the twin criteria of intensity and organisation,⁸³ the criteria remain rather vague, facilitating the possibility for States to argue that the situation in which they are involved does not amount to an armed conflict.

⁷⁸ *Jora Farm*, Feeling of wartime on India-Pakistan border due to recent skirmishes, The Times of India of 28 August 2014, available at <http://timesofindia.indiatimes.com/india/Feeling-of-wartime-on-India-Pakistan-border-due-to-recent-skirmishes/articleshow/41079418.cms> (accessed on 2 December 2014).

⁷⁹ *Marco Roscini*, *Cyber operations and the use of force in international law*, 2014, 134.

⁸⁰ International Law Association, *Use of Force Committee, Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010.

⁸¹ AP II, Art. 1 para. 2.

⁸² ICTY, *The Prosecutor v. Duško Tadić aka "Dule"*, Trial Chamber Judgment of 7 May 1997 (Case No. IT-94-1-T), para. 562.

⁸³ ICTY, *The Prosecutor v. Ramush Haradinaj and others*, Trial Chamber Judgment of 3 April 2008 (Case No. IT-04-84-T). For indicators on intensity see para. 49. For indicators on organisation see para. 60.

IV. Internationalised and Transnational Armed Conflicts

Some have suggested that the category of NIAC may be inadequate to cover the variety of conflicts today that do not occur between State actors.⁸⁴ Others have offered typologies of NIACs, to break the larger category down into conflicts of similar types/characteristics.⁸⁵ Categories into which NIACs may be divided include those that involve foreign intervention either by a third State(s) or multinational forces, and those that spill over the borders of the territorial State (with further sub-categories being possible in each of these cases).

In the case of foreign intervention by a third State or multinational forces into an existing NIAC, the widely accepted approach to determine the applicable IHL is to “split” the conflict up and consider dynamics between pairs of belligerents. Relations between State belligerents would be governed by IHL of IACs while those between a State and non-State belligerent and/or between two non-state belligerents would be governed by IHL of NIACs. Academically, this may present a satisfactory solution, but it is incredibly difficult to translate into battlefield practice. For instance, would IHL of IAC or NIAC govern persons captured by foreign troops and then handed over to an armed group? What law would apply to the reverse situation? Current interpretations may lead to the conclusion that transfers are possible in the latter case but not the former. The result of splitting the conflict up in this way would be that persons facing the same situation – deprivation of liberty – would have to be treated according to a vastly different set of rules depending on whether they are held by foreign forces or an allied armed group,⁸⁶ implying differing levels of protection for individuals caught up in the same conflict. At present, however, there is no alternative way to deal with conflicts that have been “internationalised” through the presence of foreign State or multinational elements.

Common Article 3 and AP II make specific reference to the territory of a single State, and it is possible to restrictively interpret these provisions such that the application of IHL is limited to hostilities occurring on a State’s territory.⁸⁷ Conflicts that cross borders, and conflicts that involve armed non-state actors present in more than one territory (or “transnational armed conflicts”,⁸⁸

⁸⁴ See, for example, *Claus Kress*, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, JCSL 15 (2010), 245.

⁸⁵ *Sylvain Vit e*, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, IRRIC 91 (2009), 69, 83-93.

⁸⁶ *Ibid.*, 86.

⁸⁷ See, for an explanation (but not necessarily endorsement) of this interpretation, *Michael Schmitt*, Charting the Legal Geography of Non-International Armed Conflict, ILS 90 (2014), 1, 9.

⁸⁸ *Kress* (note 84), 78.

as some have termed them), are accompanied by a host of substantive challenges, including the question of whether IHL of IACs applies if a State uses force on the territory of a non-consenting State against an armed group that has sought refuge in that territory.

These challenges raised by NIACs with an internationalised or transnational dimension have led some scholars to argue that the law of NIACs as a whole is not adequate to regulate the variety of present day conflicts.⁸⁹ We recognise that these issues represent serious challenges, to which workable solutions must be found, not only for legal theoreticians, but most importantly, for practitioners on the battlefield. However, while it is true that IHL of NIACs was not made in view of armed conflicts occurring outside the territory of the State involved, and therefore is silent and implicitly refers to the domestic legislation of the territorial State for many issues, for the time being IHL of NIACs must apply to these situations, because the alternative – that IHL does not apply to them at all – would be unimaginable.

V. The Geographical Scope of Application of IHL

IHL of IACs is considered to apply in any location where opposing forces exercise belligerent activity, be it on their territories or not (keeping in mind, of course, that the use of force on the territory of a non-consenting third State would be in violation of the *ius ad bellum*). In NIACs, the issue is not so clear-cut. According to certain interpretations of Common Article 3 and AP II, the application of IHL is limited to the territory of the State embroiled in non-international armed conflict.⁹⁰ Under this approach, IHL does not apply to acts taking place beyond the State's borders, giving way instead to IHRL and criminal/law enforcement frameworks. However, the extraterritorial application of IHRL and of domestic criminal law is often controversial. The main reason for which many are reluctant to admit that IHL applies world-wide once a NIAC exists is that IHL even of NIACs is today often claimed as constituting a sufficient legal basis for targeting or detaining enemies.⁹¹

⁸⁹ *Ibid.*; Roy. S. Schondorf, Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?, JILP 37 (2004), 61; Ruth Wedgwood, The Supreme Court and the Guantánamo Controversy, in: Peter Berkowitz (ed.), Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases, 2005, 179.

⁹⁰ Schmitt (note 87), 9.

⁹¹ See, on detention, Jelena Pejic, The protective scope of Common Article 3: more than meets the eye, IRRC 93 (2011), 189, 207; on the lethal use of force, ICRC, The use of force in armed conflicts: Expert Meeting, Report prepared by Gloria Gaggioli, 2013, 13-23; and Inter-American Commission on Human Rights, *Abella v. Argentina*, Report No. 55/97, Case No. 11.137, OEA/ Ser/ L/V/II.98, Doc. 38, 6 December 1997, para. 178.

However, the view that IHL of NIACs applies only on the territory of the State involved presents several problems. Firstly, even if one followed this approach, it will be admitted that, in line with the ICTY's ambiguous holding in the *Tadić* case,⁹² it is not entirely settled whether IHL applies in the same way throughout the territory of the State, or whether there should be a differentiation based on where hostilities (are more likely to) occur. Is, for example, IHL applicable throughout Colombia? Only in areas where hostilities occur? Would it be lawful to target a member of an armed group visiting relatives in Bogota – relatively free from conflict – or should the government seek to arrest and detain the individual under domestic criminal law and IHRL in such a situation? When hostilities spill across borders, the conditions for the applicability of IHL are even more difficult to determine. Must the intensity criterion also be satisfied in the neighbouring State for IHL to be held to apply there? Or is it simply enough that an individual, or – a different criterion – their conduct be linked to a pre-existing armed conflict in another geographical location?⁹³

This issue was at the heart of one of the controversies in the “war on terror”. Some considered that if an individual/event was linked to a pre-existing armed conflict, this nexus was sufficient to justify the application of IHL with respect to that person/event. The US, a proponent of this approach, took things much further (at least theoretically speaking), alleging that there existed a world-wide (non-)international armed conflict against “terrorism” and that IHL was applicable everywhere in the world where the US was taking action against terrorists. The view did not prove to be legally tenable, and the term “war on terror” has since been abandoned by the US. However, the US and other States continue to extend the scope of the battlefield, beyond the territories of States involved in non-international armed conflicts, in operations against terrorists, particularly through the use of drones, and it is here – rather than in the nature of the weapon system itself – that the real challenge associated with drone use lies.⁹⁴ A possible solution to the controversy, if geography were to be abandoned as the decisive criterion for application of IHL, would be to apply IHL world-wide to every act linked to a NIAC, but to consider that IHRL prevails on most issues and in most places as the *lex specialis*. This presupposes, however, that IHRL is accepted as applying extraterritorially, even in the absence of territorial control.

⁹² ICTY, *The Prosecutor v. Duško Tadić aka “Dule”* (note 9), para. 70, which reads in part: “international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”.

⁹³ Some of these questions are treated in *Noam Lubell/Nathan Dereijko, A Global Battlefield: Drones and the Geographical Scope of Armed Conflict*, JICJ 11 (2013), 65.

⁹⁴ See *supra*, text accompanying notes 59-61.

VI. The Distinction Between Civilians and Combatants

The principle of distinction is at the heart of IHL, and yet it is threatened in many armed conflicts. The threat is perhaps most acute in NIACs, which are likely to be more asymmetrical than IACs. It has been even argued that the principle of distinction is not realistic in NIACs because it is inherent in such conflicts that particularly non-state armed groups rely upon ordinary civilians for certain tasks.⁹⁵ Can fighters on the technologically weaker side in such conflicts realistically be expected to distinguish themselves from civilians, when doing so would almost certainly mean defeat? The question is, admittedly, not very palatable, but unfortunately, it reflects very real concerns, and a very pressing threat to the aims of IHL to protect those “outside” the fighting.

The increasing civilianisation of armed forces⁹⁶ is also contributing to the erosion of the principle of distinction. Several functions that contribute to military capacity and even to battlefield action – such as the provision of security services, intelligence gathering and operation of drones – are increasingly being performed by persons outside of the armed forces.

VII. The Admissibility of Targeting and Detaining Enemy Fighters in NIACs

IHL treaty law does not provide explicit authorisation to target and/or detain enemy fighters in NIACs. However, targeting and detention are, unfortunately, part of warfare, and are practiced in the context of NIACs, independently of whether or not IHL contains explicit authorisation for these occurrences. In order to regulate the admissibility of targeting and detention in NIACs, two frameworks may serve as models. In the first instance, we may choose to apply IHL of IACs to NIACs by analogy. In this case, fighters may be attacked at any time as long as they are not *hors de combat* (like combatants in IACs); and detained without any individual decision until the end of active hostilities (like prisoners of war in IACs, but without the attendant privileges).

Alternatively, as the matter is not regulated by treaty rules of IHL of NIACs as the *lex specialis*, we may choose to apply IHL as the *lex generalis*, in which case fighters may only be attacked if arrest is impossible, and only after a warning has been issued and the possibility for surrender made available (where feasible). They may only be detained in view of a trial or, in case of

⁹⁵ Sivakumaran (note 5), 357-358.

⁹⁶ Giulio Bartolini, The “Civilianization” of Contemporary Armed Conflicts, in: Hélène Ruiz Fabri/Rüdiger Wolfrum/Jana Gogolin (eds.), *Select Proceedings of the European Society of International Law*, Vol. 2, 2008, 570.

derogation, with at least the right to have the legality of detention reviewed by an impartial tribunal.

