

The unilateralization of international humanitarian law

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Abstract

Traditionally, international humanitarian law (IHL) is conceptualized as a body of mutually binding, horizontal international legal rules that are agreed upon by States and that govern the relationships between parties to armed conflicts. Yet, there is discernible evidence that contemporary IHL – and the broader normative environment that pertains to the regulation of armed conflicts in which it is situated – is incorporating elements of unilateralization, manifested in legal and non-legal norms that regulate armed conflicts taking the form of commitments whose validity is not dependent on being reciprocated. This article examines some of the systemic implications of unilateralization of IHL and considers its pitfalls and potential.

Keywords: development of international humanitarian law, unilateral norms, reciprocity, belligerent equality.

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Introduction

Traditionally, international humanitarian law (IHL) is conceptualized as a body of mutually binding, horizontal international legal rules agreed upon by States that govern the relationship between parties to armed conflicts. Its development has been closely intertwined with central notions such as belligerent equality and

reciprocity that continue to exert significant influence on our thinking about what IHL is, how it develops, applies and operates and why it is being complied with. Yet, there is discernible evidence that contemporary IHL – and the broader normative environment that pertains to the regulation of armed conflicts in which it is situated – is incorporating elements of unilateralization, manifested in (legal and non-legal) norms that regulate armed conflicts taking the form of commitments whose validity is not dependent on being reciprocated.

As far as States are concerned, unilateralization has evolved, at least partially, to compensate for their lack of appetite for “traditional” IHL-making through treaty and for their reluctance to clearly articulate their *opinio juris*. *Vis-à-vis* non-State parties to (non-international) armed conflicts, on the other hand, unilateralization speaks to some of the conundrums of conventional and customary IHL, such as why and how they are bound by these sources without being able to assume a role in their creation and how to strengthen their commitment to IHL. In both contexts of States and non-State actors alike, unilateralization is not a novel phenomenon. However, the increasing frequency with which actors resort to unilateral normative commitments suggests that the phenomenon is here to stay and warrants examination.

This article begins with a clarification of the meaning of unilateralization and an illustration of it by some examples. In the same step, the broader context in which unilateralization takes place will be provided. In a second step, the article turns to an analysis of the systemic implications of unilateralization and considers its pitfalls and potential.

Unilateralization defined, exemplified and contextualized

Unilateralization encapsulates the idea that norms that regulate armed conflicts take the form of commitments of one party whose validity are not dependent on being reciprocated, whether it be by its (would be) opponent or by other international actors, most notably States. For purposes of the present analysis, the term “norms” is understood broadly to include all authoritative standards that guide, control and regulate proper and acceptable behaviour of parties to an armed conflict. In other words, they include non-legal norms and norms of domestic law and hence reach beyond international legal norms in the sense of being embedded in the commonly accepted doctrine on sources of public international law, including conventional and customary IHL, general principles of IHL and, somewhat more on the fringes, binding resolutions of international organizations (such as binding United Nations Security Council Resolutions).¹ The all-inclusive term that will be used in the present article to capture all such norms regardless of their (international) legal status is “unilateral normative commitment”. Indeed, unilateral normative commitments often lack international legal force. The

¹ See, generally, Jann K. Kleffner, “Sources of the Law of Armed Conflict”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016.

exception to that rule is the situation in which they produce legal obligations under international law. As far as States are concerned, this is the case if and when it can be deduced from the circumstances surrounding a unilateral act that a State intends to be bound as a matter of international law.² Yet, as we will see, in many instances of unilateral commitments that States make, such an intent is not readily apparent, and is frequently more or less expressly rejected. Furthermore, the international legal status of unilateral commitments made by non-State organized armed groups is tenuous,³ with the exception of unilateral declarations made by an authority representing a people engaged in a war of national liberation as envisaged in Article 96(3) of the First Additional Protocol, the legal effects of which are clearly spelled out. However, regardless of whether unilateral commitments are of an international legal nature or not, they share the common feature of providing standards for the evaluation of parties' behaviour during armed conflicts and prescriptions on which their behaviour during armed conflict is based.⁴ They possess normative force and, perhaps even more importantly, establish normative relations between an actor that makes a unilateral normative commitment and other actors (be they an opponent belligerent party or a third party, such as a non-belligerent State, an international organization, a humanitarian actor, the armed forces or the domestic constituency of a State making the unilateral commitment).

Examples of unilateralization

Examples of unilateral normative commitments abound. States have made unilateral declarations on a number of occasions,⁵ some of which may be binding as a matter of international law, whereas others may not be. Such unilateral declarations can either address specific issues (such as the disarmament, demobilization and reintegration of child soldiers)⁶ or be more generic in nature (for example, by declaring that the State commits to the principles of the Geneva Conventions in a non-international armed conflict (NIAC)).⁷ Other than in relation to States, unilateral declarations have taken on a particularly significant role in securing normative commitments by non-State organized armed groups that are parties to

2 See generally, International Law Commission, "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations", text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). *Nuclear Tests (Australia v. France)*, Judgment, *ICJ Reports* 1974, p. 267, at para. 43.

