

DEBATE



Should the obligations of states and armed groups under international humanitarian law really be equal?

Marco Sassòli and Yuval Shany

By introducing a new 'debate' section, the Review hopes to contribute to the reflection on current ethical, legal, or practical controversies around humanitarian issues. This section will expose readers to the key arguments concerning a particular contemporary question of humanitarian law or humanitarian action.

*For this first debate, the Review asked two members of its Editorial Board, **Professor Marco Sassòli** and **Professor Yuval Shany**, to debate on the topic of equality of states and armed groups under international humanitarian law. **Professor René Provost** comments on this debate, adding a third dimension to the discussion.*

The crucial question is whether it is realistic to apply the current legal regime to non-state armed groups. How can armed groups, with sometimes very limited means and low levels of organization, meet the same obligations as states? What are the incentives for armed groups to respect rules that their opponents have enacted? Why

should they respect any rules when the very fact of taking arms against the state already makes them ‘outlaws’?

All participants in this discussion share an aspiration to ensure better legal protection for all those affected by armed conflicts. Professors Sassòli and Shany have agreed to present two ‘radically’ opposed stances, Professor Sassòli maintaining that equality should be reconsidered and replaced by a sliding scale of obligations, and Professor Shany rebutting this assertion. Professor Provost then reflects on the stances put forward by the two debaters and invites us to revisit the very notion of equality of belligerents.

The debaters have simplified their complex legal reasoning for the sake of clarity and brevity. Readers of the Review should bear in mind that the debaters actual legal positions are more nuanced than they may appear in this debate.

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Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?

Marco Sassòli*

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* Marco Sassòli would like to thank Ms Lindsey Cameron, LL.M, doctoral candidate at the University of Geneva, for her thoughtful comments and for revising this text.

When asked whether states (and therefore the government armed forces that represent them) and non-state armed groups have, or should have, equal obligations under international humanitarian law (IHL), its defenders are faced with a dilemma in their desire to increase respect for victims of armed conflict. On the one hand, the dogma that all parties to an armed conflict are equal before IHL (hereafter referred to as ‘the dogma’) is a cardinal principle of that body of law and there are good theoretical reasons – and even more compelling practical ones – to apply it equally in non-international armed conflicts (NIACs).¹ On the other hand, it is legitimate to question whether this is realistic. This is a highly relevant concern: unrealistic rules do not protect anyone but rather tend to undermine the willingness to respect even the realistic rules of IHL. Both armed groups and governments are equally in a dilemma. Government forces understandably want their enemies to respect the same rules as those by which they are bound. On the other hand, any idea that an armed group (which governments invariably classify as being composed of criminals, if not ‘terrorists’) could be equal to a sovereign state in any respect is heresy for governments obsessed by their Westphalian concept of state sovereignty. As for armed groups themselves, they may appreciate the idea of having the same rights as their opponents, but most of them are much less willing – and to a certain extent even unable – to respect the same obligations. I do see and understand the risks of abandoning the dogma and I admit that it is not easy to agree upon the rules that bind armed groups if they are not equally bound. Nevertheless, I will argue here in favour of abandoning the dogma, in order to launch a debate, which I am grateful that the *Review* is hosting.

In international armed conflicts (IACs), the dogma results from the necessary separation between *ius ad bellum* (which has today turned into *ius contra bellum*, the law prohibiting the use of force in international relations) and *ius in bello* (the law regulating how such force may be used). From time to time, especially when they are convinced that they have a particularly noble cause, states attempt to question this separation, but they have accepted it in treaty rules. From a practical point of view, without it respect for humanitarian law could not be obtained, since – at least between the belligerents – it is always controversial which of them is resorting to force in conformity with the *ius ad bellum* and which violates the *ius contra bellum*. From a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *ius contra bellum* committed by ‘their’ party.