To determine which of the two approaches is more appropriate, one of the authors of this contribution has suggested that we must determine the *lex specialis* for every given situation and specific set of circumstances.⁹⁷ As already mentioned, such exercises are academically enriching, but not entirely useful for practitioners, who require clear guidelines on conduct, particularly when the issues at stake could quite literally make the difference between life and death. In addition, the results of such determinations must be realistic for those who are supposed to apply them, as unrealistic rules do not protect anyone.

This area represents one of the biggest gaps in IHL of NIACs, and it is one where the development of new specific rules and/or guidelines has been suggested. As mentioned above, the ICRC is currently working in discussion with States on this issue.⁹⁸

VIII. Autonomous Weapon Systems

Autonomous weapon systems may be defined as “weapon systems that, once activated, can select and engage targets *without further human intervention*”.⁹⁹ Most of the challenges presented by such systems are linked to the notion of “autonomy” that they might possess. Currently, no country is fielding fully autonomous weapon systems in battle. Some systems, such as drones, do demonstrate limited autonomy. As such, one of the problems of the debate is that it remains hypothetical. We assume it may one day be technologically possible to develop robots that can operate fully autonomously, that possess all the necessary capacities to perceive the information required to comply with IHL (a formidable technological challenge – the system in question must be at least as good as a human being in perceiving changes to both its physical environment and the larger battle context, as we will discuss below), and to subsequently actually *apply* IHL to that information. If and when this does become possible, the following issues are expected to present legal challenges.

⁹⁷ Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, in: Orna Ben-Naftali (ed.), *International Human Rights and Humanitarian Law*, 2011, 34, 78-93.

⁹⁸ See *supra*, text accompanying notes 38-40.

⁹⁹ UN Human Rights Council (rapp. *Christof Heyns*), Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions of 9 April 2013 (UN Doc. A/HRC/23/47), emphasis added; the definition is contained in the Summary on the cover page.

The first is linked to predictability. Autonomous weapons must, by nature, possess a form of artificial intelligence, and possibly even be capable of “learning”. As such, it is difficult to say with certainty whether it will be possible to ensure that they cannot act in a way they were not intended by their human creators to act. It is the latter that are the addresses of IHL, and as such it must be always possible for humans to predict how the weapon will operate, otherwise humans cannot remain responsible for their “conduct”.

The second issue concerns IHL’s temporal scope of application, as it will become necessary to determine the extent to which IHL is applicable to conduct in peacetime (such as the development and programming of autonomous weapons) which produces results during armed conflict and constitutes the last human intervention in an attack (because individuals actually using the systems must trust that they have been programmed correctly).

Thirdly, there are concerns related to the three principles governing the conduct of hostilities: distinction, proportionality and precautions. A preliminary legal issue to be addressed before we discuss the principles themselves involves the question of whether targeting decisions involve subjective judgements. In our opinion, IHL on targeting requires an objective assessment of material facts rather than subjective value judgements – which machines are unable to make. Some argue that it is precisely this “assessment” that involves subjective determinations.¹⁰⁰ We are of the opinion that this is not a normative proposition, but simply a correct description of the (unfortunate) reality on the ground.

As targeting decisions are to be based on objective facts, the three principles mentioned above require that those conducting hostilities are able to sense, capture and synthesise a range of information in complex, dynamic environments. Assuming the technological challenge of building machines capable of gathering the relevant information is overcome, IHL further requires that they are capable of performing, in real-time, the no less formidable task of completing case-by-case determinations of whether lethal force can be deployed in compliance with IHL. In many cases, these determinations involve balancing between military necessity and the interests of humanity, and it is difficult (to say the least) to imagine reducing that balance to a matter of algorithms (although this would certainly help clarify the proportionality principle!). For example, proportionality assessments of an attack against a legitimate target must include an evaluation of risks to civilians as well as an evaluation of the “con-

¹⁰⁰ Human Rights Watch/International Human Rights Clinic: Human Rights Program at Harvard Law School, *Losing Humanity, the Case Against Killer Robots*, 2012, 4; *Peter Asaro, On Banning Autonomous Weapon Systems: Human Rights, Automation and the Dehumanization of Lethal Decision-Making*, IRRC 94 (2012), 687, 696-700; *Noel E. Sharkey, The inevitability of autonomous robot warfare*, IRRC 94 (2012), 787, 789-790; and (more nuanced), *Heyns* (note 99), paras. 70-74.

crete and direct military advantage anticipated”¹⁰¹ as a result of the attack. Both elements constantly change depending on movements of troops and civilians, the plans of the commander and the development of military operations on both sides. If a machine were to autonomously apply the proportionality principle, it would need, first, to be suitably programmed, and then, to be constantly updated as to military operations and plans.

The same difficulty is present regarding the principle of distinction. An object is a legitimate military objective if it makes an “effective contribution to military action” *and* the attack offers a “definite military advantage” “in the circumstances ruling at the time”.¹⁰² An autonomous weapon would need not only to be able to capture the relevant information, but also to be “aware” of changing military plans and operational developments in order to apply the principle.

IHL requires attackers to take feasible precautions to avoid or minimise incidental harm to civilians. As the rules of IHL are addressed to human beings, we contend that the feasibility assessment must be based upon what would be feasible for a human being executing the same attack and not upon the capabilities of the machine. This may require a consolidated assessment of whether an autonomous weapon is as able as the average soldier to respect IHL. However, such assessments must be made *for every attack*. Furthermore, the obligation to take certain precautions, such as those to verify the nature of a target or to choose means and methods that avoid/minimise incidental effects on civilians, are addressed only to “those who plan or decide upon an attack”.¹⁰³ It is correct that this means that only human beings may “plan or decide” but does not exclude decisions made by programming machines to execute an attack. Yet other obligations to take precautions are incumbent upon those actually carrying out attacks, such as the obligation to interrupt an attack when it becomes apparent that it is unlawful.¹⁰⁴ This again implies that autonomous weapons must possess the ability to act based on real-time processing of battlefield information that they (must be able to) sense and gather.

The final challenge relates to the concept of direct participation in hostilities. Generally, exactly what conduct constitutes direct participation in hostilities continues to be debated. In the specific case of autonomous weapons, things are even more unclear. Who, in the chain of producing, programming and deploying these weapon systems, directly participates in hostilities? According to the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostili-

¹⁰¹ AP I, Art. 51 para. 5 lit. b.

¹⁰² AP I, Art. 52 para. 2.

¹⁰³ AP I, Art. 57 para. 2 lit. a.

¹⁰⁴ AP I, Art. 57 para. 2 lit. b.

ties, one of the constitutive elements of direct participation is the direct causation of harm, and the Guidance suggests that this “should be understood as meaning that the harm in question must be brought about in one causal step”.¹⁰⁵ Obviously, only human steps can count (because the concept of direct participation refers to *who* and not *what* may be targeted). Therefore, if autonomous weapons are used, the last causal human step leading to the harm caused will constitute direct participation in hostilities. This step may be geographically removed from its effects. The Interpretive Guidance also holds that the standard of direct causation includes conduct that causes harm only in conjunction with other acts.¹⁰⁶ It is possible to interpret this expansively such that, in case autonomous weapons are used, the last human being to determine the weapon’s targets in an undetermined number of future operations directly participates in hostilities. However, in our view, like the drafters of tactical military manuals, programmers do not directly participate in hostilities, although the respect of IHL depends on them. States and other humanitarian actors must make sure that such individuals know and comply with IHL.

Along with the possible challenges that fully autonomous weapons – if ever developed – may present to IHL are potential advantages. Using autonomous weapons may allow attacks to be executed in such a way as to guarantee better respect for the principles of distinction, proportionality and precautions, as they are able to perform better than humans in certain situations, process information more rapidly, and do not face the same emotional and physical stressors that human fighters are exposed to. Robots can take additional precautionary measures that are impossible for humans (for example, measures that involve serious risks) and can delay the use of force until it is established with greater certainty that the target and the attack are legitimate. The development of autonomous weapons may even lead, because of programming needs, to a clarification of many rules that have so far remained vague. Only human beings can deliberately chose not to comply with the rules they were instructed to follow, and only human beings – not weapon systems – violate IHL.

IX. Cyber Warfare

One of the few areas in which existing IHL rules have not caught up with technological progress is cyber warfare. Fortunately, this has not yet produced significant humanitarian consequences. Although cyber security concerns encompass a range of phenomena,¹⁰⁷ the ICRC uses the term cyber warfare to

¹⁰⁵ *Melzer* (note 32), 53.

¹⁰⁶ *Ibid.*, 54.

¹⁰⁷ *Cordula Droege*, Get off my cloud: cyber warfare, international humanitarian law, and the protection of civilians, *IRRC* 94 (2012), 533, particularly 534-538.

refer to “means and methods of warfare that rely on information technology and are used in the context of an armed conflict”.¹⁰⁸ This statement helpfully clarifies the fact that IHL is only applicable to cyber operations that are part of an armed conflict. However, in reality, it is not very easy to determine when an operation can be considered to have taken place “in the context of” an armed conflict. It is even more difficult to determine when cyber operations alone trigger the applicability of IHL. Can they constitute hostilities to which IHL of IACs applies? Can they ever reach the minimum threshold of violence necessary to make IHL of NIACs applicable? A logically distinct, but related question, which raises similar difficulties, is determining when a cyber operation amounts to an attack to which the detailed IHL rules on targeting apply. What kind of effect must a cyber operation produce in order for it to constitute hostilities or an attack?

What is most often discussed in *ius in bello* is which cyber operations linked to armed conflicts would constitute “attacks” within the meaning of IHL. Legal experts drafting the Tallinn Manual on the International Law Applicable to Cyber Warfare¹⁰⁹ have defined a cyber attack as “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”.¹¹⁰ According to these experts, “it is the use of violence against a target that distinguishes attacks from other military operations”¹¹¹ and “[n]on-violent operations, such as psychological cyber operations or cyber espionage, do not qualify as attacks”.¹¹²

These experts steer away from problematic and over-inclusive definitions of “attack”, which include any operation that interferes with information systems. The intended effects of the cyber operation, then, are determinative of whether or not it can be qualified as an attack within the meaning of IHL, and as such this is a reasonable approach. However, the effects doctrine, requiring death or injury to persons, or damage or destruction of objects, is not without problems, and it may indeed prove to be under-inclusive. A cyber operation that resulted in the obliteration of data necessary to run Switzerland’s financial markets, for

¹⁰⁸ ICRC, Statement on weapons delivered during the General debate on all disarmament and international security agenda items, UN General Assembly, 67th session, First Committee, 16 October 2012, available at <https://www.icrc.org/eng/resources/documents/statement/2012/united-nations-weapons-statement-2012-10-16.htm> (accessed on 8 December 2014).

¹⁰⁹ See the website of the Tallinn Manual Process, available at <https://ccdcoe.org/tallinn-manual.html> (accessed on 8 December 2014).