3 See, for example, International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention*, Geneva, December 2016, p. 288, at Section 857; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, pp. 109–10 and 118–24, noting that "each commitment will have to be assessed on its own terms" while suggesting that "[m]any such declarations should also be considered binding as a matter of law".

4 For further discussion of the distinction between legal and non-legal norms, see Michael Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?", *Netherlands Yearbook of International Law*, Vol. 11, 1980; Pieter van Dijk, "Normative Force and Effectiveness of International Norms", *German Yearbook of International Law*, Vol. 30, 1987.

5 See, for example, S. Sivakumaran, above note 3, pp. 113–14.

6 *Ibid.*

7 *Ibid.*

a NIAC. These acts frequently consist of declarations through which the organized armed group in question expresses its intent to be bound by (certain) IHL treaties, commitments made to the International Committee of the Red Cross (ICRC), to United Nations bodies, to Switzerland as the Depository of the Geneva Conventions and Additional Protocols thereto or to the non-governmental organization Geneva Call.⁸ As far as the substance of these declarations is concerned, they can either be of a general nature and include entire IHL treaties, or they can concern particular rules or issues, for instance in the form of “Deeds of Commitment” made under the auspices of Geneva Call on matters ranging from anti-personnel mines and the protection of children to displacement and gender.⁹ Whether these unilateral declarations of organized armed groups are constitutive of international legal obligations or merely declaratory thereof is unclear. The ICRC is of the opinion that “the absence of any such commitment does not reduce the obligations of non-State armed groups to abide by treaty and customary international law”.¹⁰ Conversely, the existence of such commitments would, according to that view, presumably not be able to extend their obligations as a matter of international law, thus seemingly suggesting that the only way in which such groups can become bound as a matter of IHL is through the constructs of bindingness debated in doctrine.¹¹ Yet, some practices of international courts and the United Nations suggest that an answer to the question is perhaps less categorical and that the international legal status of unilateral declarations of organized armed groups must be determined on a case-by-case basis.¹²

Other unilateral normative commitments take the form of policies – understood here broadly to extend to domestic laws, regulations, procedures, administrative actions, incentives, or voluntary practices – that States adopt on a given issue. The US Department of Defense (DoD) *Law of War Manual*,¹³ for instance, is ripe with references to such policies on a range of issues that span from pre- and post-strike measures to address civilian casualties involving the use of force¹⁴ and implementing and enforcing IHL¹⁵ to weapons reviews¹⁶ and media coverage of military operations and the role of journalists.¹⁷ The US DoD

8 *Ibid.*, pp. 118–22.

9 See, generally, Geneva Call, available at: www.genevacall.org (all internet references were accessed in August 2022).

10 ICRC, above note 3, p. 288, at Section 857.

11 ICRC, above note 3, p. 180, at Section 507. For a discussion, see Jann K. Kleffner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

12 S. Sivakumaran, above note 3, pp. 113–14 and 109–10.

13 US DoD, *Law of War Manual*, Washington, DC, June 2015 (updated December 2016), available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

14 Administration of Barack Obama, “Executive Order 13732 – United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force”, *Federal Register*, Vol. 81, 1 July 2016, available at: www.govinfo.gov/content/pkg/DCPD-201600443/pdf/DCPD-201600443.pdf.

15 See DoD Directive 2311.01E, DoD Law of War Program (May 9, 2006, Certified Current as of Feb. 22, 2011); DoD Directive 5100.77, DoD Program for the Implementation of the Law of War (Nov. 5, 1974).

16 See US DoD, *Law of War Manual*, above note 13, pp. 337–9, at Section 6.2.

17 See *ibid.*, references on p. 171, at Section 4.24.

Law of War Manual is also instructive in as much as it is one of the few military manuals that address the respective roles of such policies and IHL and the relationship between the two on a number of occasions. It explains that policies shall not be confused with *opinio juris*,¹⁸ and that DoD personnel may be required to adhere to law of war rules, even where the rules do not technically apply as a matter of law.¹⁹ The DoD *Law of War Manual* also articulates the general view that policy may go beyond the minimum restrictions of IHL, but may not be more permissive than what IHL allows.²⁰ When political norms that pertain to the (non-legal) regulation of armed conflicts are being adopted, States usually do so on a non-reciprocal basis regarding the (would-be) belligerent opponent. Such policies henceforth constitute unilateral normative commitments in the present sense.

IHL and policy converge in a variety of instruments, which assume a dual role in articulating unilateral commitments and as restatements of rules of IHL. Besides military manuals, such instruments include internal guidelines, instructions to the armed forces, disciplinary codes and codes of conduct, domestic legislation, *de facto* legislation enacted by non-State organized armed groups and Rules of Engagement.²¹ One of the challenges in examining the extent to which these instruments are declaratory of norms of IHL, of the *opinio juris* of a given State, or instead express unilateral normative commitments consists of disentangling IHL and policy. Rarely²² are States (and even less so organized armed groups) willing to offer detailed views on what they consider as belonging to one or the other realm and go beyond generic statements that IHL and policy must be distinguished from one another.²³

Context: “Delegalization”

The aforementioned examples indicate that unilateral commitments that are binding as a matter of international law are the exception to the rule that they are

18 *Ibid.*, pp. 33–4.

19 *Ibid.*, pp. 36 and 70–1.