For IHL of NIACs, the dogma is less uncontroversial. Certainly common Article 3 to the Geneva Conventions explicitly prescribes that ‘each Party’ to such a conflict has to respect its provisions. Protocol II is deliberately silent on the issue. The extensive corpus of customary rules found by the International Committee of the Red Cross Study on Customary International Humanitarian Law (ICRC Study

1 I myself wrote elsewhere: ‘[I]f IHL did not respect the principle of the equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected’. Marco Sassòli, Antoine Bouvier, and Anne Quintin, *How Does Law Protect in War?*, 3rd edn, ICRC, Geneva, 2011, p. 347.

on Customary IHL) to apply to NIACs is exclusively based upon state practice. But why should armed groups be bound by rules created by the practice and *opinio iuris* of their enemies? In addition, technically no international *ius ad bellum* exists in NIACs, since such conflicts are neither justified nor prohibited by international law. *Ius contra bellum* for NIACs consists of national legislation. The monopoly on the use of force for state organs is inherent to the very concept of the Westphalian state. The national legislation of all states bars anyone except state organs acting in that capacity to engage in an armed conflict against anyone. IHL does not oblige states to adopt internal laws that treat members of rebel forces and members of governmental forces equally. In domestic law, governments and armed groups are profoundly unequal and such domestic laws do not violate IHL.² Does this inherent inequality of belligerents in NIACs leave room for the equal application of humanitarian law?

Even for IHL itself, the question arises whether it is realistic to treat equally such profoundly unequal entities as states and armed groups. When looking at the reality in the field, most armed groups are perceived – rightly or wrongly – as ignoring IHL, both in the sense of not knowing it and also in the sense of deliberately conducting hostilities in a way contrary to its basic principles, such as the principle of distinction. Many armed groups indeed consider that their only chance to overcome militarily and technologically incomparably stronger governmental forces is to attack ‘soft targets’, namely civilians and the morale of the civilian population, in the hope that they will withdraw their support for the government. The militarily weaker ‘outlaw’ does not respect the law, but rather sees the resort to violations such as terrorist attacks or acts of perfidy as his only chance of avoiding total defeat. To outlaw armed groups and label them as ‘terrorist’ is sometimes a self-fulfilling prophecy. In addition, humanitarian players in the field report that, even with some well-organized armed groups that control territory, it may be possible to have a dialogue about humanitarian problems or access to war victims, but not about the respect of substantive legal rules by those groups. For many humanitarian organizations, the security of their own staff and the acceptance of their activities is such an overriding concern that a dialogue about violations committed by those groups is seen as too risky. Of course, non-governmental organizations (NGOs) such as Geneva Call have been able to obtain and monitor commitments to respect rules on some well-defined issues, such as the use of anti-personnel landmines or of child soldiers. Nevertheless, it is much more difficult to obtain from certain groups a renunciation of the practice of resorting to suicide attacks directed against civilians, hostage-taking or the use of human shields as a usual method of warfare.

One may object that this bleak picture equally applies to many governmental armed forces actually conducting armed conflicts. Few of them may claim to be champions of the respect of IHL. The degree and extent of disrespect is

2 As will be shown in the contribution by Zakaria Daboné in this issue, in branches of international law other than IHL, states (the main subjects of international law) and armed groups (their enemies) are similarly fundamentally unequal.

nevertheless greater for most armed groups than for most governmental forces. In addition, and more importantly, this seems to be due not only to a lack of willingness but also, in respect of certain rules, to a lack of ability. Furthermore, while it is lawful for governmental forces to target the commanders of an armed group, eliminating them exacerbates the inability of the group to comply with many rules, as the commanders are often the only ones capable of ensuring compliance by their subordinates.

NIACs are by definition fought at least as much by armed groups as by governmental armed forces. If the applicable law takes only the needs, difficulties, and aspirations of the latter into account, while it claims to apply to both, it will be less realistic and effective. If governmental forces and armed groups are equal, we would have to check for every rule whether an armed group having the necessary will was able to comply with the rule found, without necessarily losing the conflict. This applies not only to existing, claimed, and newly suggested rules of IHL but also to any interpretation. States undertake this reality check for themselves, as they are the legislators. For armed groups, such a reality check is not done. If certain rules are not realistic for armed groups and we nevertheless claim that they apply to them, this will not only result in the violation of such rules; it will also undermine the credibility and protecting effect of *other* rules with which an armed group *is* able to comply.