¹¹⁰ Tallinn Manual on the International Law Applicable to Cyber Warfare, 2009, 108, Rule 30.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

example, would not qualify as an “attack” despite the crippling and clearly deleterious effects that would follow for the entire country. A compromise solution would therefore be to consider cyber operations without violent effects as hostilities and attacks if they have a considerable effect upon the targeted party.¹¹³ This is however a very vague criterion and it is difficult to reconcile with the text of the existing treaty law.

Cyber attacks also bring up issues related to the principle of distinction. The basic IHL rule on determining whether an object is a military objective is contained in Art. 52 of AP I, which describes military objectives as “those *objects* which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage” (emphasis added). Applying this to cyber attacks, we must first ask ourselves which parts of an information system can be considered possible targets of an attack: the physical system itself or the data contained within the system? Opinion is divided on whether data itself can be considered an “object” in the ordinary meaning of the term, as it is intangible.¹¹⁴ If data is not an “object” then by definition, it cannot be a military objective.

All the aforementioned and many other discussions on cyber warfare show that existing IHL is simply not adapted to intangible operations and objectives. Pending new specific treaty law, existing rules would however have to be applied after appropriate interpretation and the Tallinn Manual constitutes invaluable help, providing clarification on numerous issues and at least outlining the debate on others.

D. The Main Challenge: Ensuring Respect of Existing Rules

There is near unanimity among States and scholars that the main challenge to IHL is ensuring its effective implementation on the ground during armed conflicts. However, States are very reluctant to accept new enforcement mechanisms that would operate during armed conflicts – especially if these would equally cover NIACs, as they should, given that the latter constitute the vast majority of today’s armed conflicts.

That enforcement is the Achilles’ heel of IHL should not astonish. The situations to which IHL applies manifest themselves as chaotic exceptions to the

¹¹³ See, for a similar approach applying the same threshold for the two logically distinct questions when an armed conflict is triggered by a cyber operation and when such an operation constitutes an attack under IHL, *Michael N. Schmitt*, *The Law of Cyber Warfare: Quo Vadis?*, SLPR 25 (2014), 269, 290, 291, 295 and 296.

¹¹⁴ Tallinn Manual (note 110), 126-7.

normal course of relations between actors in the international community. As such, it would be absurd if IHL were perfectly respected in these situations, which are characterised by hostile conduct that is contrary to the basic norms of international law (in IACs) or of domestic law (in NIACs). Furthermore, IHL is a part of international law. Like most other branches of international law, it is marked by the absence of third party adjudication and enforcement. It must be self-applied by its addressees — States, armed groups and individuals. However, in times of armed conflict, the very survival of those addressees is at stake. The usual mix of negotiations, and mutual bartering of various promises and threats that leads to most rules of international law being respected most of the time does not work to promote compliance between belligerents seeking to defeat each other. More importantly, reciprocity, an important sociological factor and legal principle, does not work positively to promote mutual respect for the law in asymmetric conflicts.¹¹⁵ In any case, from a historical perspective reciprocity in the form of reprisals often led, in practice, to a “competition in barbarism”¹¹⁶ rather than inducing the enemy to cease violations. Reprisals are therefore largely outlawed in contemporary IHL.

To fill the gaps and promote better respect of IHL, some have suggested improving current implementation mechanisms, as well as put forward ideas for new mechanisms. In 2003, the ICRC organised several regional expert meetings on this question.¹¹⁷ Unfortunately, such propositions will only be effective if States are willing to accept efficient third-party enforcement in the international society. If this were the case, we would not need new implementation mechanisms, as the existing ones would function sufficiently.¹¹⁸

I. IHL-based Implementation Mechanisms Have Not Developed

1. *Protecting Powers*

Protecting powers are a mechanism specific to IHL,¹¹⁹ but analogous to one present in the law of diplomatic relations. Under this system, a third State may

¹¹⁵ See *infra*, text accompanying notes 137-138.

¹¹⁶ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict*, 1968, 99.

¹¹⁷ 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.

¹¹⁸ *Ibid.*, 47.

¹¹⁹ GC I, Arts. 8, 10; GC II, Arts. 8, 10; GC III, Arts. 8, 10; GC IV, Arts. 9, 11; AP I, Art. 5.

act as an intermediary representing one of the belligerents *vis-à-vis* the enemy, to cooperate in the implementation of IHL and to monitor compliance. However, this mechanism has not been employed since the Falklands-Malvinas conflict in 1982. It is considered a difficult, if not impossible, system to implement. First, the three States concerned must agree on the principle of employing the system and on designating one State as the protecting power, which is understandably difficult when two of them are at war. Second, the system of protecting powers only applies to IACs and as most contemporary armed conflicts are non-international, the system becomes increasingly obsolete. Third, neutrality plays a smaller role in contemporary international society, and additionally, neutral States are hesitant to act as protecting powers in an environment where most IACs are perceived as international law enforcement operations against international “outlaws”.¹²⁰

2. *The International Humanitarian Fact-Finding Commission*

Although lawyers are fascinated by legal debates, it remains that most controversies on whether IHL has/has not been violated in contemporary armed conflicts are not about the law, but about the facts. As such, the impartial, independent, reliable establishment of facts by a neutral, legitimate body could greatly contribute to ensuring better respect of IHL. It would also serve to prevent or suppress rumours, perceptions or propaganda that IHL is always violated (which lead to further violations).¹²¹ Such a fact-finding body would also provide third States with reliable information on the situation, allowing them to make appropriate decisions in light of their obligation to ensure respect of IHL.¹²²

The Geneva Conventions encourage States to agree to enquiry mechanisms in the event of alleged violations, but States have never resorted to the use of such mechanisms. Article 90 of Protocol I established the International Humanitarian Fact-Finding Commission (IHFFC), which may enquire, in international armed conflicts, into allegations of serious violations between States having accepted – *ex ante* or *ad hoc* – its jurisdiction. Unfortunately, despite having members, a secretariat, a budget, and 72 States that have accepted its jurisdiction *ex-ante*, it has never been used. Why? First, it must be triggered through the consent of both belligerents, which is incredibly difficult to secure during an armed conflict. Today however, there arguably exists an IAC between two States that have accepted the jurisdiction of the IHFFC *ex ante*: Russia and Ukraine. Nevertheless, not even Ukraine has seized the IHFFC to enquire into

¹²⁰ See *infra*, text accompanying notes 133-136.

¹²¹ See *infra*, para. following note 161.

¹²² GC I, Art. 1; GC II, Art. 1; GC III, Art. 1; GC IV, Art. 1; AP I, Art. 1.

the numerous IHL violations by insurgents it considers attributable to Russia. Second, it too has no mandate in NIACs. The IHFFC has indicated its willingness to work in NIACs, but again, this would only be possible if the consent of both parties was obtained. Third, as it has never been used, it cannot demonstrate its expertise and impartiality, and tends to be considered an obsolete mechanism by many. Fourth, unlike *ad hoc* enquiries set up by the UN, the IHFFC is not linked to any international body that could follow-up on its findings and recommendations. Fifth, States, in our view, simply dislike automatism, preferring *ad hoc* mechanisms over which they have a greater degree of control.

3. The ICRC

The ICRC's greatest assets are its independence, its focus on humanitarian action, its impartiality and its principled approach. It continues to be the main, and unfortunately in some cases (such as those of forgotten conflicts), the only actor monitoring the respect of IHL on the ground. However, the ICRC is not without its own limitations.

First, its priority remains its humanitarian work and securing access to persons and areas affected by conflict. This sometimes means that when faced with difficult choices between promoting compliance and gaining access, it will prefer the pragmatic approach that guarantees access to victims. Take, for instance, the manner in which the ICRC chooses to share its classification determinations. Even if it had come to the conclusion that the situation in Eastern Ukraine is an IAC because the insurgents are under Russian control, and that Crimea is occupied territory, it would not choose to make its conclusions public, nor even to share them with the Russian Federation, as doing so would jeopardise its chances of remaining present and assisting war victims in that region and in other conflict areas in which Russia has influence. This "softly-softly" approach prioritising access, while an understandable policy choice, raises several difficulties. Beyond frustrating legal scholars, it also means that no dialogue can be initiated on the protective rules on occupation contained in the Fourth Geneva Convention. In any case, although the ICRC does engage authorities in bilateral and confidential discussions on legal issues, the fact that this occurs "behind the scenes" increases public perception that the law does not matter, and also means that other States have no solid basis for implementing their obligation to ensure respect for IHL. Furthermore, even this approach does not always guarantee the ICRC secure access to the victims. Sometimes security concerns or States' obsession with sovereignty prevents the ICRC from being present in conflict areas. The ICRC rarely speaks out even when it is denied access, as it nevertheless maintains hope that it may be granted access at a later stage. In some cases, the ICRC does not even have meaningful access to

the parties themselves – for instance, when the government does not permit engagement with armed groups classified as “terrorist”, or when the government or armed group itself mistrusts the ICRC.

Second, despite being independent, the ICRC exists on a planet dominated by States. Its leverage on powerful States like India (Kashmir) and Russia (Chechnya) is so limited that it may not even try to pressure them publicly on key issues. Although from a legal and humanitarian point of view it should probably have done otherwise, it is therefore understandable that the ICRC accepted the (rather counter-factual and counter-intuitive) determination by a unanimous UN Security Council that the occupation of Iraq came to an end on 30 June 2004.¹²³ Third, repeated attacks against ICRC premises and personnel have obliged the organisation to balance its mission to protect victims of armed conflicts against the risks associated with fulfilling this mission. In an increasing number of situations (Eastern Congo, Iraq, Syria, Chechnya, the Tribal areas in Pakistan), the ICRC is no longer able to be fully present in the midst of the fighting and therefore cannot directly monitor the respect of IHL where it is most likely to be violated. Fourth, humanitarian action is increasingly seen by the international community or by those who claim to represent it (e.g. until 2014, NATO in Afghanistan) as an aspect of building peace and a means to undermine popular support for insurgents (e.g. the Taliban). It is obvious that such insurgents do not appreciate these peace building efforts. This fact makes it increasingly difficult to carry out neutral and impartial humanitarian action that is not linked to any political goals and accepted by all parties.

II. The Need for an Inter-State Mechanism on Compliance

We currently lack a forum to discuss challenges States face in implementing IHL, to assess when the obligation to ensure respect under common Article 1 is triggered, and to coordinate a response in cases of insufficient respect. Contrary to many treaties in other branches of international law, the Geneva Conventions do not foresee a State conference or treaty body to monitor compliance. Switzerland and the ICRC have launched a joint initiative to fill this gap, based upon a mandate received from the 31st International Conference of the Red Cross and the Red Crescent.¹²⁴ Consultations are under way on a number of

¹²³ Security Council, Resolution 1546 of 8 June 2004 (UN Doc. S/RES/1546); *Knut Doermann/Laurent Colassis*, *International Humanitarian Law in the Iraq Conflict*, GYIL 47 (2004), 293, 307-312.

