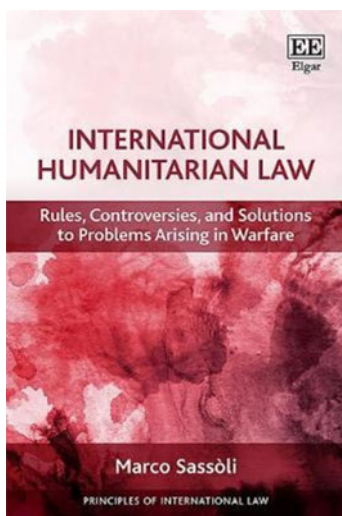


BOOK REVIEW



International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare

Marco Sassòli*

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Several years ago, I received an invitation to travel to Geneva to participate in a discussion on issues related to detention and treatment of captives at Guantanamo Bay Naval Base. I was excited to visit Geneva for the first time, although I knew it would be a challenging topic and audience. As the US Army's former senior international humanitarian law (IHL) adviser turned law professor, I looked forward to the opportunity to rebut some of the assumptions about my views that I expected to be confronted with.

When I learned that I would be sharing the stage with Professor Marco Sassòli, I was, to be candid, much more excited about this opportunity. Although I had never met Professor Sassòli, I've always considered him one of a handful of IHL scholars whose works laid the foundation for so many of those who would seek to join his circle of experts as it expanded over the years. When I received an email from Professor Sassòli inviting me to present a lecture to his IHL class, I knew this would indeed be both a challenging and memorable visit.

* Published by Edward Elgar, Cheltenham, 2019.

It therefore came as a welcome surprise when the *International Review of the Red Cross* contacted me and asked if I would be interested in reviewing Professor Sassòli's new IHL text, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. I immediately answered this request in the affirmative, and I was eager to dive into Professor Sassòli's latest work. Having now finished my review, not only has my expectation that this would be an outstanding contribution to the field been confirmed, but also my own expertise has been enhanced. Accordingly, I hope this review inspires others—scholars, legal and operational practitioners, and others interested in this vital but often cryptic realm of international law—to share the experience of learning from Marco Sassòli through this latest work.

Let's start with the foundation, for all lawyers know that the value of expert interpretation and opinion is contingent on the foundation upon which it rests. To say this foundation is solid would be inadequate to capture the expertise and respect in the field of IHL that Professor Sassòli brings to this work. One need only consider the colleagues whose praise for the book populates the back cover: Michael Schmitt, Bruce Oswald, Marko Milanovic, and Andrew Clapham. Those familiar with IHL scholarship and practice know that there are few other peers for whom these experts would offer such unanimous and uniform praise. And for good reason—Professor Sassòli has developed his expertise through years of study, practice with the International Committee of the Red Cross (ICRC), service as an expert, and teaching IHL. Having had the pleasure of interacting with him at a number of conferences and working groups, I agree with the consensus of experts referenced above. It is no exaggeration to invoke the tag line from an old commercial for E.F. Hutton brokers: *When Marco talks, people listen*.

The scope, density and organization of his book corroborate the high expectations that I had when I first cracked open the cover. I will attempt to highlight each of these aspects in this review. Of course, this is not to say that I agree with all of Professor Sassòli's interpretations—probably a manifestation of what he identifies as the logical tendency of the views of experts in the field to be informed by their disparate experiences (more on that later). But my disagreements were remarkably few. Indeed, if there is one aspect of his book that stood out to me as a testament to Professor Sassòli's scholarly integrity, it was that it revealed how his own views and interpretations have evolved over time; how he recognizes that like the balance between military necessity and humanity which itself lies at the foundation of IHL, scholars must constantly strive to balance formalism with pragmatism in order to ensure that the influence they exert on the evolution of the law avoids distortions that will ultimately undermine the credibility of the law.

Anyone who has contemplated adopting a text for an IHL course or considered a text as a “go-to” resource for IHL issues understands that this is one area of the law that does not lend itself to uniform organization. Some texts are organized along a historical vector; others simply align the structure of the text with key treaties or perhaps cardinal IHL principles. In *The Law of Armed*

Conflict: An Operational Approach,¹ my co-authors and I sought to align the structure of the book with the likely presentation of issues that a military legal adviser would encounter in support of the planning, execution and assessment of a combat operation. Our goal was to place the law in the context of the range of issues likely to arise during military operations.