Five examples may illustrate this doubt about the realism of certain legal developments, if the same rules apply to both sides. First, the current tendency of international criminal tribunals, the ICRC, and scholars to bring the law of NIACs closer to that of IACs, mainly via alleged customary rules, may also have the negative side effect that armed groups are claimed to be bound by rules that only states are truly able to comply with – and that were made for states in conflicts between themselves. I will mention below the prohibition of arbitrary detention as an example. Second, the increasing integration of human rights standards into IHL may lead to a similar result. Third, the combination of the minimum age of 18 and a large concept of (prohibited) involvement of children with armed groups results in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the whole population, on whose behalf they (claim to) fight. Fourth, the usual definition of pillage – for example, that which is suggested by those who fight against businesses pillaging natural resources in conflict areas – turns out to be discriminatory against armed groups because it includes any appropriation without the consent of the owner. As the owner is not defined in international law, it is considered to be defined by domestic law. Under the latter, however, the owner is, in most countries, the government. This means that armed groups commit the war crime of pillage when they continue an existing exploitation of natural resources in a territory that they control, perhaps even the territory of the people for whom they fight, even if they use the proceeds for the benefit of the local population, or to continue their fight for that people. Fifth, the development of concepts such as command responsibility by international criminal tribunals and human rights NGOs may lead to unrealistic requirements addressed to leaders of armed groups, neglecting the organization of armed groups

(who are often obliged to act clandestinely), which is fundamentally different from that of states.

In my view, these questions deserve serious analysis, preferably involving practitioners (in our case, members of armed groups as much as soldiers), which may lead us to abandon the axiom of the equality of belligerents in NIACs.

The breathtaking discovery of customary rules applicable in NIACs, which parallel rules of treaty law applicable in IACs, and the willingness of the ICRC to consult states on the possibility of developing the treaty law, in particular that applicable to NIACs,³ is certainly to be applauded from the perspective of the all too many victims of violence and arbitrariness in NIACs worldwide. In addition, the more the set of rules applicable in IACs and NIACs become similar, the more the theoretically thorny and politically delicate question of the classification of certain armed conflicts (in particular mixed ones) becomes moot. It may also be true that governmental forces would be perfectly able to respect the same rules in both categories of armed conflicts. Many armed groups, on the other hand, could not possibly respect the full range of rules applicable in IACs.

This could lead us to apply a sliding scale of obligations to them. The better organized an armed group is and the more stable the control over territory it has, the more similar the rules applicable would be to the full IHL of IACs. In the Spanish civil war, for example, both sides could have respected nearly all those rules, because both sides controlled and administered territory and fought mainly through regular armies. On the other hand, while control over territory by an armed group is not indispensable for IHL of NIACs to apply, one cannot imagine how a group forced to hide on government-controlled territory could implement many of the positive obligations foreseen by IHL. One may object that many of those obligations only arise if a party undertakes certain activities. Thus, every armed group is materially able to respect the customary prohibition of arbitrary detention – interpreted by the ICRC Study on Customary IHL as encompassing the need that the basis for any internment must be previously established by law – simply by not detaining anyone. However, such a requirement is unrealistic and is likely to lead to summary executions of enemies who surrender.

Which rules can and therefore must be respected in which circumstances would obviously have to be laid down in detail. This cannot depend on the ability of a given armed group to respect certain rules, but must be determined generally (for certain categories of armed groups) and *in abstracto*, and it must preserve a humanitarian minimum. Otherwise, a weak armed group would be allowed, for instance, deliberately to target civilians if this constitutes its only realistic means of weakening the government.

Such a sliding scale of obligations would not be revolutionary. The threshold of application of Additional Protocol II, which is much higher than that of Article 3 common to the Conventions, already results in such a sliding scale. This

3 See Jakob Kellenberger, President of the ICRC, 'Strengthening legal protection for victims of armed conflicts: States' consultations and ways forward', 12 May 2011, available at: <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-2011-05-12.htm> (last visited 15 May 2011).

high threshold is often regretted, but perhaps it is realistic for armed groups. Indeed, only armed groups that control territory (which is one of the conditions for the Protocol, but not for Article 3, to apply) may be able to respect certain rules of the Protocol.

To apply such a sliding scale to both sides would be absurd. On the contrary, the weaker their enemies are, the easier it is for governmental forces to respect IHL. Therefore, we must consider abandoning the fiction of the equality of belligerents and require full respect of customary and conventional rules of IHL from the government, while demanding respect only according to their ability from their enemies. This corresponds to the real expectations of contemporary governmental forces fighting armed groups. Which ISAF soldier expects (in the sense that he foresees) that the Taliban will respect the same rules that his commander requires him to respect? To inform governments and their soldiers that their enemies are not bound by the same rules also reduces the risk of violations committed under the title of reciprocity for the enemy's perceived violations. While violating IHL on the basis of reciprocity is widely outlawed, it continues to provide an argument and an excuse for many violations – and may lead to a competition in barbarism in many armed conflicts.