¹²⁴ Swiss Federal Department of Foreign Affairs, Joint Initiative by Switzerland and the ICRC on strengthening compliance with international humanitarian law, available at https://www.eda.admin.ch/eda/en/home/aussenpolitik/voelkerrecht/humanitaeres_voelkerrecht/ikrk-initiative.html (accessed on 16 December 2014); ICRC, *Strengthening compliance with international humanitarian law (IHL): The work of the ICRC and the Swiss*

potential methods by which to strengthen compliance, such as the introduction of periodic debates on compliance questions, periodic reports on national implementation, and fact-finding processes in case of alleged violations. It would, in our view, be desirable that a future inter-State IHL compliance mechanism include an independent body with no operational humanitarian role in the field and that it possess the capacity to trigger its own operation and provide States with the necessary information to assess, in periodic meetings, whether IHL has been violated. Although it will be challenging in practice, such a mechanism must also be authorised to deal with armed groups if it is to contribute to greater respect for IHL in NIACs. In addition, the relationship between any future IHL mechanism and existing IHRL mechanisms must be clarified. Unfortunately, reports on the current discussions of States in the context of the Swiss-ICRC initiative suggest that a majority of States do not support the idea of an independent treaty body, nor the involvement of armed groups in a compliance mechanism, nor even discussion of violations in specific conflicts by a periodic meeting of States.¹²⁵ At least the idea of holding such periodic meetings currently meets with acceptance, and such meetings could hopefully constitute a first step towards achieving the other goals just mentioned.

III. Limitations of the United Nations

Although, the UN Security Council can be considered an embryonic centralised enforcement system, it is limited in several ways. First, it is dominated by the veto-wielding P-5. Their decisions (like those of most other members) are based on political interests rather than on objective criteria relating to non-compliance. The resulting impression is that enforcement by the UN Security Council involves double standards, and this leads to resentment by civilians and belligerents involved in armed conflicts. It may also lead to choices – or offers leaders convenient alibis – to disregard Council decisions, especially if no action was taken in prior similar situations that elicited the sympathy of public opinion or elites in a given country. Second, the main concern of the UN Security Council must be with *ius ad bellum*, i.e., maintaining or restoring international peace and security.¹²⁶ As a consequence, its main priority is not to ensure the highest degree of respect for IHL during armed conflicts, and it is less capable of enforcing respect by both parties as, at least in IACs, one necessarily violated the *ius ad bellum* and deserves harsher treatment by the Council, irre-

government, available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm> (accessed on 16 December 2014).

¹²⁵ See ICRC, *ibid.*

¹²⁶ Charter of the United Nations of 26 June 1945, Art. 24.

spective of its respect for IHL. Third, it is extremely difficult for the UN to apply the principle of equality of belligerents¹²⁷ to NIACs involving governments and armed groups. The former represent constituent member States and the latter are inevitably perceived as criminals, if not as “terrorists”, even by the UN. This stance is unhelpful from the compliance viewpoint, as all weapons-bearers should be engaged to promote full respect of IHL and sanctioned if they do not.

IV. Limits of International Criminal Justice

Bearing in mind the important progress highlighted earlier,¹²⁸ it must nevertheless be noted that until recently, international criminal tribunals existed for only two of the many situations requiring them – namely the crises in the former Yugoslavia and Rwanda. Although we now have a standing International Criminal Court, it will only be able to function with maximum effectiveness once its Statute has been universally accepted, and absent political interference, including by the permanent members of the UN Security Council, or self-censorship by the Prosecutor. The very credibility of international justice is dependent on this, as justice that is not the same for everyone is not true justice. Another significant material limitation to the work of the ICC results from its Prosecutor’s understandable policy to concentrate upon the most large-scale and most representative crimes.¹²⁹ One can only hope that prospective perpetrators envisaging attacking “only” hundreds of civilians or torturing “only” tens of prisoners do not study the ICC’s website.

Besides these material limitations, it is well recognised (at least at the domestic level) that criminalisation and punishment cannot be the only response to socially deviant behaviour. The increasing focus on criminal prosecution of violations may have inadvertently weakened aspects of implementation. For example, the threat of criminal prosecution may have made States more reluctant to accept existing fact-finding mechanisms such as the IHFFC. States have even become wary of the ICRC, which has stressed that it will not share information for the purpose of the prosecution of perpetrators and has even obtained

¹²⁷ See *infra*, text accompanying notes 132-133.

¹²⁸ See *supra*, text accompanying note 58.

¹²⁹ International Criminal Court, The Office of the Prosecutor, Letter to Senders re Iraq of 9 February 2006, available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed on 16 December 2014).

corresponding immunities from international criminal tribunals.¹³⁰ This fear has also meant that certain proposals to develop new mechanisms to enhance respect for IHL – such as the suggestion that States operationalise the proportionality principle, that they keep records to ensure a minimum of transparency about precautionary measures, that they conduct enquiries in cases involving civilian deaths and make the inquiry results publicly accessible¹³¹ – have met with resistance in military circles, even if these measures do not aim at criminal prosecution.

A disproportionate focus on criminal prosecution may also give rise to 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 false. For instance, to protect the civilian population it is crucial that all those launching attacks take all feasible measures to minimise incidental civilian harm by, for example, verifying targets and issuing effective warnings. Violations of these obligations do not amount to war crimes, but they remain crucial rules.

While the great civilising impact of international criminal law is that it individualises responsibility and sanctions, it must be admitted that 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 it is taken into account by all participants. To split, for example, the targeting process up into contributions for which individuals can be held criminally responsible is, first, not conceptually easy to carry out; second, it is often impossible to obtain sufficient evidence to prosecute all those involved in violations; and thirdly, establishing individual responsibility only gets us half-way to justice. It is also indispensable to establish the responsibility of States and armed groups.

Criminal justice furthermore inevitably adopts an approach to behaviour in war that is retrospective, legalistic, procedural and confrontational. Punishment for violations is handed down many years after the fact. While confrontational

¹³⁰ See ICTY, *The Prosecutor v. Simić and others*, Decision on the Prosecution Motion under Rule 73 of 27 July 1999 (Case No. IT-95-9-T); ICC, Rules of Procedure and Evidence in: Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II. A, Art. 73.

¹³¹ See *Marco Sassòli/Lindsey Cameron*, The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*, in: Natalino Ronzitti and Gabriella Venturini (eds.), *Current Issues in the International Humanitarian Law of Air Warfare*, 2006, 35, 63-64 and 71.

and procedural processes are required to bolster the law in the long-term, progress must also be made in strengthening implementation through *preventive* action, *immediate* reactions to violations, and the provision of *timely* redress to victims. Co-operative, pragmatic approaches often lead to better immediate results. There is great complementarity and mutual reinforcement between international criminal justice and the traditional methods of implementation of IHL. We must avoid criminal justice being seen as the dominant solution, to the detriment of cooperation and humanitarian action.

V. The Equality of Belligerents Before IHL Is Challenged in Discourse and in Reality

Perhaps the most important principle of IHL is the absolute separation between the *ius ad bellum* (regulating the legitimacy of resort to force) and the *ius in bello* (regulating the actual use of force). The separation results in the equality of belligerents before IHL. This means effectively that the rules apply in the same way to both parties, independently of whether or not their cause is just under the *ius ad bellum*.¹³² This constitutes the difference between armed conflicts between equals, to which IHL applies, and crimes, to which criminal law and IHRL rules on law enforcement apply.

The principle itself is frequently challenged or ignored by those who are convinced of the ‘justness’ of their cause. Even if only at the level of perception – and not that of legal argument – certain IACs are seen as law enforcement actions of the international community directed against “outlaw” States, entities, or groups. This is even a legally correct description of conflicts resulting from the application of the UN Charter’s collective security system and it corresponds to the discourse employed in the military campaigns of hegemonic powers and their allies.¹³³ In such situations, the perception of the parties as equals is threatened, and it becomes difficult to argue that the same rules of conduct apply to both the outlaws and the law enforcers. Those who perceive themselves as enforcing the common interest would not like to be told that they are being held to the same standards as the “outlaws”. They may even genuinely believe that, as defenders of the international community, they can, quite literally, do no wrong. This attitude may be behind the UN’s reluctance to rec-

¹³² See generally, *Marco 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: Michael Schmitt/Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, 2007, 241, with further references.

¹³³ *Detlev F. Vagts*, *Hegemonic International Law*, *AJIL* 95 (2001), 843 ff.; *José Enrique Alvarez*, *Hegemonic International Law Revisited*, *AJIL* 97 (2003), 873.

ognise that it is not only bound by the principles and spirit of IHL, but also by all its detailed rules.¹³⁴ At most, the “good guys” may accept being bound by a new set of *temperamenta belli*,¹³⁵ human rights-like restraints addressed solely to those engaged in international law enforcement – but not to their enemies.¹³⁶ At least as long as armed conflicts remain a reality distinct from crimes, the understanding that IHL can only work if it applies equally to both parties cannot be stressed enough. Failure to uphold the principle of equality of belligerents would bring us back to our historical starting point, with *temperamenta belli* applying only to those engaged in a *bellum iustum*. The progress made in the centuries intervening between Grotius’ time and ours would be erased.

VI. Difficulties in Obtaining Respect for IHL in Asymmetric Conflicts

At its inception, IHL regulated behaviour between States, which are equal in their sovereignty. It is best suited to armed conflicts between parties that are similar in terms of military and technological capacity. However, many present day conflicts are NIACs, and almost by definition exhibit heavy asymmetry. In asymmetric conflicts, both sides are convinced that they cannot succeed militarily without violating or at least “reinterpreting” IHL. As such, asymmetric conflicts pose a direct challenge to the very philosophy of IHL. The St. Petersburg Declaration laid down that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.¹³⁷ A strong argument to convince belligerents to respect IHL is to explain that victory is not only possible, but potentially facilitated, through compliance with IHL rules which require that parties concentrate only on what is decisive – the military potential of the enemy. This argument does not work in the case of asymmetric conflicts.

An official US commission of inquiry looking into the “war against terrorism” concluded that the US could not defeat the “enemy” if captured foes were to be treated in line with the ICRC’s interpretation of the Third Geneva Convention.¹³⁸ The belief that it is justifiable to obtain intelligence relating to ter-

¹³⁴ Sassòli, (note 132), 259.

¹³⁵ For the *temperamenta belli*, which Grotius holds applicable to those fighting for a just cause, see Peter Haggemacher, Grotius et la doctrine de la guerre juste, 1983, 597-604.

¹³⁶ See David Scheffer, Beyond Occupation Law, AJIL 97 (2003), 842; Nehal Bhuta, The Antinomies of Transformative Occupation, EJIL 16 (2005), 721; Steven R. Ratner, Foreign Occupation and International Territorial Administration, EJIL 16 (2005), 695.