As the title indicates, Professor Sassòli approached the challenge of structuring the book with quite a holistic vision. First, the text would provide a comprehensive explanation of the myriad of rules under the umbrella of IHL and, to a lesser extent, international human rights law (IHRL). Second, the text would highlight areas of controversy related to the interpretation and implementation of these rules. Finally, the text would offer proposed solutions to many of these controversies.

I found this approach both effective and engaging; I especially appreciated the comprehensive foundation that the text provides in the first five chapters. These chapters explain in a clear and readily understandable manner the historical foundation of the law and how this history evolved into contemporary IHL. Professor Sassòli's years of experience teaching IHL had an obvious and useful influence on these introductory chapters; indeed, it was easy for me to imagine how the organization and style of these chapters reflect Professor Sassòli's pedagogy as he teaches students how the law evolved, the many influences on that evolution, and how the law functions in the contemporary international domain. This is beneficial because the text intermingles explanation of legal sources, both positive and customary in nature, with Professor Sassòli's commentary. The reader is thus able to gain an understanding of the law through the lens of an informed expert perspective.

I especially enjoyed the chapter on sources of IHL. Professor Sassòli walks the reader through recognized sources of IHL: treaties, customary international law, general principles and soft law. This is largely consistent with other texts, but Professor Sassòli adds important insights into various influences on the interpretation and evolution of the law, explaining the role of sources such as the ICRC Commentaries to the Geneva Conventions and Additional Protocols, decisions of international and domestic tribunals, military manuals and policies, and scholarly writing and commentary.

This last category is, unfortunately, given insufficient weight. Professor Sassòli justifiably notes that scholarly writing must be taken with a grain of salt, especially considering the explosion of interest in the field in the past two decades. His candour in expressing what must be his own reticence in attributing too much weight to this IHL scholarship is refreshing, and he rightly observes that the pressure on academics to satisfy institutional requirements often leads to what I have called the phenomenon of a "solution in search of a problem". I also think his cautionary warning that scholars are often substantially influenced by their pre-academic professional backgrounds is valid, though perhaps a bit too

1 Geoffrey S. Corn *et al.*, *The Law of Armed Conflict: An Operational Approach*, 2nd ed., Wolters Kluwer Law & Business, New York, 2019.

sweeping. In contrast, as long as a scholar's background is candidly acknowledged, I believe it can often render scholarship more valuable. Finally, as one of a number of current or former military officers engaged in IHL scholarship I was surprised and frankly disappointed with Professor Sassòli's use of the term "brainwashed" to characterize the influence of prior military and government service. In my view, experience—whether military, governmental or non-governmental—often makes a valuable contribution to the foundation of scholarly exploration of IHL issues and important insights into how the law actually functions. Indeed, Professor Sassòli seems to implicitly acknowledge this—at least in relation to non-governmental service—when in the same chapter he emphasizes how his own experiences have informed his views.

Professor Sassòli's scepticism regarding the probative value of much of the contemporary IHL scholarship aligns perfectly with one of the few aspects of the book that I believe might have been approached differently: the lack of reference to such works throughout the text. I was somewhat surprised that there were not more references to other distinguished scholars in the field. This was especially apparent in the foundational chapters; reference to such scholarship seemed much more significant in the topical chapters, but overall there seemed to be a limited diversity of views referenced. For example, I was surprised there was no reference to Brigadier-General Kenneth Watkin's award-winning book *Fighting at the Legal Boundaries*² in the discussion of conflict assessment and classification or in the chapter addressing the relationship between IHL and IHRL.

Furthermore, as I reviewed the text it quickly became apparent that a significant majority of citations were to primary sources, with an especially heavy reliance on ICRC Commentaries and other ICRC interpretive sources. This seems to reflect a prioritization of ICRC views over those of many scholars and official government statements which, while often aligning with those views, also at times deviate substantially from them. This prioritization raises a legitimate question: whether it creates the perception of doing what Professor Sassòli seems to criticize military and government experts for doing, namely being overly influenced by their professional associations. Furthermore, when referenced in the text, these government positions are mostly used to illustrate points of divergence with ICRC views. Failing to cite provisions of these same sources that highlight these points of divergence *and* alignment is a missed opportunity to provide important insights into the current state of the law. Furthermore, reference to a broader swath of scholarly works would have aided those using this text in identifying additional sources to further their exploration of the issues. When cited by an expert of Professor Sassòli's gravitas, references to other scholarly works would also help readers cull the scholarly wheat from the chaff.