20 For example, as far as the treatment of unprivileged belligerents is concerned, *ibid.*, p. 161; and as far as restrictive and protective standards in the conduct of hostilities are concerned, p. 186.

21 At times, some of these instruments also play a role in ensuring coalition coherence, where one coalition partner makes a non-legal unilateral normative commitment that aligns with the legal obligations of another coalition partner. See Dale Stephens and Eve Massingham, “Military Partners and the Obligation to ‘Ensure Respect’ for IHL”, *Articles of War*, 18 November 2021, available at: [https://lieber.westpoint.edu/military-partners-obligation-ensure-respect/?ct=t\(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01\)](https://lieber.westpoint.edu/military-partners-obligation-ensure-respect/?ct=t(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01)).

22 As alluded to, the US DoD *Law of War Manual*, above note 13, is a notable exception.

23 See, for example, UK Ministry of Defence, *The Joint Service Manual of The Law of Armed Conflict*, Joint Service Publication 383, 2004, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf. Explaining the nature of rules of engagement at p. 53, at Section 5.2:

The law of armed conflict must not be confused with engagement (ROE). The latter are “directions for operational commands that set out the circumstances and limitations under which armed force may be applied by United Kingdom forces to achieve military objectives for the furtherance of United Kingdom government policy”.

usually either not, or that they have, an uncertain standing as a source of international law (in the case of unilateral commitments of organized armed groups) or that they are articulated in instruments that constitute concoctions of international legal and policy considerations. As far as States are concerned, the dominance of unilateral commitments of a non-legal nature and the creation of grey zones in which law and policy are interspersed is intimately connected to the phenomenon of – for lack of a better term – “delegalization” of IHL proper and of norms that regulate armed conflicts more broadly.

As far as the process of “delegalization” of IHL proper is concerned, States contest the customary nature of rules of IHL or refuse to become party to a given IHL treaty while emulating the pertinent rules as non-legal unilateral commitment. An example of the latter is the US policy on anti-personnel landmines, which aligns (outside the Korean Peninsula) with a number of the key requirements of the Ottawa Convention, to which the United States is not a party.²⁴ While at other times, the practice to act in accordance with a treaty to which the United States is not a party may be informed by the consideration that the general principles of the treaty have been determined to be declaratory of customary international law,²⁵ the United States expressly rejects that contention in relation to the prohibitions contained in the Ottawa Convention.²⁶ We can therefore safely assume that the United States’ policy is a non-legal unilateral commitment based on other (non-legal) considerations.²⁷

“Delegalization” of norms that regulate armed conflicts more broadly takes the form of non-legal unilateral commitments forestalling the formation of new conventional and customary IHL. Here, a unilateral commitment prevents a new rule of IHL on a given issue to emerge because States commit to it expressly only as a matter of policy. An example is the UK’s policy on not equipping military religious personnel with weapons.²⁸ While the relevant provisions in conventional IHL are silent on the issue, the UK’s clarification that not to arm them is a matter of policy forestalls a claim that it does so out of a sense of legal obligation that may inform a process of customary IHL formation to the effect that the bearing of arms by military religious personnel would be contrary to IHL. “Delegalization” of norms that regulate armed conflicts more broadly has a comparable effect on the adoption of new treaty rules, where States are reluctant

24 See US DoD, *Law of War Manual*, above note 13, pp. 401–2, at Sections 6.12.13 and 6.12.14.

25 *Ibid.*, p. 71, at Section 3.1.1.1: “Reasons for Acting Consistent With a Treaty Rule, Even Though the Treaty Does Not Apply”.

26 See US DoD, *Law of War Manual*, above note 13, p. 402, at Section 6.12.14: “prohibitions do not reflect customary international law”.

27 US DoD, *Law of War Manual*, above note 13, p. 71, at Section 3.1.1.1: “Reasons for Acting Consistent With a Treaty Rule, Even Though the Treaty Does Not Apply”. In the second paragraph of this section:

In addition, it may be important to act consistently with the terms of the treaty because the treaty represents “modern international public opinion” as to how military operations should be conducted. Other policy considerations, including efficacious training standards or close relations with coalition partners, may lead to a policy decision that DoD practice should be consistent with a particular law of war treaty rule, even if that rule does not apply to U.S. forces as a matter of law.

28 UK Ministry of Defence, above note 23, Section 7.30.

to turn their policies on hitherto unregulated issues into legally binding rules of conventional IHL. “Delegalization” and unilateralization are intimately connected, as the former removes norms from the reciprocal relation that IHL gives rise to. The “delegalized” norms take the form of unilateral commitments instead.

As far as States are concerned, unilateralization and “delegalization”, in turn, are manifestations of a broader geopolitical environment that has aptly been described as the multilateral ice age, characterized by a deep sense of mistrust between States in multilateral processes, a tangible fatigue of States to commit to new international legal rules and other multilateral normative commitments, and where the resulting regulatory gaps are partially filled by incremental voluntary measures of individual States.²⁹

In contrast to States, unilateralization is the product of an entirely different consideration as far as non-State organized armed groups are concerned: rather than to “delegalize” IHL proper or norms that regulate armed conflicts more broadly, unilateral normative commitments here assume a role in addressing some of the conundrums caused by IHL’s State-centric features, most notably the exclusion of non-State organized armed groups from the creation of multilateral conventional and customary IHL. We will return to this issue below (see the “Non-State organized armed groups” section).