¹³⁷ *Supra*, note 18.

¹³⁸ James R. Schlesinger (Chairman), Final Report of the Independent Panel to Review DoD Detention Operations of 24 August 2004, 85, available at,

rorist networks by subjecting captured foes to inhumane treatment demonstrated one aspect of the corrupting influence of asymmetry. The technologically superior party, faced with an unconventional enemy that violates the law, adopts the logic wherein the ends (preventing future attacks at home) justify all means. The other dimension of the corrupting influence is to be seen on the side of the “terrorist” adversary, who does indeed employ illegal tactics, not simply out of hate and spite, but based on the very rational calculation that his only chance of overcoming a technologically and militarily superior enemy lies in demoralising the latter’s civilian population through acts of terror. The vicious cycle is complete, and never-ending. In our view, however, both sides are wrong. Inhumane treatment of suspected “terrorists” only contributes to their recruitment efforts and places democratic States on the same moral plane as the terrorists, while terrorist attacks bolster the enemy population’s support for both its government as well as the latter’s military solutions to the “terror” problem.

Furthermore, in asymmetric conflicts, most rules of IHL are in fact only addressed to one side. Only one side has prisoners and an air force. Only one side could possibly use the civilian population as a shield. Although the reciprocity argument cannot justify violations of IHL, this absence of reciprocity negates an important motivating factor that leads to respect for IHL. A combatant treats captured enemy combatants humanely because he or she hopes to be accorded similar treatment if captured. This positive reciprocity is obviously lacking in asymmetric conflicts.

Finally, all legal systems require a minimum of structure and authority in order to be meaningfully implemented. 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 to comply with rules. Furthermore, the requirement that armed groups possess such structures and processes presupposes that the aim of all such groups is to eventually take over State functions through control of territory. While this is true for some groups, it is not a safe assumption to make generally. Some groups simply do not have either governance aspirations or the structures typically associated with such functions. A similar problem arises in the case of so-called “failed States”, where formal structures of authority have collapsed and informal structures are non-transparent, transient and based upon interpersonal relations rather than rules. In practice, it is much more difficult for third party humanitarian actors (such as the ICRC) to persuade, train and monitor the actions of individuals forming part of such loosely organised groups than it is to convince a troop commander who is able to transmit instruc-

<http://www.defenselink.mil./news/Aug2004/d20040824finalreport.pdf> (accessed on 16 December 2014).

tions to his units, monitor respect, receive and deal with allegations of non-respect and act to repress violations should they occur.

VII. IHL Is Humanitarian, but Some Actors Pursue Inherently Inhumane Goals

As we have mentioned, according to the philosophy of IHL, respect for its rules should not prevent, but may even facilitate victory. By permitting only that violence which is directed at the military potential of the enemy, the balance between the principles of necessity and humanity serves to curb “total war”.¹³⁹ Acts of violence against persons or objects of political, economic, or psychological importance may sometimes present more efficient ways of overcoming the enemy, but are never necessary, because every enemy can be overcome by sufficiently weakening its military forces. Today, this line of reasoning is not only “oversimplistic” according to some scholars,¹⁴⁰ but is at odds with the very aims of certain actors engaged in armed conflicts, aims that are incompatible with IHL, and which include genocide, ethnic cleansing, looting and rape. This violence is not directed at enemy militaries, but at entire populations. Respecting IHL would make the achievement of such goals impossible. In these cases, it is almost impossible to obtain respect for IHL.

In another type of situation, the goal of a belligerent is in line with IHL, but the most readily available means to achieve that end is prohibited. For example, take a belligerent wishing to oust an enemy government. This aim as such is fully compatible with IHL, and the belligerent remains in compliance with IHL if fighting is only conducted against the enemy government’s armed forces. However, once those armed forces are defeated, but the enemy government itself refuses to surrender, the belligerent has “run out of targets” militarily speaking.¹⁴¹ The only option remaining under IHL would be to occupy the country and physically arrest the members of that government and its supporters. However, the experience of the US and its allies in Iraq may strongly discourage future belligerents from adopting the same approach; in fact, the experience may encourage the taking of “short-cuts” such as seeking to provoke the local (enemy) population to oust the enemy government. If this is done through

¹³⁹ See, *Gabriella Venturini*, *Necessità e proporzionalità nell’uso della forza militare in diritto internazionale*, 1988, in particular 145-150.

¹⁴⁰ *Michael Schmitt*, *Targeting and Humanitarian Law: Current Issues*, *IYHR* 33 (2003), 59, 68.

¹⁴¹ *James E. Baker*, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, *NWCR* 55 (2002), 11; *Adam Roberts*, *The Law of War After Kosovo*, in: *Andru E. Wall* (ed.), *Legal and Ethical Lesson of NATO’s Kosovo Campaign*, *U.S. Naval War College, ILS* 78 (2002), 401, 416.

propaganda, including disinformation, it is unproblematic under IHL. However, if the short-cuts include supporting doubtful local warlords and armed groups, attacking that population and the infrastructure it relies on, or making life for members of that population impossible, they would be incompatible with IHL. In such a case, in order to respect IHL, the belligerent may be required to employ a more “costly” strategy (both in terms of resources and actual lives). Clearly, it is more difficult to convince belligerents of this than it is to persuade them to attack ammunition factories rather than holiday resorts.

VIII. Engaging Non-state Armed Groups

In 1930, a British author wrote: “[I]n spite of the modern theories, which make individuals subjects – and sometimes the only subjects of International law, it nevertheless has something to do with States.”¹⁴² Despite the many changes the world has undergone since then, this dictum still rings true today. International law is primarily made by and addressed to States; its implementation mechanisms are even more State-centred. While today, the rules on State responsibility are well codified, the international responsibility of non-state actors still remains largely uncharted territory. In those cases where international rules do apply to non-state actors (or are claimed to apply to them), no international forum exists in which individual victims, injured or third States, intergovernmental or non-governmental organisations could invoke the responsibility of a non-state actor and obtain relief.

International reality, however, has become increasingly less State-centred, involving the participation of NGOs, multi-national enterprises, and armed groups. As far as armed conflicts are concerned, it is imperative that international law catches up with international reality, for to fail to do so results in a weak level of protection for victims of the majority of armed conflicts, those involving armed groups. Other non-state actors such as multi-national enterprises and NGOs may be dealt with by the domestic law of the territorial State in which they are present. In the case of armed groups, this is simply not possible. Their existence in itself is testament to the fact that they operate beyond the practical reach of the law enforcement systems of the territorial State. They must therefore be engaged by international law and its mechanisms. IHL of NIACs has, since 1949, been more progressive than the rest of international law in this regard. Armed groups are specifically mentioned as addressees of IHL by Article 3 common of the Geneva Conventions. Nevertheless, the mechanisms of implementation for NIACs remain very limited and some IHL treaties, such as the Ottawa Convention banning landmines, are still only addressed to

¹⁴² *Thomas Baty, The Canons of International Law, 1930, 1.*

States. In addition, although armed groups are addressees of IHL and bound by its rules, it is necessary to engage them directly to foster a sense of ownership of the rules of IHL on their part.

In our view, engagement must begin in the process of drafting rules. One of the reasons for claiming that IHL is no longer adequate for modern conflicts involves precisely the issue of armed groups – in particular transnational armed groups. If we assume that a revision of the law applicable to fighting between States and armed groups were to take place, the revision, in our opinion, should involve all stakeholders, including armed groups. Similarly, one could not review the law of naval warfare without consulting the world's navies. IHL is, above all, a pragmatic endeavour. Its success depends on effective application by parties to conflicts. As such, it must be based on a solid understanding of the problems, dilemmas and aspirations of all parties to armed conflicts. Criminal law, on the contrary, does not have to take into account the aspirations of the criminals, or be realistic for them. This is because, unlike IHL, which is enforced horizontally by the parties, criminal law enforcement is vertical and hierarchical.

Once it is developed, the law must be disseminated to those who are charged with applying it. How does one disseminate to armed groups, taking their specificities into account? As efficient training does not consist solely of teaching prohibitions, but of showing how real-life situations may be solved while respecting IHL, the risk is that realistic training is considered support to the group, which is frequently equated with support to terrorism.

It is worthwhile to get an armed group to commit to respecting IHL. This by itself would help close the ownership gap, and would create a constituency of leaders and other members, who would become advocates of IHL within the group (if for no other reason than to avoid losing face should violations continue unabated after the commitment is obtained). General commitments to respect IHL – such as declarations to comply with “the Geneva Conventions and Additional Protocols” may be viewed with scepticism, as those treaties contain over 500 articles! Instead, a two-page code of conduct, which addresses the genuine humanitarian issues that arise for a given armed group in the field, is preferable. Geneva Call,¹⁴³ a Swiss-based NGO, works precisely to obtain such concrete commitments by armed groups to humanitarian rules prohibiting the use of landmines, the involvement of children in armed conflict and sexual

¹⁴³ For more information, consult the Geneva Call website at <http://www.genevacall.org>.

violence, through formal “Deeds of Commitment”¹⁴⁴ which are signed in Geneva by high-level military leaders of armed groups.

Armed groups should equally have access to advisory services, such as those provided by the ICRC to States. In our view, compliance is much more difficult for these groups than it is for governments with structures and institutions in place. How does a clandestine, illegal group ensure compliance with IHL? How does it punish members who do not comply? Can it punish or provide a fair trial without legislation? If we are serious about obtaining respect for IHL by armed groups, we must engage with the groups as they attempt to address these questions. This must be done assuming that many groups genuinely wish to respect IHL, which may prove to be untrue. However, it is also often untrue in the case of States, but this does not prevent us from providing them with advice. Experience shows that such advice often contributes to parties wanting to comply with IHL even if they did not want to do so initially.

Furthermore, the respect of IHL by an armed group should be rewarded. In an IAC, a combatant falling into the power of the enemy becomes a prisoner of war. Combatant immunity means she cannot be punished for having participated in hostilities. If she commits war crimes, however, she must be punished. She therefore has a definite interest in complying with IHL. This incentive does not exist for non-international armed conflicts. If a fighter in a NIAC only kills government soldiers, he will nevertheless be prosecuted for murder once captured by governmental forces. Even perfect respect for IHL does not bar prosecution under domestic law. Although this fundamental difference between international and non-international armed conflicts is inherent in our Westphalian international system, we should nevertheless develop some incentives and rewards – in IHL, international criminal law, refugee law and international anti-terrorism law – for compliance. This is one of the major reasons why we believe that lawful acts of war committed in an armed conflict should never be allowed to fall under any definition of terrorism.¹⁴⁵

Commitment, advice and rewards are, by themselves, not sufficient to promote compliance. The respect of the law also has to be monitored, and mechanisms to engage with armed groups in this regard remain few and far between. Under Article 3 common to the Geneva Conventions, the ICRC may offer its services to an armed group and if the latter accepts, the ICRC may monitor the group’s respect in exactly the same way as it monitors the activities of States involved in international armed conflicts. Similarly, Geneva Call monitors

¹⁴⁴ For more information, see Geneva Call’s explanation of their Deeds of Commitment at <http://www.genevacall.org/how-we-work/deed-of-commitment> (accessed on 2 January 2015).