In conclusion, a caveat: the importance of abandoning the equality of the belligerents should not be overstated. Most human suffering in NIACs does not result from disregard of those rules that some non-state armed groups may have objective difficulties to respect. It results from violations – by both sides – of those rules that every human being can respect in every situation: not to rape, not to torture, not to kill those who are in the power of the enemy or are powerless. To adapt some rules to what a party can actually deliver would simply deprive it of an easy excuse to reject the entire regime. The equality of belligerents is a fiction in NIACs. Fictions undermine IHL. Because this body of law applies to an (undesirable) reality, it must deal with the humanitarian consequences of that reality, and it must take reality into account in all its rules and principles if it wants to be able to maintain a real impact.



A rebuttal to Marco Sassòli

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Professor Marco Sassòli's call for re-examination of the existing IHL 'dogma' that adheres to the principle of belligerent equality in asymmetric conflicts involving state and non-state actors is certainly thought-provoking (if not provocative) in nature. There is little question that IHL suffers from chronic compliance problems in NIACs involving strong states on the one hand and weak militant groups with limited capabilities on the other; it is also clear that compliance problems are closely tied to questions of capacity and military rationale (that is, that parties that stand to suffer military disadvantage if they are to comply with IHL norms may be more inclined to violate IHL). These compliance problems might be exacerbated by the ideological leanings of some non-state actors who reject the moral values underpinning IHL, and by the fact that IHL norms have become more demanding over the years: the higher the normative bar is set in NIACs (as a result of the diffusion of IHL norms governing IACs to non-international conflict settings and the complementary role of international human rights law and international criminal law therein), the greater the compliance gap – that is, the gap between the norms and the manner in which non-state actors are able and willing to conduct themselves. Sassòli is thus correct in criticizing normative overreaching as counter-productive to IHL compliance.

Still, one has to be careful not to throw out the baby with the bathwater. Doing away with the principle of belligerent equality may open a 'Pandora's box'

* Yuval Shany would like to thank Mr Yahli Shereshevsky and Professor Gabriella Blum for their useful comments on an earlier draft.

that could threaten the legitimacy and effectiveness of IHL, and might lead to lower – not greater – compliance with its norms. First, strongly linking the scope of IHL obligations to organizational capacities and military rationales, as proposed by Sassòli, represents a dangerous concession to practical contingencies, which may decrease the incentive for compliance and put in question the applicability of IHL to changing battlefield conditions. While it is sensible to create some degree of correlation between the conduct expectations that IHL norms convey and the capabilities of any particular set of belligerents, one ought to recall that the overriding *raison d'être* of IHL is not full compliance with its norms but rather the protection of humanitarian values (high compliance rates being the means to an end, not an end in themselves). While a capacity-based sliding scale of obligations would minimize the number of violations, it would not incentivize parties to improve their compliance capacities in a manner that would lead to improved humanitarian protections. On the contrary, under the scheme proposed by Sassòli, parties would have a strong disincentive to invest in capacity-building (such as establishing prison camps or acquiring more discriminating weapons) as this would not only divert scarce resources from their military operations but would also subject such operations to new legal restrictions. Furthermore, if capacity is indeed a controlling factor in determining the scope of IHL obligations, then it is difficult to see why this rationale would not apply to asymmetric inter-state conflicts involving developed and developing countries. Thus, pegging the scope of obligations to the capacity to comply may generate an unfortunate 'race to the bottom', resulting in considerable erosion of humanitarian protections in many, if not most, armed conflicts.

In the same vein, Sassòli's position that it is 'unrealistic' to expect non-state actors to comply with IHL obligations (such as the principle of distinction) that would put them at a military disadvantage appears to assign too much weight to military considerations, at the expense of IHL's humanitarian mission, which limits the space left to *raison d'état* in designing and executing military operations. Accepting that parties to armed conflict – both states and non-states – may prioritize winning over complying with IHL may deal a severe blow to the image of IHL as a non-negotiable body of side-constraints that limits the belligerent parties' available military options. So, instead of requiring belligerents to channel the violence that they apply to lawful forms of conduct and to develop suitable military strategies and capacities to that effect, we would end up acquiescing to fighting tactics that are an anathema to humanitarian values. Furthermore, once the principle of belligerent equality is sacrificed in favour of military expediency, it would be hard not to allow for similar military necessity concessions in other conflict settings. Here too, once an exception to the principle of belligerent equality is allowed in some cases, the legitimacy of insisting upon its application in other cases is compromised.