Systemic implications, pitfalls and potential of unilateralization

What, then, are the systemic implications of unilateralization for the fabric of IHL? What prospect does it hold out to develop IHL further? And what risks does it bear? These questions will be examined by first considering reciprocity and belligerent equality as two closely intertwined fundamental precepts of IHL (“Reciprocity and belligerent equality” section), before addressing the risk of unilateralization leading to a retrogressive trend in IHL as the primary international legal framework to regulate armed conflicts (“The risk of retrogression” section). We will then turn to the role of unilateralization *vis-à-vis* non-State organized armed groups (“Non-State organized armed groups” section).

Reciprocity and belligerent equality

Unilateralization leads to diverging standards between belligerent parties (except in the situation where belligerent parties unilaterally commit to identical rules). A first

29 In the field of IHL, the fate of the IHL Compliance mechanism proposed by the ICRC and Switzerland is illustrative in that regard; see Yvette Zegenhagen and Michael Meyer, “Improving Compliance with IHL: A Long-Term Enterprise”, *Articles of War*, 22 November 2021, available at: [https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/?ct=t\(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01\)](https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/?ct=t(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01)); Helen Durham, “Strengthening Compliance with IHL: Disappointment and Hope”, *ICRC Humanitarian Law & Policy Blog*, 14 December 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/>.

implication for the fabric of IHL is that unilateral norms that regulate armed conflicts are divorced from reciprocity and belligerent equality. Both are traditionally assigned pivotal roles in the development and applicability of, as well as in the compliance with, IHL. Hersch Lauterpacht famously asserted, a few years after the Second World War, that “it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them”.³⁰ The crucial role of reciprocity and belligerent equality that his assertion epitomizes has remained a doctrinal truism of dogmatic proportion and dominates our thinking about IHL, even if more recent scholarship has brought to the fore certain nuances, especially when comparing the role of reciprocity and belligerent equality in international armed conflicts (IACs) and NIACs, respectively (see further, the “Non-State organized armed groups” section below).

Much as in international law more broadly, reciprocity’s role in the creation (and hence development) by States of the two main sources of IHL – treaty and custom – is omnipresent.³¹ Despite occasional affirmations to the contrary expressed in relation to multilateral treaties of a “normative” character in some fields, including IHL, the creation of conventional and customary IHL is quite simply not occurring unilaterally.³² Accordingly, conventional and customary IHL cannot develop through unilateralization (unless unilateral acts can be couched in terms of practice and/or *opinio juris* as part of the process of customary IHL formation). Indeed, to the extent that unilateralization takes the form of non-legally binding unilateral commitments (as it frequently does) it forestalls these norms that regulate armed conflict from entering the realm of international law.³³ Consequently, any instance of non-compliance with such non-legal norms will not be governed by the rules and processes applicable to breaches of international law, including those that international law foresees for the responsibility of States and individuals. This is not to suggest that non-legal unilateral normative commitments cannot feature in a broader framework of accountability that encompasses all processes (also non-legal and/or domestic ones) through which the conduct of parties to an armed conflict are assessed and measured. Indeed, some of them can even entail domestic legal responsibility were these commitments binding as a matter of domestic – rather than international – law.³⁴ States and other actors may be engaged by other States and other actors, including their own domestic constituencies if they do not act in conformity with non-legal unilateral normative commitments. In fact, some of

30 H. Lauterpacht, “The Limits of the Operation of the Law of War”, *British Year Book of International Law*, Vol. 30, 1953, p. 212.

31 See Bruno Simma, “Reciprocity”, in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, paras 3–6.

32 *Ibid.*, para. 6.

33 See also the discussion of unilateralization’s context of delegalization above.

34 See, for example, US DoD, *Law of War Manual*, above note 13, Section 18.7.2.3 which notes, in the context of unilateral commitments that set higher standards as a matter of policy than what IHL requires, that failures to adhere to such more restrictive standards may be punishable under the Uniform Code of Military Justice, but “would not necessarily be violations of the law of war”.

the features of such a broader scheme of accountability may closely resemble, or even be identical to, those of a less formal nature that we are familiar with in IHL, such as when media and public opinion exert pressure and demand that States account for their actions. The important difference remains, however, that States can reject any claim of “responsibility” for a “breach” of a non-legal unilateral normative commitment by asserting its non-legal and unilateral nature.

A separate issue concerns the implications of unilateralization for *de facto* reciprocity in the realm of compliance with IHL. Even though it is not featuring as a legal condition for compliance with applicable rules of IHL,³⁵ reciprocity is regarded as a socio-psychological factor which has an impact on compliance, both in a positive (observance of one party generates observance of its opponent) and a negative sense (violations of one party trigger violations by the opponent).³⁶ *De facto* reciprocity is postulated to constitute such a factor on condition that belligerents are bound by the same rules of IHL, encapsulated in the dogma of belligerent equality,³⁷ which is precisely not the case with unilateral normative commitments, except in the case where the belligerents in a given armed conflict unilaterally undertake to apply the same rules of IHL.³⁸ On that account, unilateralization would bear the risk of making a negative impact on belligerents’ propensity to comply with IHL, because those norms to which a given belligerent has unilaterally committed do not “bind” its opponent. Yet, the suggestion that unilateralization automatically means less compliance needs to be approached with caution for at least the following two reasons.