¹⁴⁵ See, for a more detailed discussion, *Marco Sassòli*, *La définition du terrorisme* (note 68), 33-44.

whether a group's commitments correspond to reality on the ground. However, sovereignty-obsessed States do not appreciate such activities.

Finally, as with States, there must be responsibility for violations by armed groups. International criminal law is as much addressed to members of armed groups as members of armed forces. 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 has been a pioneer with its Alien Tort Claims Act.¹⁴⁶ Furthermore, the international responsibility of an armed group has already been addressed by sanctions taken by the Security Council against armed groups.¹⁴⁷ Another area that we think deserves exploration concerns how humanitarian organisations react to violations of IHL by armed groups. On the one hand, these organisations want to assist and protect persons who are in the hands of the armed groups, which necessitates continuing to cooperate with the group. On the other hand, reacting to violations is crucial, and humanitarian organisations must not sacrifice criticising violations, at least bilaterally and confidentially, to ensure access.

There are three main objections to engaging all non-state armed groups. First, many object that engagement by international actors encourages armed groups to continue employing violence, which inevitably contributes to human suffering. We would like to see a world without armed groups, just as we would like to see a world without armed conflicts. However, at present, they must be accepted as a reality, similar to armed conflicts. They will not disappear if we ignore them. Rather, the reality in armed conflicts may be improved if we devise methods and mechanisms through which to engage with these actors.

Second, more moderate opponents accept engaging some, but not all, armed groups. We hold that engagement must be toward all groups, because if not, selective criteria for which groups to engage will be applied, and these will only weaken efforts to ensure compliance. From a humanitarian point of view, distinctions between "good", "bad" and "horrible" armed groups would mean that those in greatest need of protection would be deprived of it because they are in the hands of a group whose methods or ideology we utterly reject. En-

¹⁴⁶ The Alien Tort Statute of 25 June 1948, 28 U.S. Code. § 1350 (2001).

¹⁴⁷ See, for example, concerning UNITA: Security Council, Resolution 1127 of 28 August 1997 (UN Doc. S/RES/1127); Security Council, Resolution 1173 of 12 June 1998 (UN Doc. S/RES/1173); Security Council, Resolution 1221 of 12 January 1999 (UN Doc. S/RES/1221 (1999)); concerning Republika Srpska: Security Council, Resolution 942 of 23 September 1994 (UN Doc. S/RES/942); concerning rebels in Sierra Leone: Security Council, Resolution 1171 of 5 June 1998 (UN Doc. S/RES/1171); and to a certain extent, concerning the Khmer Rouge: Security Council, Resolution 792 of 30 November 1992 (UN Doc. S/RES/792).

gaging all groups would also avoid a diplomatic problem. If we refuse, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how can we justify engaging the FARC to the government of Colombia? The only reasonable limitations to engagement are therefore to require that the group be a genuine armed group engaged in a genuine armed conflict. Both terms are admittedly not very clearly defined in IHL.¹⁴⁸

Third, the most recent obstacle to engaging armed groups is linked to the fight against terrorism. The US, for instance, has criminalised any support to the 60 groups currently on its “terror” list,¹⁴⁹ which includes some armed groups involved in NIACs. Furthermore, the US considers mere training in IHL as constituting “support” to armed groups.¹⁵⁰ In our view, this is incompatible with Common Article 3, which gives impartial humanitarian bodies the right to offer their services to armed groups, and if their offer is accepted, to provide such services to the groups. The approach of the US, and many other States criminalising the support of terrorist groups, is often justified as a method of implementing UN Security Council Resolutions. Such resolutions could indeed prevail under Article 103 of the UN Charter over Common Article 3.¹⁵¹ However, we would interpret such resolutions in conformity with Common Article 3 such that they do not affect the right of initiative of impartial humanitarian bodies.

E. The Challenge of Perception: The Perceived Gap Between the Promises of the Law and Reality Is Widening

The incredible development IHL has witnessed has generated increased expectations of protection. The statements of scholars, international tribunals, international organisations, States, and now, even armed groups, might lead one to believe that the full machinery of international law will guarantee protection in times of armed conflicts. We are told that most rules of IHL have a *ius cogens* character¹⁵² and are intransgressible.¹⁵³ We hear of the growth of custom-

¹⁴⁸ See *supra*, text accompanying notes 81-83.

¹⁴⁹ As of 2 January 2015. The U.S.’s list of foreign terrorist organisations is available on the website of the U.S. Department of State at <http://www.state.gov/j/ct/rls/other/des/123085.htm> (accessed on 2 January 2015).

¹⁵⁰ See, Section 2339B, title 18 of the United States Code (USC), 2339B (a)(1), Anti-terrorism and Effective Death Penalty Act of 1996, and the US Supreme Court in *Holder v Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, 2720 und 2725.

¹⁵¹ See in particular Security Council, Resolution 1373 of 28 September 2001 (UN Doc. S/RES/1373).

¹⁵² International Law Commission, Commentary, Draft Articles on Responsibility of States for internationally wrongful acts, in: United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August

ary IHL, that it is not only binding upon all States, but that it is based upon State practice, and that IHL rules applicable to IACs are also applicable to NIACs.¹⁵⁴

The UN Security Council has consistently held that violations of IHL constitute threats to international peace and security. In this, it is applauded by the unanimous college of scholars. However, victims of violations of IHL in Chechnya, Palestine and Syria still wait for the Security Council to comply with the “duties”¹⁵⁵ conferred upon it by the Charter to manage such threats. Furthermore, IHL experts optimistically recall that all States have an obligation to “ensure respect” of IHL.¹⁵⁶ In the halls of the United Nations, the doctrine of the “responsibility to protect”¹⁵⁷ is debated. While both represent truly lofty and laudable aspirations, they are lacking in clarity.¹⁵⁸ These concepts generate massive expectations that the international community is, all too often, unable to fulfil either because intervention may prove too costly in terms of human and material resources, or because political interests at play in certain situations prevent any action/intervention. Both reasons leave affected populations with a bitter taste in their mouths. They may interpret unwillingness to intervene as a judgement that their situation is not “horrible enough” to warrant international action, or they may be left with the feeling that their lives and fortunes are being balanced against and sacrificed for political points.

Despite the progress made in the international fight against impunity for violations of IHL, there are many armed conflicts in which not a single perpetrator has been punished. Even where serious international and domestic efforts towards criminal prosecutions have been made, most war criminals continue to benefit from *de facto* impunity. While we are told that there is “no peace without justice”, many war victims are simply still deprived of both. The case of the

2001), published as General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (UN Doc. A/56/10), 284 (para. 5 of commentary on Art. 40); ICTY, *The Prosecutor v. Zoran Kupreskic and others*, Judgment of 14 January 2000 (Case No. IT-95-16-T), para. 520.

¹⁵³ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 257, § 79.

¹⁵⁴ See *supra*, text accompanying notes 3-11, and ICTY, *The Prosecutor v. Duško Tadić aka “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (note 9), paras. 96-136.

¹⁵⁵ UN Charter (note 126), Art. 24.

¹⁵⁶ GCs I-IV, Art 1; AP I Art. 1.

¹⁵⁷ General Assembly, Resolution 60/1 of 24 October 2005, World Summit Outcome Document (UN Doc. A/RES/60/1), paras. 138-140.

¹⁵⁸ For Responsibility to Protect, see, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001.

former Yugoslavia has shown that it is materially, socially and politically impossible to prosecute all perpetrators of war crimes. As for reparations, in not one single case has full compensation been offered to all victims of violations after a conflict.¹⁵⁹

That victims were not sensitised, from the very beginning, to these perspectives contributes to the credibility gap under discussion. It is highly irresponsible on the part of the international community to generate expectations that it is not willing to, or cannot – materially or financially – fulfil. Doing so only serves to rub salt in the wounds of those who have already suffered much.

This credibility gap has negative effects on the implementation of IHL. Firstly, the perceived gap with respect to some rules affects how other rules are complied with. Some alleged customary rules unfortunately do not correspond to what States and armed groups actually do in many cases, and this puts at risk other uncontroversial rules, for example, the rule prohibiting deliberate attacks upon civilians. Secondly, in some cases the delivery of a “promise” has also served as an alibi for inaction. According to some sources, this was the hope of some Security Council members in setting up the ICTY.¹⁶⁰ Thirdly, the gap leads to frustration on the part of victims, who no longer believe in the restraining power of the law. This means that they, and those fighting on their behalf, are less likely to comply with IHL. Fourthly, the generation of unrealistic expectations may, quite simply, place persons affected by armed conflicts in grave danger, as evidenced by the tragedy of Srebrenica. Had its inhabitants known at the outset that the UN could not realistically deliver on the promise of designating Srebrenica a protected zone, they may not have tolerated Bosnian Muslim forces’ occasional provocation of the Bosnian Serb forces through raids on the surrounding villages¹⁶¹ and they would likely either have stayed in their villages of origin or have fled to real safety instead of concentrating in the place where they would eventually be massacred. Finally, and most importantly, only very few individuals would be ready to respect rules protecting those they perceive as their enemies, if they were convinced that they were the only ones respecting those rules.

¹⁵⁹ The UN General Assembly has promised full reparation to all victims of violations of IHL in: 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, General Assembly, Resolution 60/147 of 20 March 2006 (UN Doc. A/RES/60/147).

¹⁶⁰ *Pierre Hazan* (James Thomas Snyder, transl.), *Justice in a Time of War: the True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 2004.

¹⁶¹ ICTY, *The Prosecutor v. Naser Orić*, Trial Chamber Judgment of 30 June 2006 (Case No. IT-03-68-T), paras. 104-105.