The chapter on respect for the law, like all the chapters in the text, is comprehensive and interesting. I thought Professor Sassòli's discussion of the ICRC and its role in ensuring implementation of and respect for IHL was

2 Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Armed Conflict*, Oxford University Press, New York, 2019.

uniquely beneficial. This is unsurprising considering his long and valued relationship with the ICRC, but considering the vital role this organization plays in the realm of IHL, it is important for anyone studying the topic to gain this type of informed and comprehensive perspective. Equally valuable was the integration of opinions on how the ICRC itself must evolve in order to continue to enhance its role in the development of the law. For example, Professor Sassòli explains why in his opinion the ICRC must play a more aggressive role in mobilizing humanitarian concerns in response to State reluctance to move the law forward through new or revised treaties:

In my view, the ICRC must convince States to accept again the difference between its operational role, on the one hand, and its general advocacy for the respect of IHL, its progressive development and new enforcement mechanisms, on the other hand. In its operational role, the ICRC has excellent reasons to pursue its confidential and cooperative approach. In its role as guardian and promoter of IHL outside specific operational contexts, the ICRC must become the advocacy organization it once was by mobilizing public opinion against their reluctant governments and cooperating with civil society.³

While others may disagree with the strategy that Professor Sassòli proposes, this passage is illustrative of how he integrates his own commentary throughout the text and his willingness to candidly highlight what he believes are deficiencies in current approaches to the development and implementation of IHL.

The text includes a chapter on when IHL applies as a bridge between the general and the specific. I was especially interested in this chapter not only because it is an area of the law that I struggled with during my time in practice and focused on when I first began my academic career, but also because I was genuinely curious as to how Professor Sassòli would explain the complexities of conflict assessment and classification. His treatment did not disappoint. For example, in his treatment of international armed conflicts (IACs), he explains why he believes that an act of violence between members of State armed forces is not necessarily dispositive, because in his view such violence is indicative of an IAC only when conducted pursuant to the highest authority of the State. Specifically, he notes:

Although I do not think parties must have *animus belligerandi* (“intention to fight”) for IHL of IACs to apply, the mere fact that the person using force is attributable to a State is not sufficient in my opinion. Rather, the highest authorities of the State must (previously or subsequently) additionally approve the use of force.⁴

While this point of view is appealing, Professor Sassòli seems to be implying a requirement that is not explicitly required by the text of Article 2 common to the Geneva Conventions; nor, to my knowledge, is it addressed in the associated

3 *International Humanitarian Law*, p. 146.

4 *Ibid.*, p. 169.

ICRC Commentary. It would have been useful for him, at this point, to illustrate the logic of his opinion with some historic examples, such as the shooting incident by the Panamanian Defense Forces that was the breaking point for President George H. W. Bush and led to the US decision to launch an invasion of Panama. Professor Sassòli's proposed approach to an IAC trigger could have been developed a bit further, especially addressing the complexity of one State deciding whether to attribute violence by another State's armed forces as an action approved by the highest authority.

The most interesting aspect of this chapter, however, is Professor Sassòli's treatment of the increasingly common phenomenon of State military action directed against a non-State organized armed group operating in the territory of another State. He explains the two prevailing theories of conflict classification in such situations: what Brigadier-General Kenneth Watkin has called the "formalist" theory advanced by Professor Dapo Akande—that an IAC exists once one State uses military force on the territory of another without consent; and what Professor Sassòli characterizes as a compromise view advanced by the ICRC (which I believe is essentially indistinguishable from the formalist view)—that the non-consensual use of force qualifies as an IAC between the two States but the law of non-international armed conflict (NIAC) applies between the State and the organized armed group. I must admit that I was surprised when I read, "I therefore prefer a third solution: one should apply only IHL of NIACs because no armed conflict between States exists."⁵ This "third solution" is, in essence, the position that has been advanced by the United States since the inception of the several extraterritorial NIACs in which it has engaged since 11 September 2001. Whether this is indeed a "third" solution or an alternative to a formalist/ICRC interpretation, I not only agree with this view but thought this exemplified Professor Sassòli's ability to balance formalism and pragmatism, and his willingness to reconsider long-standing assumptions related to IHL interpretations. His observation that "what makes an armed conflict international is not where it occurs but that it occurs between two states"⁶ indicates not only the impact of these characteristics of his scholarly approach, but also why he is so highly regarded in this field.

There were some other aspects of this chapter that especially caught my attention. First, I wish Professor Sassòli had provided a bit more treatment on the impact of disputed governing authority when assessing the existence of an IAC. Again, the example of the US invasion of Panama provides a good example of how questions about governing legitimacy may open the door to States "gaming" the IAC factual assessment. How should an "invitation" to intervene from a disputed governing authority impact conflict classification? I appreciated that the text emphasized in several parts how the context of international criminal law may have led to enunciation of conflict assessment requirements—for example, the "protracted" armed violence requirement—that are logical in the criminal

⁵ *Ibid.*, p. 172.