First, compliance of one belligerent party may bear the potential of inducing the opponent belligerent party to reciprocate such behaviour, even if the behaviour conforms to unilateral normative commitments, as opposed to conventional or customary IHL. If party A to a NIAC unilaterally applies standards that mimic the treatment of prisoners of war, the opponent party B may be induced to reciprocate such conduct. For, the very psycho-sociological mechanisms that are at play when reciprocity is said to have an impact on the conduct of parties to armed conflicts and their individual members are not, or at

35 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 140, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

36 ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, Geneva, 2004, pp. 9 and 13.

37 For a discussion of belligerent equality in the specific context of NIACs, see the debate between Marco Sassòli, Yuval Shany and René Provost on whether or not the dogma should be abandoned or modified. Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Marco Sassòli, “Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; René Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

38 On such cases of overlapping unilateral commitments, see René Provost, “Asymmetrical Reciprocity and Compliance with the Laws of War”, in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, UBC Press, Vancouver, 2012, p. 35.

least not primarily, dependent on reciprocal legal relations. Rather, it is the conduct of one party that is reciprocated by its opponent. Whether that conduct is in conformity with reciprocal legal rules (or indeed, whether it conforms to non-legal norms) seems to be of lesser importance in the context of *de facto* reciprocity. Put differently, reciprocal rules would seem not to be a *conditio sine qua non* for *de facto* reciprocity to generate a pull towards compliance: we need to distinguish between norms on which belligerents base their conduct (legal or non-legal, reciprocal or unilateral), on the one hand, and the implications of such conduct for the conduct of the belligerent opponent, on the other.³⁹

Second, *de facto* reciprocity's significance needs to be considered in the broader context of other factors that make an impact on compliance. Pertinent scholarship suggests that factors such as the quest for international and domestic legitimacy,⁴⁰ cultural and religious values, doctrine and ideology, professional (military) ethics and a sense of honour,⁴¹ effective and virtuous leadership within military organizations, and military efficiency more broadly,⁴² exert significant influence on the behaviour of belligerents and their inclination to comply with IHL. Material resources and capacity of a given party to an armed conflict also exert influence. Yet, to the extent that these are internal factors that originate in the "inner life" of a belligerent, they are to a large extent divorced from, and retain their significance irrespective of, the behaviour of an opponent. As a matter of fact, unilateral normative commitments can even be said to befit these factors as modes of articulation, for instance in the form of internal guidelines, instructions to the armed forces, disciplinary codes or codes of conduct. Endowed with the pedigree of internal legitimacy, they may very well bear the potential to further compliance. Surely, it is not suggested here that the potential to generate compliance pulls of *de facto* reciprocity and of internal factors as articulated in unilateral normative commitments are mutually exclusive. Belligerents' motivation to comply with IHL may very well be informed by both. The point remains, however, that an absence of *de facto* reciprocity does not automatically mean non-compliance because internal factors as articulated in unilateral normative commitments can generate compliance pulls.

The risk of retrogression

Unilateralization carries the risk of outright retrogression if States contest rules of IHL or their detailed content and recouch them as non-legal unilateral normative commitments. Here, unilateralization does not take the form of creating "new" (even if non-legally binding) norms. Rather, unilateralization is used as a strategy

39 In this vein, see also, R. Provost, *ibid.*

40 Hyeron Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015, pp. 60–3 and 65–70.

41 Dale Stephens, "Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015.

42 Geoffrey S. Corn, "Contemplating the True Nature of the Notion of 'Responsibility' in Responsible Command", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015.

to tone down an attempt at delegalization by “re-committing” to a delegalized norm through a unilateral commitment. Admittedly, instances of blatant delegalization of fundamental rules of IHL by attempting to downgrade them from international legally binding rules to non-legal unilateral normative commitments rarely occur. The standards for the treatment of detainees in the so-called War on Terror, where the United States replaced legally required standards of treatment with less exacting non-legal unilateral normative commitments,⁴³ constitute a notorious exception to the rule that IHL’s fundamental principles display a fair degree of stability. Another example is Israel’s position on the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, rejecting it *de jure* despite the contrary position of an overwhelming majority of other States, the International Court of Justice⁴⁴ and international organizations, but instead applying its “humanitarian provisions” *de facto*, in an attempt to turn these provisions into unilateral normative commitments that lack legal force.⁴⁵ Although exceptional, these examples illustrate that the risk of retrogression is real even in relation to fundamental precepts of IHL. Also, even less so can the risk of more subtle forms of retrogression in relation to detailed aspects of a given rule be excluded. Again, the US DoD *Law of War Manual* supplies an instructive example, this time in relation to the obligation to take feasible precautions for the protection of civilians and other protected persons and objects. The *Manual* expresses the view that the United States, even though a non-party to the First Additional Protocol, accepts such an obligation.⁴⁶ It also clarifies that the term “feasible” can be used interchangeably with the terms “reasonable” or “practical” and that a determination of whether or not a precautionary measure is feasible has to be made “taking into account humanitarian and military considerations”.⁴⁷ Siding with many States, including State parties to the First Additional Protocol, and with a number of authorities, the authors of the DoD *Law of War Manual* construe the overall precautions requirement as a due diligence obligation. Accordingly, they consider it to require