The credibility gap can, however, be bridged, firstly by respecting IHL as promised. This will be easier to accomplish if commitments are realistic and nuanced. Additionally, we must work to prevent the imbalance in perception that IHL is more frequently violated than respected. Anyone consulting media and NGO reports would be led to believe that IHL is almost never complied with. This perception is strongest in certain long-running conflicts, for example, in the Near East, where people have a profound sense of being the victims of historical injustice. This imbalance in perception is not only inaccurate, but also extremely dangerous, and can result in a vicious cycle of non-respect. To counter this, it is necessary to foster – globally – an attitude in which respect for IHL matters and violations – no matter who they are committed by – are taken seriously. Well-organised, powerful, democratic States can take the lead in setting this tone. Second, States accused of violations should carry out serious enquiries and make their results public in every instance, in order to convince their adversaries and others of their general willingness to respect IHL. In our view, this would contribute much more towards winning the “war on terrorism” than any doubtful intelligence information which may be extracted from suspected terrorists. Thirdly, the media and NGOs cannot be relied upon to report evenhandedly and proportionately about respect and violations. They correctly consider violations scandals that must be made known, while respect is considered “normal” and as newsworthy as the fact that most drivers respect speed limits most of the time. Nevertheless, all of us should endeavour, whenever possible and when it is true, to show that IHL is very often respected. This is not an easy task, as it is difficult to come across real-life examples of respect, unless one is in the field and working directly in situations of armed conflict, in which case, one will be aware of such examples daily.

F. How to Produce New, More Adequate Rules and Mechanisms?

I. Through Treaties?

One might be inclined to expect that, when it comes to the elaboration of new IHL rules, especially those relating to mechanisms, the obvious starting point should be treaty law. This was what *Henry Dunant* suggested and achieved in 1864 with the very first Geneva Convention¹⁶² after he had witnessed in 1859 the horrors of the battle of Solferino. However, the composition and functioning of the international community is very different today, and current international reality is such that there are great difficulties in adopting new multilateral treaties and having them universally accepted. For a start, the

¹⁶² *Supra* (note 1).

number of States in existence has increased dramatically, a fact that necessarily affects the length of negotiation processes that result in multilateral treaties.

Secondly, as there is already a largely adequate normative framework in place, the few remaining areas that would benefit from clarification often involve highly technical or controversial points of law that States do not really wish to clarify, preferring to maintain a certain latitude of action in armed conflicts. Codification to clarify issues such as, for instance, the temporal and geographical scope of IHL, the contours of the principle of proportionality, the notion of direct participation in hostilities, the relationship between IHL and IHRL is particularly challenging (or impossible at present) because the debate is not settled, and there are (sometimes very wide-ranging) differences of opinion about what would constitute acceptable and unacceptable conduct.

Finally, there are some concerns that moves to agree on new rules might jeopardise the already existing normative framework. A particularly good illustration of such concerns can be found in the case of the International Humanitarian Fact-Finding Commission, established by Article 90 of AP I.¹⁶³ While there is general recognition that the mandate and trigger mechanism of the IHFFC need to be re-examined,¹⁶⁴ States are extremely hesitant to re-open discussion on this mechanism, or to admit that it has failed, bury it officially, and agree on something new on the same issue.

By pointing out the above, we do not mean to suggest that IHL treaties may never again be concluded. Indeed, recently, we witnessed the adoption of the Convention on Cluster Munitions and the Arms Trade Treaty, both of which are relevant from the point of view of armed conflict. Neither do we mean to suggest that only treaties with universal acceptance are effective instruments. The Ottawa Convention on Landmines, the Convention on Cluster Munitions and Additional Protocol I itself have not been accepted by several key States that are involved in armed conflict. India, Israel, Pakistan, Turkey and the United States are particularly noteworthy as non-parties of all three treaties. Nevertheless, those treaties bind their parties and provide evidence of State practice that is useful in determining the emergence of customary rules on specific issues. The case of the Ottawa Convention shows that a widely ratified treaty may also have an impact on the conduct of non-Parties.

Finally, future attempts to address substantive challenges to IHL through treaty law should be carried out in such a way as to address (or at least, to avoid

¹⁶³ See *supra*, text accompanying notes 121-122.

¹⁶⁴ Chairs' Conclusions, Second Meeting of States on Strengthening Compliance with International Humanitarian Law, Geneva, 17-18 June 2013, available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm> (accessed on 8 November 2014).

widening) the ownership gap with respect to armed groups and the law. In order for new rules to be realistic and to be complied with, modalities of engaging armed groups in the development and – at the very least – recognition of new norms must be elaborated.¹⁶⁵

II. The Revival of Customary Law

We now turn to customary IHL, which – unlike treaty IHL – has seen tremendous expansion over the past twenty years. The customary law channel has already been effective in bridging – at least in theory – the substantive gap between IHL of IACs and NIACs, and this channel may prove useful in addressing some of the other challenges outlined in this article, particularly those related to the admissibility of targeting and detaining enemy fighters in non-international armed conflicts. However, mechanisms and institutions needed for better enforcement can by definition not be created by customary law.¹⁶⁶ In addition, if we are to look to customary IHL to fill the substantive gaps identified above, then the evaluation of custom needs to be largely independent from actual practice of States, and more reliant on *opinio iuris* – on what States say rather than what they actually do. Even then, it is rather delicate to tell States that have rejected a certain rule as a binding treaty obligation that the same rule is binding upon them *qua* customary law, based upon their “practice”.

Furthermore, in order to ensure that future customary rules are realistic for all belligerents, it is important that the practice and statements of armed groups are taken into account. At present, armed groups are largely ignored in the evaluation of custom.¹⁶⁷ Although there are several conceptual difficulties in considering the practice of armed non-state actors in the norm-creating process, some scholars have argued that it is possible for armed groups to play a role in

¹⁶⁵ For a concrete proposal, see *Sivakumaran* (note 5), 564-567; for a general discussion of armed groups and the creation of international law, see *Anthea Roberts/Sandesh Sivakumaran*, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, *YJIL* 37 (2011), 107.

¹⁶⁶ The prevailing view is that customary law is concerned with substantive provisions, rather than with procedural ones. See, ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* Merits Judgment, ICJ Reports 1986, para. 200; *Bing Bing Jia*, *The Relations between Treaties and Custom*, *Chin. JIL* 9 (2010), 81, 92.

¹⁶⁷ *Anthea Roberts/Sandesh Sivakumaran* (note 165); at page 150, they mention the ICRC Customary Law Study, which did collect practice of armed groups, but did not use it in its evaluation of custom. They also mention that the ICTY in *Tadic* “took into account the practice of the CPLA, FMLN and the Royalists in Yemen in determining that a number of customary rules applied to noninternational [sic] armed conflicts”. However, the scholars also note that “nonetheless, in subsequent cases, the ICTY has not relied on the practice of armed groups”.

the development of new rules, although they see the risk of “downgrading” current international protections.¹⁶⁸ These scholars have put forward a theory of what they call “quasi-custom” which, in our opinion, merits further reflection.¹⁶⁹

III. New Forms of Soft Law

Besides conventional and customary IHL – which both require lengthy periods to establish new rules – there are other ways that have been employed to reinforce and consolidate the body of law that applies in times of armed conflicts. The most notable of these are “soft” or “non-binding” documents that provide guidelines for conduct.

Some of these non-binding documents claim to be “restatements” of existing international law, rather than developments of the law. Examples include the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea,¹⁷⁰ the 2005 ICRC Customary International Humanitarian Law Study,¹⁷¹ and the 2009 Manual on International Law Applicable to Air and Missile Warfare.¹⁷² Inevitably, these non-binding documents are not pure restatements, but on certain issues they represent developments of the law with respect to specific questions.¹⁷³ Other non-binding documents are intended to serve as guides to the interpretation of certain elements of the law, such as the ICRC’s Interpretive Guidance on the notion of Direct Participation in Hostilities.¹⁷⁴ Another example, the 2008 Montreux Document,¹⁷⁵ “the first document of international

¹⁶⁸ *Ibid.*, 141-152.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Louise Doswald-Beck* (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1995.

¹⁷¹ *Henckaerts/Doswald-Beck* (note 10).

¹⁷² Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), *Manual on International Law Applicable to Air and Missile Warfare*, 2009.

¹⁷³ For the HPCR Manual on Air and Missile Warfare, see *Ian Henderson*, *Manual on International Law Applicable to Air and Missile Warfare: A Review*, MLLWR 49 (2010), 169; for the ICRC Customary Law Study, see *John B. Bellinger, III/William J. Haynes II*, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, IRRC 89 (2007), 443; for the San Remo Manual, its introduction is itself instructive: “The purpose of the Manual is to provide a contemporary restatement of international law applicable to armed conflicts at sea. *The Manual includes a few provisions which might be considered progressive developments in the law*, but most of its provisions are considered to state the law which is currently applicable.”, emphasis added.

¹⁷⁴ *Melzer* (note 32).

¹⁷⁵ *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during*

significance to define how the law applies to the activities of private military and security companies (PMSCs) when they are operating in an armed conflict zone”,¹⁷⁶ explicitly states that it does not attempt to create legal rules, but contains “a set of good practices designed to help states take measures nationally in order to fulfil their obligations under international law”.¹⁷⁷

In our view, in international law even more so than in other areas of law, there exists a sliding scale between restatement and progressive development and between new legislation and the interpretation of existing rules.

With some new non-binding documents, there is concern about the process leading to their adoption, which is non-transparent and non-inclusive. They are often elaborated by experts whose representativeness and legitimacy are doubtful. Even where States are involved, these soft law rules are no longer elaborated, as they were traditionally, in the UN General Assembly or the Human Rights Council, in public and with civil society present. The Copenhagen Process on the Handling of Detainees in International Military Operations¹⁷⁸ is an example. It was launched in response to challenges presented by detention in the context of international military operations, and comprised of a five-year process involving the participation of 24 States and 5 international/regional organisations. The resulting Copenhagen Process Principles and Guidelines have been criticised on various counts, including for the closed nature of the process leading to their adoption.¹⁷⁹ Similarly, the current initiatives led by Switzerland and the ICRC to strengthen the respect of IHL and that led by the ICRC to strengthen legal protection for persons deprived of their liberty in relation to NIACs involves, for the time being, only State representatives and the reports on discussions held do not attribute any opinions to individual

armed conflict (2008). The Montreux Document is available in an Annex to the letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General (UN Doc. A/63/467-S/2008/636).

¹⁷⁶ Swiss Federal Department of Foreign Affairs, Montreux Document, <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html> (accessed on 9 November 2014).

¹⁷⁷ *Ibid.*

¹⁷⁸ Copenhagen Process on the Handling of Detainees in International Military Operations, at the website of the Danish Ministry of Foreign Affairs: <http://um.dk/en/foreign-policy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations> (accessed on 2 January 2015).

¹⁷⁹ Jacques Hartmann, The Copenhagen Process: Principles and Guidelines, EJIL:Talk! Blog of the European Journal of International Law, 3 November 2012, available at <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines> accessed on 9 November 2014).

States.¹⁸⁰ This makes it impossible for civil society, even in democracies, to advocate for more humanitarian positions by their governments.

Despite the declared intentions of their authors, such documents create presumptions¹⁸¹ as to the state of development of the law, and as such may be useful tools in addressing the substantive gaps addressed in our paper. Future attempts to develop similar instruments would benefit from inclusivity, transparency and methodological rigour, to avoid criticisms of their validity, credibility and legitimacy.