Second, retreating from the principle of belligerent equality may delegitimize IHL in the eyes of key constituencies within state parties involved in asymmetric conflicts, and reduce the incentive of those states to comply with their IHL undertakings. Of course, states involved in asymmetric conflicts already complain about the erosion of the belligerent equality principle that results from the poor record of compliance of non-state actors with their IHL obligations,

the evisceration of the institution of belligerent reprisals, and the operational disadvantages attendant on compliance with IHL when fighting irregular forces that operate from the midst of a civilian population. In addition, states' compliance records are often subject to closer scrutiny and collective enforcement efforts than their non-state counterparts. Nevertheless, the principle of belligerent equality and the certain promise – however symbolic – of reciprocal compliance that it conveys plays a useful role in facilitating state compliance. The principle, or the myth, of belligerent equality symbolizes the link between IHL and notions of chivalry, professionalism, 'fair play', and justice, which serve as part of the historic building blocks of IHL's legitimacy in the eyes of combatants and the general public. It also serves as an important explanation for the willingness of states to extend the application of IHL to NIACs (as is revealed by the *travaux préparatoires* and official commentaries dealing with Common Article 3 of the Geneva Conventions, Article 43 of Additional Protocol I and Article 1 of Additional Protocol II). Note that, even under conditions of lopsided compliance, state parties may still deem it beneficial to comply with their IHL obligations, as it may help them to maintain the high moral ground vis-à-vis their non-state and law-violating opponents. Upsetting the existing compliance–legitimacy equilibrium through requiring states to meet higher legal standards, without the benefit of reciprocity or the legitimacy dividend associated with demonstrating a superior record of compliance, could deprive states of an important incentive to comply and might lead them to try to evade their IHL obligations altogether (for example, by denying the applicability of IHL, or characterizing key IHL norms as 'arcane').

Consequently, I would advise against doing away with the belligerent equality dogma, as such a move could prove to improve compliance by some non-state actors only marginally, but also invite other belligerents – state and non-state entities – to challenge the legitimacy and applicability of important IHL principles. Renouncing the principle may thus generate more harm than good. Still, Sassòli is correct in observing that IHL standards should be realistic and not out of touch with battlefield conditions and material capacities. So how can one reconcile the dogma with the real gaps in military needs and capacities that are a feature of asymmetric conflicts? I would propose three possible avenues of accommodation to address this conundrum: acceptance of a 'common but differentiated responsibilities' framework for some IHL standards,⁴ the supplementing of IHL by human rights law, and nuanced enforcement strategies that take into account the aforementioned capacity gaps. Jointly and separately, these accommodating techniques accept the need for some sliding scale of obligations (or expectations of compliance), without giving up on the belligerent equality principle as a whole.

First, one can argue that IHL already contains different standards for belligerents as far as standards such as the need to adopt 'feasible precautions' to prevent or reduce collateral damage (Article 57 of Additional Protocol I), 'feasible measures' to prevent or suppress breaches (Article 86 of Additional Protocol I), or

4 For a discussion, see Gabriella Blum, 'On a Differential Law of War', in *Harvard International Law Journal*, Vol. 52, No. 1, 2011, p. 163.

‘all possible measures’ to search for the dead and the wounded (Article 8 of Additional Protocol II) are concerned. Since what is feasible or possible is context-dependent and capacity-related, it is fair to assume that the armed forces of a rich belligerent state would be held to a higher level of expectations than a ragtag non-state militia. Hence, Professor Gabriella Blum of Harvard is correct in observing that IHL, like international environmental law, may include a doctrine of ‘common but differentiated responsibilities’ (CDR), allowing for certain differences in the actual obligations imposed on the belligerent parties. For example, she argues that: ‘A common-but-differentiated principle of proportionality and the duty to take precautions in attack might impose substantially higher degrees of responsibility on richer or more technologically advanced countries than on poorer ones’.⁵

Note, however, that the CDR approach presented here is simultaneously broader and narrower in scope than the approach advocated by Sassòli. It is broader in that it does not apply exclusively to NIACs; instead it is claimed that the doctrine is an inherent part of IHL, which applies across the board to all conflicts between disparate armed forces. It is narrower in that it does not encompass most IHL rules but only a number of context-dependent standards. Hence, its adverse impact on core humanitarian values is limited. At a deeper level, one can maintain that a CDR approach does not represent a challenge to the principle of belligerent equality; rather, it is an application of that principle: substantive equality requires us to treat differently placed legal subjects in a differentiated manner.