43 See United States Memorandum from President George W. Bush regarding humane treatment of Taliban and al Qaeda detainees of 7 February 2002, in ICRC, “United States of America, Practice Relating to Rule 87. Humane Treatment”, National Legislation section, para. 3, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_cou_us_rule87:

Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

44 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, *ICJ Reports 2004*, paras 90–101, available at: www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

45 See, for an account of Israel’s position and criticism among others, Ardi Imseis, “On the Fourth Geneva Convention and the Occupied Palestinian Territory”, *Harvard International Law Journal*, Vol. 44, 2003, pp. 92–100.

46 See US DoD, *Law of War Manual*, above note 13, Section 5.2.3.

47 *Ibid.*, Section 5.2.3.1.

those precautions to be taken “that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.⁴⁸ The notions of “practicable” and “practically possible”, in turn, denote that the determination of the feasibility or non-feasibility of a given precaution is a fact-driven exercise. If circumstances are such to render a given precautionary measure practical or practically possible, it is a legal obligation under IHL to take such a measure. So far, the construction of the precautions requirement in the US *Manual* corresponds to the widely accepted view. Yet, the US DoD *Law of War Manual* differs from the latter in as much as it posits that:

the determination of whether a precaution is feasible involves significant *policy*, practical, and military judgments, which are committed to the responsible commander to make in good faith based on the available information. In assessing whether the obligation to take feasible precautions has been satisfied after the fact, it will be important to assess the situation that the commander confronted at the time of the decision and not to rely on hindsight.⁴⁹

The *Manual* subsequently reiterates that “it is not the case that the legal requirement to take feasible precautions requires whatever may be done” and confirms the view that “it is possible for precautions to be taken, as a matter of practice or policy, that are not required as a matter of law, and the U.S. military frequently has done so.”⁵⁰ Surely, such a unilateral policy-driven overreach of the legal obligation to take precautions is unproblematic from an IHL perspective. Yet, introducing policy choices (or policy “judgments”, as they are referred to in the *Manual*) into the determination of whether a given precautionary measure is feasible bears the risk of retrogression, if and when such policy choices fall short of what is practical and practically possible under the circumstances.

The risk of retrogression is exacerbated by the failure of an overwhelming majority of States to identify precisely what they consider to be rules of customary IHL, by refraining from positively revealing which of their practice they consider to be accompanied by *opinio juris* as the conviction that it is required or permissible as a matter of IHL. Rather than doing so, States either opt for generic assertions that (their positions on) IHL shall not be confused with their unilateral (non-legal) normative commitments that belong to the exclusive realm of politics and policies or they opt for pronouncements of what they consider not to be the law in the context of specific rules.⁵¹ Thus far, the call for a constructive (re)claiming of the central role of States in the creation of customary IHL by more assertive,

48 See *ibid.*, Section 5.2.3.2; and see ICRC Customary Law Study, p. 54, with references to relevant State practice; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2010, p. 139; William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, pp. 121–2.

49 US DoD, *Law of War Manual*, above note 13, Section 5.2.3.3: “The Taking of Precautions and Law, Policy, and Practice” (emphasis added).

50 *Ibid.*

51 See, for example, the US response to the ICRC Customary Law Study: John B. Bellinger, III and William J. Haynes, II, “A US Government Response to the International Committee of the Red Cross Study

but also more precise, pronouncements on their *opinio juris* has remained unheeded.⁵² What results is at best a stagnation in the development or clarification of customary IHL, and at worst an attempt at pushing back on existing customary rules of IHL. Unilateralization plays a role in both respects, as unilateral non-legal normative commitments replace clear and precise pronouncements on States' *opinio juris* or are offered as an alternative to existing customary rules. From a positivistic standpoint, such challenges to existing customary rules of IHL are doomed to fail, as long as they are confined to a minority of States. The customary rules of IHL remain legally binding, even upon the State which attempts to push back on them by resorting to unilateralization (or, for that matter, by resorting to other strategies). Yet, in a legal system that remains to a large extent horizontal, engaging the State concerned on the basis of such legally binding rules becomes more difficult, if the standpoint of that State is that the rule in question is merely a unilateral non-legal normative commitment rather than a legally binding rule of IHL. The normative traction of the given customary rule is weakened *vis-à-vis* that State. For, from that State's perspective, unilateralization offers it the option to respond to the invocation of the given rule of customary IHL by claiming that it has committed to the envisaged conduct or result only unilaterally and in a non-legally binding manner.