⁶ *Ibid.*, p. 172.

accountability context but less so in the operational context. Not only do I agree, but I think these contextual influences are generally under-explored.

By far the most interesting section of the book is the professor's treatment of what was commonly known as the US "Global War on Terror", or GWOT. Professor Sassòli first explains why this "global" war concept was so widely condemned as extreme, but also how the US "abandoned" the term (I actually don't think the term was ever offered as a legal concept) in favour of characterizations aligned with the notion of an extraterritorial NIAC against non-State terror groups considered to be organized armed groups. Again, I was surprised by Professor Sassòli's pragmatic approach to the complex question of how geography impacts conflict assessment and scope. First, he notes that the ICRC has yet to embrace (or perhaps more accurately has rejected) the notion of a "worldwide" NIAC. He then follows by noting:

The ICRC's fears linked to worldwide targeting and detention of "enemy fighters" based upon an "authorization" provided by IHL of NIACs are understandable. However, I think that logic as well as the reality of modern weapons and conflicts dictate that geography as a decisive criterion for the application of IHL should be abandoned in favor of placing emphasis on the nexus of the conduct, the legitimacy of the target and protection offered by other branches of international law even where IHL applies. Under this approach, IHL would apply worldwide to every act linked to a NIAC. First, however, conduct to be regulated must have a stronger nexus with the NIAC the further away from the NIAC it occurs.⁷

I tend to think this proposed approach is actually manifested by State practice more than is often recognized. Furthermore, I have also proposed a sliding scale of certainty to justify lethal targeting contingent on the proximity of the proposed target to the "conventional" battle space. Thus, I found this passage both logical and valuable. This is not to say that I think such an approach resolves all complexity—for example, how would this approach apply in the absence of a "hot" or conventional battle space which might result from initial conventional success against an organized armed group that then disperses to continue operations in other areas? But again, what is more significant for the purposes of this review is how passages such as this attest to Professor Sassòli's especially appealing approach to the topic.

Following this chapter, the book then moves into treatment of topical issues: combatants and prisoners of war; civilians in the power of an enemy; belligerent occupation; the missing and dead; protection of civilians against the effects of hostilities (where the book addresses targeting issues); means and methods of warfare; naval warfare; and air and missile warfare. This part of the text provides an unsurprisingly comprehensive explanation of the myriad of treaty and customary international law rules related to each respective aspect of IHL regulation.

7 *Ibid.*, p. 190.

Were the text to end here, it would be quite impressive. However, Professor Sassòli then moves into what might be best characterized as the “contemporary challenges” phase of the text. This begins with a treatment of the relationship between IHL and other branches of international law: IHRL, international criminal law, migration law, law related to peacekeeping operations, and the law of neutrality. This is a valuable contribution for all readers, but I think especially for the practitioner who might have extensive expertise in IHL itself but limited opportunities to explore these intersections—junctions which can have such profound practical and operational impact. Professor Sassòli then moves to a topical treatment of a number of complex issues, ranging from the question of whether IHL provides a source of authority or only serves as a constraint, to IHL and gender issues, to cyber and drone operations, to cultural and environmental protections, to the conduct of operations in NIAC involving targeting and detention. From a structural perspective, I felt this approach was quite useful, especially for readers who hope to utilize the text as a research companion. The ability to focus directly on one of these many issues will streamline research, and the comprehensive treatment will provide an excellent foundation for further exploration of these issues. Again, while I might not agree with all of Professor Sassòli’s opinions or interpretations, there is no question that each is well reasoned and highly credible.

International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare is an exceptional contribution to the growing crop of IHL texts, offered by a scholar and practitioner of unquestioned expertise. This book’s innovative structure makes it viable as a text for an IHL course, and equally valuable as a principal source for scholars in other fields of law and policy, and for practitioners. Whether one is interested in learning IHL from its roots up or focusing on specific topical issues and debates, this text is a comprehensive yet reader-friendly resource. Professor Michael Schmitt says it perfectly on the book’s back cover:

A succinct and accessible treatment of the key principles and rules of IHL, [the book] moves beyond doctrine to perceptively examine the dynamic of implementing IHL in law and practice. Sassòli also takes on the key issues around which contemporary IHL debates are circling ... and does so with the clarity and precision that has long marked his work.

This is indeed a book that should be on the shelf of every IHL scholar and practitioner.