IV. Scholarly Writings Between Apology and Utopia

“It should be recalled that the law of armed conflict has a history of rules later being accepted which first emerged ‘from the pens of scholarly advocates’.”¹⁸² When a problem of interpretation of IHL arises, students, scholars and practitioners regularly consult scholarly writings. If the Commentaries published by the ICRC¹⁸³ and currently in the process of being updated¹⁸⁴ were to be classified among the traditional sources of international law, they would probably constitute particularly authoritative scholarly writings. Other scholarly writings, however, increasingly lack the same weight. This is because, often times, scholars do not try to present the law as it is, but as they or their clients wish it to be. On the one hand, some present – often camouflaged through sophisticated, novel, policy-oriented theories – the practice of powerful States, or the criticisms by their parent States, as the law. On the other hand, idealist lawyers are under the illusion that they can improve the law by claiming that their humanitarian aspirations already constitute law. Despite their noble aims, such scholars weaken the impact of the law. When it comes to IHL in particular, scholars must remain realists, because it is a profoundly pragmatic branch of international law. In Utopia, there is no IHL, because there are no armed conflicts.

¹⁸⁰ See *supra*, notes 40 and 124.

¹⁸¹ See, concerning the HPCR Manual, *Henderson* (note 173), 180.

¹⁸² *James E. Bond*, Application of the Law of War to Internal Conflicts, GJICL 3 (1973), 345.

¹⁸³ *Jean Pictet* (ed.), Commentary on the Geneva Conventions of 12 August 1949, Volumes I – IV, 1952; *Yves Sandoz* (ed.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987.

¹⁸⁴ See interview of 12 July 2012 with *Jean-Marie Henckaerts*, legal adviser and head of the project to revise the Commentaries, available at <https://www.icrc.org/eng/resources/documents/interview/2012/geneva-conventions-commentaries-interview-2012-07-12.htm> (accessed on 2 January 2015).

V. The Increasing Importance of Jurisprudence

Yet another way in which IHL has been fleshed out has been through the overwhelming impact of jurisprudence. Unlike under IHRL, which developed later, mechanisms of implementation, monitoring and enforcement under IHL are quite weak. For the most part, enforcement through criminalisation is left up to national authorities. With the notable exception of the work of the ICRC, the compliance mechanisms foreseen by IHL have never been activated.¹⁸⁵

In the absence of an IHL mechanism that can be triggered by the individual victim, the jurisprudential burden is shifted to existing human right bodies – such as the United Nations Human Rights Council, the UN Committee against Torture, the African Commission and Court on Human and People’s Rights, the Inter-American Commission and Court of Human Rights and the European Court of Human Rights among others – and to international criminal courts such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.

As far as human rights bodies are concerned, while this shift fills the mechanism gap in some ways,¹⁸⁶ it also creates certain substantial challenges for all human rights bodies engaging with such questions.¹⁸⁷ For instance, it is doubtful whether they have the competence to handle specific IHL questions in a realistic manner, especially when it comes to questions of conduct of hostilities – including determinations of direct participation in hostilities and proportionality, which involve rather complex evaluations, that are very different from the point of view of international human rights law, where life and property are

¹⁸⁵ ICRC, Background Document, Second Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL), 17/18 June 2013, Geneva, 5-6, available at <https://www.icrc.org/eng/assets/files/2013/2013-06-strengthening-ihl-background.pdf> (accessed on 9 November 2014).

¹⁸⁶ See *Robert Kolb/Gloria Gaggioli* (eds.), *Research Handbook on Human Rights and Humanitarian Law*, 2013, who refer to this as a development of “paramount importance in particular in institutional terms”. They go on to say, “Taking into account that the ICRC can only rarely publicly address violations of IHL and that the international criminal tribunals focus on the behaviour of individuals and not parties to a conflict as such, the Human Rights Council and its mechanisms have become ‘the major forum in which governments are most likely to be held to account for abuses committed’ in the context of armed conflict where they are ‘called upon to justify their conduct publicly and in a systematic manner’. Thus, it has become the main substitute for the lacking monitoring mechanisms under the Geneva Conventions and the Protocols additional to them”, 455, (footnotes/further references omitted).

¹⁸⁷ See generally, *Françoise J. Hampson*, *The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body*, IRRC 90 (2008), 549.

protected to a greater degree than is the case in times of armed conflict.¹⁸⁸ In the case of international criminal courts, the challenge is that these operate at the level of individual (not belligerent) responsibility, and deal only with violations of IHL that amount to war crimes, and therefore other violations of IHL that do not amount to such gravity are not covered. Additionally, the practice of international criminal tribunals and – to a lesser extent – that of human rights bodies does not take the difficulties of applying IHL during armed conflicts into account.¹⁸⁹ Their interpretations are in some cases easier to apply years after the events than on the battlefield.¹⁹⁰

The jurisprudence of these human rights bodies and criminal tribunals has nevertheless played an enormous role in developing and clarifying the laws applicable to armed conflict, for example those on the relationship between human rights law and humanitarian law, the material, temporal and geographical scope of NIACs, the existence of a similar body of IHL rules for IACs and NIACs, among others.

As for domestic jurisprudence, it could and should have an important role in enforcing and clarifying the legal obligations of States, but it is often marked by the desire to justify the conduct of the forum State or to criticise conduct of another State. Often, domestic jurisprudence employs various types of avoidance strategies to absolve the forum State of IHL violations, or is marked by utopian interpretations by judges targeted against enemy or third States, or armed groups.¹⁹¹

VI. The Role of Natural Law

Finally, and as a last resort, it must be recalled that in the event of an issue on which treaty and customary law are silent, for which no non-binding texts exist and where jurisprudence is unavailable, we still are guided, in the realm of IHL more than in other branches of public international law, by natural law, which inspired the very first codifications.

¹⁸⁸ *Kolb/Gaggioli* (note 186), 456: “Another weakness is the often superficial invocation and application of IHL by treaty bodies that may not do justice to the detailed content and the conceptual underpinnings of the law of armed conflict.”

¹⁸⁹ *Grignon/Sassòli* (note 58), 144-152.

¹⁹⁰ For instance, the concept of responsibility for violations of IHL through the doctrine of joint criminal enterprise, while undoubtedly useful for criminal prosecutions, is not very evident to apply in practice during battle.

¹⁹¹ See generally, *Sharon Weill*, *The Role of National Courts in Applying International Humanitarian Law*, 2014.

This understanding first appeared in the Martens Clause contained in the preamble to the 1899 Hague Convention:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹⁹²

The Martens clause shows, effectively, a link between positive law and natural law. That the High Contracting Parties were motivated by considerations of “rightness” to include the clause in the preamble brings into focus the relationship, particularly in this area of international law, between what is morally good, fair or just, and what is legal. The Martens clause is today, even more than when it was drafted, read to mean that the silence of treaties on a particular issue does not give States the right to act as they will, establishing additional wellsprings in which to seek guidance on conduct: the usages established between civilised nations, the laws of humanity and the requirements of the public conscience.

The reference to the usages established between civilised nations points to “the importance of customary norms in the regulation of armed conflicts”.¹⁹³ The term “laws of humanity” is taken to be synonymous with the expression “principles of humanity”, which prohibit, “means and methods of war which are not necessary for the attainment of a definite military advantage”.¹⁹⁴ The term “the dictates of the public conscience” has been interpreted variously, but could be said to include authoritative expressions, such as those found in General Assembly resolutions, of the will of the international community.¹⁹⁵

G. Conclusion

By definition, IHL and its implementation mechanisms can never be perfect, because in a perfect international society, armed conflicts, to which IHL applies, would not exist. Nevertheless, since 1864, when *Henry Dunant* obtained

¹⁹² Preamble, Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention and Hague Regulations) of 29 July 1899. It must be noted that the Martens Clause originally dealt only with the (already at that time) controversial issue of the protection of persons directly participating in hostilities, but lacking combatant status.

¹⁹³ *Rupert Ticehurst*, *The Martens Clause and the Laws of Armed Conflict*, IRRC 37 (1997), 125, 129.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, 130-131.

States' acceptance of the first Geneva Convention, the legal protection of war victims and international efforts to obtain compliance with those rules have seen incredible progress. It is, however, disheartening to note that the 38 years since 1977 (when the Additional Protocols were adopted) constitute the longest period in the 150 years of the history of modern, codified IHL in which no general update of existing IHL has been undertaken. This is not solely because the existing rules are largely adequate, but also and more importantly, because a majority of States are obsessed with their sovereignty and fear any outside interference, even in the form of rules protecting their populations, and additionally because a minority of powerful States desire to keep as many options as possible open in the event of an armed conflict. Limited progress has been achieved, but only through normative detours and often in a veiled manner. Some efforts have claimed the exact opposite of what is actually their aim, i.e., mere restatement and interpretation rather than (new and) improved rules and more efficient mechanisms resulting in better protection. Nevertheless, any approach to IHL must be pragmatic. If – but only if – such new avenues improve protection of war victims, they deserve to be pursued, even if they frustrate positivist lawyers and make it more difficult for practitioners to know what “the law” is.

As for the enforcement of existing rules, even if we take into account the fact that IHL implementing mechanisms can by definition never be perfect, add our admiration for the humanitarian activities of the ICRC, and subtract the distortions that arise from misperception, we must admit that IHL, which offers adequate protection to most on nearly all humanitarian issues, if applied and interpreted in good faith, is simply insufficiently enforced. This is the greatest challenge for IHL. Today some fragile momentum exists for an inter-State implementation mechanism. For the time being, States do not seem to support the necessary minimum for an efficient mechanism, i.e. an independent treaty body, the involvement of armed groups, and open discussions about violations. However, perhaps even an insufficient mechanism may generate momentum which will provide, once a political window of opportunity opens, the basis for further improvement.

More generally, what is lacking is political will by States and armed groups to respect IHL. Although desperately needed, this can only marginally be created by legal mechanisms. What is required first and foremost is to convince individuals who decide and fight for States and armed groups, and society at large, that respect for the law matters. To foster a general culture of respect, dissemination, training and education are crucial, but not sufficient. A range of political, moral, religious and/or utilitarian arguments can be used as well. The role of law in all this is limited. This article has nevertheless shown that some of the challenges for the implementation of IHL are related to – if not caused by – legal issues. We do not pretend to have solutions for overcoming all these

challenges, but have tried to suggest 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 belligerents as possible must perceive IHL as an obstacle to the achievement of their final aims; engaging all those who are meant to respect IHL; and reducing the credibility gap, not only by enforcing IHL, but also by placing the emphasis on the existing rules instead of endlessly developing new ones – or, worse, pretending that they already exist – and by convincing the general public, journalists, news-consumers, fighters and their constituencies that there is much more respect for IHL in evidence than they may be given to think.