Non-State organized armed groups

As alluded to, unilateralization assumes a different role *vis-à-vis* non-State organized armed groups than *vis-à-vis* States. While non-State organized armed groups are largely excluded from the process of conventional and customary law-making (with the exception of *ad hoc* agreements, including special agreements concluded in accordance with Article 3 common to the four Geneva Conventions), it has become virtually universally accepted ever since the adoption of common Article 3 that conventional and customary IHL binds them. Unilateral normative commitments have gained prominence in a quest to overcome the doctrinal, practical and humanitarian challenges⁵³ that this enigma entails. Indeed, such unilateral normative commitments often are reaffirmations of rules of IHL that conventional wisdom holds already bind non-State organized armed groups.⁵⁴ At times, they even go further than what a State opponent has accepted as legally binding upon it under IHL and in that sense are constitutive rather than

Customary International Humanitarian Law”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007.

52 For such a call, see Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Law Pluralism”, *International Law Studies*, Vol. 91, 2015.

53 For discussion, see J. K. Kleffner, above note 11.

54 For the Deed of Commitment reaffirming the absolute prohibition of crimes of sexual violence, launched in 2012, see Geneva Call, “Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination”, available at: www.genevacall.org/wp-content/uploads/2020/09/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf.

declaratory.⁵⁵ Securing a unilateral normative commitment by a non-State organized armed group is seen as a way of strengthening the sense of ownership of non-State organized armed groups over the norms of IHL, increasing their normative traction, and improving such groups' propensity to comply.⁵⁶ As noted above, the question whether their unilateral commitments are (or can be) constitutive of IHL cannot be answered conclusively. However, unilateralization in the context of non-State organized armed groups is being employed as a strategy to at least confirm the validity of IHL and on occasion even as a strategy to bring them into the reach of IHL in case of rules that would otherwise not apply to them. Unilateralization hence assumes a radically different role than in the case of States.

The systemic implications of unilateralization for the law of NIAC also differ in some important respects from those for the law of IACs. The role of reciprocity and belligerent equality in the latter context cannot be equated with that in the former in at least the following ways. First, the creation of conventional and customary law of NIAC does not occur along reciprocal lines in as much as non-State organized armed groups are systematically excluded from the law-making process. Second, several aspects of the notion of belligerent equality suggest that it is somewhat of a conceptual misfit in the context of the law of NIAC. In IACs, IHL creates a perfect balance between parties to an armed conflict, most notably due to its separation from the *jus ad bellum* and by excluding the possibility of applying domestic (criminal) law to lawful acts of war by virtue of the combatant privilege. In contrast, members of State armed forces and those of non-State organized armed groups are unequal in the sense that the former are granted certain rights and privileges whereas the latter are not. Admittedly, the ensuing inequality is not one under the international law of NIAC, which retains the fiction of equal application. However, the inequality under domestic law that follows from the absence of a shield of immunity as a result of the combatant privilege is an important departure from the law of IAC. Indeed, a lack of compliance with IHL by non-State organized armed groups is not infrequently explained, at least in part, by that inequality, informing the recurring *de lege ferenda* calls for an extension of both *jus ad bellum* and combatant privilege to NIACs.⁵⁷ The question whether and to what extent this assumption withstands rigorous scrutiny aside,⁵⁸ the transposition of belligerent

55 S. Sivakumaran, above note 3, pp. 243–6 (more onerous obligations accepted by non-State organized armed groups in Deeds of Commitments on anti-personnel mines in cases where the States against which they are fighting are not party to the Ottawa Convention).

56 Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

57 See, amongst others, Claus Kress, "Towards Further Developing the Law of Non-International Armed Conflict: A Proposal for a *Jus in Bello Interno* and a New *Jus Contra Bellum Internum*", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, with further references to other suggestions along similar lines at footnotes 36–8; see also Geoffrey S. Corn, "Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?", *Stanford Law & Policy Review*, Vol. 22, No. 1, 2011, available at: <https://law.stanford.edu/wp-content/uploads/2018/03/corn.pdf>.

58 See, for example, Frédéric Mégret, "Response to Claus Kress: Leveraging the Privilege of Belligerency in Non-International Armed Conflict Towards Respect for the *Jus in Bello*", *International Review of the Red Cross*, Vol. 96, 2014.

equality into the law of NIAC should be met with a fair degree of scepticism and nuance.⁵⁹ Besides for conceptual reasons, such scepticism is also informed by concerns about the normative overreach that results from belligerent equality in an increasingly dense set of rules of the law of NIACs, which imposes obligations on (some) non-State organized armed groups that are regarded as unrealistic in factual terms. One alternative that has been offered is to tailor the extent and nature of obligations of non-State organized armed groups under the law of NIAC and align them to their factual capacities and capabilities on a “sliding-scale of obligations”.⁶⁰ Another suggestion is to move from formal to substantive equality under the law of NIAC, and replace the idea underlying belligerent equality in NIACs that States and non-State organized armed groups are the same (and hence subject to the same obligations) by a model in which insurgents and the State may be held to distinct obligations.⁶¹ This model foresees the involvement of non-State organized armed groups in the norm creation process, leading to “the identification of a code for insurgents, which can be the pendant of state duties under the laws of war by way of a process that directly and exclusively involves non-state armed groups, and no state at all”.⁶² On both accounts, the ensuing unilateralization is regarded as a means to accommodate non-State organized armed groups better within the fabric of IHL with the ultimate goal of improving their compliance with it.