The second accommodating measure that I would propose involves the supplementing of IHL standards by norms derived from international human rights law. Sassòli is correct in advising us against normative overreaching – that is, foisting upon the parties to NIACs obligations (and international criminal law standards) that they cannot conceivably implement now or in the foreseeable future. It is less clear, however, whether there really is a need to supplement the minimal IHL obligations that bind all parties with additional IHL norms that would apply only to the state party to the conflict (in violation of the belligerent equality principle). A better approach might be to retain *inter partes* the principle of belligerent equality – which, as explained before, is a feature that confers legitimacy upon IHL norms and may promote compliance on the part of the conflicting parties with their mutual IHL obligations – and to address additional aspects of state conduct that may infringe upon humanitarian values through the application of standards derived from international human rights law (to the extent that they are applicable to the circumstances at hand). Unlike IHL, human rights law is not based on a notion of equality or reciprocity; hence its lopsided application (assuming that non-state actors are subject to fewer human rights obligations than states) raises fewer doctrinal objections than those raised by a departure from the principle of belligerent equality in IHL. Since human rights law is not invested with the reciprocity-based ‘baggage’ that accompanies IHL norms, it constitutes a better legal area for developing asymmetric obligations than the latter body of law.

5 *Ibid.*, p. 194.

Moreover, the introduction of human rights law can be understood as a corrective measure that offsets some of the inequality attendant on the status of belligerents in an NIAC. As Sassòli notes, the non-state party to the conflict is subject to the criminal law of the state in whose territory it operates; thus conduct by militia members that may not violate IHL could nonetheless entail individual criminal responsibility under domestic law. Holding states to international human rights norms similarly introduces external legal standards, which may at times be more demanding than IHL standards. In this manner, the principle of belligerent equality is preserved, not violated: both parties are subject to the same IHL norms (attenuated by the aforementioned CDR principle), and both parties are also subject to additional legal standards derived from non-IHL sources.

The final accommodation measure that I propose to consider can be found in the field of enforcement. Even if we reject Sassòli's suggestion that different IHL obligations would apply for states and non-state actors, we may still consider the practical utility of applying different enforcement resources to address state and non-state violations. It may certainly be the case that, in some conflict situations, enforcing IHL norms against states represents a more cost-effective strategy for third-party enforcement agencies, given the numerous leverages that can be employed against states (but are inapplicable to non-state actors). Furthermore, the international community may at times – though not necessarily all of the time – adopt less tolerant positions vis-à-vis legal infractions by one of its established members than by an outlaw group with shakier law-applying institutions (in the same way that domestic law enforcers may prefer to invest more time and energy in investigating corruption at high levels than at low levels of government). In such cases, selective enforcement may be viewed as a corrective measure, which somewhat offsets the elevated status of states over non-state actors in international life and the superior influence that the former have on IHL law-making. In any event, selective enforcement (which raises its own host of legitimacy and effectiveness problems) does not openly challenge the principle or myth of belligerent equality. Furthermore, as long as an 'acoustic separation' can be maintained between actual and potential norm-enforcement actions, it is possible to convey to all parties involved in the conflict expectations of full and equal compliance.

In sum, the principle of belligerent equality plays a useful role in legitimating IHL and in encouraging compliance with its norms. While Sassòli is right in cautioning against normative overreaching and expecting non-state actors to deliver more than they can, the capacity gaps between states and non-state actors can be better addressed through applying the principle of CDR in some areas of IHL, utilizing human rights law standards to hold the state party to more demanding norms of conduct, and engaging, where necessary, in selective enforcement of IHL. Jointly and separately these corrective strategies offer a more promising avenue for addressing gaps than an outright renunciation of the principle of belligerent equality.