And yet, as laudable as that endeavour may be, we should not lose sight of the risks that the offered solutions entail. Tying IHL obligations to factual capacities may lead to a race to the bottom, because it would disincentivize non-State organized armed groups to improve their compliance capacities.⁶³ On the opponent’s (State) side, abandoning belligerent equality may also entail the risk of delegitimizing IHL and of doing away with whatever is left of reciprocity as generating a pull towards compliance.⁶⁴ Moreover, several questions would need to be answered in testing the hypothesis that granting non-State organized armed groups a role in the norm-creation process may improve compliance. What if the resulting norms diverge in important respects from IHL as we know it? Are we prepared to take the consent of non-State organized armed groups to a given norm of IHL seriously enough to also accept that a lack of consent means that a given rule of IHL does not bind them? Are some rules of IHL (perhaps for example the fundamental rules as enshrined in common Article 3 and the basic

59 For such scepticism and nuance, see, for example, Adam Roberts, “The Principle of Equal Application of the Laws of War”, in David Rodin and Henry Shue (eds), *Just and Unjust Soldiers: The Legal and Moral Status of Soldiers and Civilians in War*, Oxford University Press, Oxford, 2007, p. 229. Sassòli refers to the concept of belligerent equality in NIACs as a “fiction”: Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, Cheltenham, 2019, p. 51, at Section 4.44. In his view, it should be abandoned. See Marco Sassòli, above note 37.

60 M. Sassòli, above note 37.

61 R. Provost, above note 37, pp. 440–1; R. Provost, above note 38.

62 R. Provost, above note 37, p. 441.

63 Y. Shany, above note 37, p. 433.

64 Y. Shany, *ibid.* See, on that pull, or lack thereof, and the need to contextualize it, the above section “Reciprocity and belligerent equality”.

principles of distinction and protection) sacrosanct and safe from withholding consent?

While both the fact/capacity-driven and the consent-driven alternative models to belligerent equality thus give rise to a number of challenges, a more modest model of unilateralization would be to separate more clearly the rules of IHL proper from unilateral normative commitments of non-State organized armed groups. To secure such commitments may be important to engage non-State organized armed groups and can potentially also be one way to further compliance, but it need not necessarily come at the expense of the already applicable law of NIAC if the latter is understood to retain its validity, albeit in the background. As long as IHL and unilateral normative commitments align or there is a willingness of a non-State organized armed group to go beyond what the law requires, there is no need to let the law take the front seat in engaging a non-State organized armed group, especially if that group assigns more normative traction to its unilateral commitment than to IHL. Obviously, such a model has its limits: if a non-State organized armed group is unwilling or unable to emulate individual rules in unilateral normative commitments, IHL will in all likelihood not provide a very efficient safety net in the background or, for that matter, anywhere else. However, both IHL and unilateral normative commitments can play a mutually enforcing role when engaging with an organized armed group in the quest to change such an attitude or to develop its compliance capabilities. Those aspects of the law of NIAC that are rejected or normatively overreaching the factual capacity of a given organized armed group at a given moment in time might be held off to form the subject of a unilateral normative commitment until the attitude or factual circumstances have changed. This would not mean that the law of NIAC has been inapplicable in the meantime, nor would it mean that such an organized armed group can freely chose not to improve its compliance capabilities. Rather, the law would provide important benchmarks in capacity-building measures, whereas unilateral normative commitments assume the role of emulating the rule(s) of IHL in question when these measures have yielded sufficient results.

Conclusion

Unilateral normative commitments are a feature of contemporary IHL. While one has to be cautious about making predictions for the future, the function that unilateralization fulfils suggests that its relevance will neither stagnate nor decrease. There are no signs that the two main drivers of unilateralization – the fatigue of States to resort to “ordinary” law-making, in particular as regards conventional IHL, and the phenomenon of non-State organized armed groups – are about to disappear. If anything, the current international climate and the reality of NIACs indicate that instances of unilateralization will continue to increase, much as other compensatory responses to the lack of traditional IHL development through treaty and custom – including “informal” law-making

through expert manuals, clarification processes and humanitarian actors (not least the ICRC) claiming some of the space left unoccupied by inactive States.⁶⁵ The point is not whether unilateralization is “good” or “bad”. The point is rather that we consider it in the overall normative landscape of the regulation of armed conflicts and subject it to rigorous scrutiny in the quest to maintain the delicate balance between humanitarian considerations and military exigencies that informs IHL as a whole.

65 On some of these responses, see other contributions in this issue of the *Review*, for example, Yahli Shereshevsky, “International Humanitarian Law-Making and New Military Technologies”, *International Review of the Red Cross*, Vol. 104, 2022; Liesbeth Lijnzaad, “Going for a Test Drive? Some Observations on Expert Manuals in the Laws of Armed Conflict”, *International Review of the Red Cross*, Vol. 104, 2022; and Pauline Charlotte Janssens and Jan Wouters, “Informal International Law-Making: A Way Around the Deadlock of International Humanitarian Law?”, *International Review of the Red Cross*, Vol. 104, 2022. Also see “‘Political Declaration’ Regarding Explosive Weapons in Densely Populated Areas: Interview with Eirini Giorgiou”, *International Review of the Red Cross*, Vol. 104, 2022.