



The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany

René Provost

René Provost is Associate Professor at the Faculty of Law at McGill University, Canada, and the founding Director of the Centre for Human Rights and Legal Pluralism at the same university.

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Marco Sassòli's argument that the equality of obligations of states and non-state armed groups under IHL should be abandoned and, even more clearly, Yuval Shany's claim that it must be retained are both grounded in a premise that such an equality presently obtains under international law. I am tempted to start by expressing strong doubt as to whether this is an accurate portrayal of the current state of the laws of war. As Sassòli correctly notes, there has been a tendency for international criminal tribunals in their decisions gradually to chip away at the distinction between the legal regime applicable to IACs and the one designed for NIACs. That jurisprudence, presented as a depiction of customary law by these tribunals, has, to a significant extent, been entrenched in the Statute of the International Criminal Court (ICC), now ratified by well over half of all states. Two observations can be made in this respect: first, the expansion of criminal accountability for war crimes committed in the context of an NIAC seems to have grown organically from the mandates of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively); as such, it reflects the procedural logic of the penal process much more than a thoughtful and broad-based analysis of the contemporary reality of civil wars as experienced by all sides, and the appropriate norms that can govern that reality under international law. The second, related observation is that the depiction of the laws of war

applicable to NIACs found in the jurisprudence of international tribunals and the ICC Statute corresponds to a formalistic and positivist construction of law that stands removed from the practices and views of the legal agents whose behaviour we seek to regulate – in this case, that of insurgent fighters. In other words, there is a significant case to be made that this view meaningfully corresponds to ‘the law’ only within The Hague city limits, but not much beyond. This in fact echoes Sassòli’s call for IHL to contain rules that are realistic: that is, ones that reflect, to some extent at least, the interests of the non-state groups, although he makes that point as part of an argument for jettisoning the principle of equality of belligerents, whereas I would raise it as evidence that no such principle exists today in relation to internal armed conflicts.

Beyond the discussion of whether the formal equality of belligerents under IHL should be abandoned or found not to exist (a debate that may be taken as overly theoretical), how should we react to the question posed by the editors of this journal, namely ‘Should the obligations of states and armed groups under international humanitarian law really be equal?’ If we adopt a purely humanitarian standpoint, then it should make no difference whatsoever to the victims of an armed conflict whether the violations they suffer are imputable to a state or to a non-state armed group; what is central is whether their fundamental interests as human beings, as recognized under IHL, have been denied. This perspective on the laws of war, endorsed by Shany in his response, seems mostly to have held sway in the analysis of the international criminal tribunals, aligned with the protection of individuals under international human rights law. This goes hand in hand with a move to increase reliance on international human rights standards in situations of armed conflict, especially internal conflict. According to this vision of humanitarian law, a principle of equality of belligerents appears not only compatible but actually required. If, however, we take humanitarian law to represent an attempt to reconcile the strategic interests of belligerents with a degree of protection for the victims of war – an aspiration that is quite distinct from that at the root of human rights standards – then the picture becomes more muddled, calling for a modulated regime in which some concessions must be made to all legitimate interests.⁶ One of those legitimate interests is the aspiration to win the war, reflecting the dissociation of the regulation of the conduct of war under *ius in bello* and the eventual illegality of the use of force according to *ius ad bellum*. According to this model, we come to see that the relative positions – and hence strategic interests – of each side to an NIAC are not identical. It is even possible that the interests of individual victims may not be constant in their relation with a state Party to a conflict on the one hand, and an insurgent group on the other. For instance, individuals may have distinct claims related to social and economic interests when dealing with a state as compared to a rebel group. Once the fluctuating nature of the interests at stake is accepted, then a principle of formal equality of belligerents, whereby the same rules simply apply to all, becomes

6 I explore this at length in René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002.

more difficult to imagine as a foundational component of IHL applicable to civil wars.

Up to this point, the discussion has mainly concerned NIACs, but we could indeed, on a similar basis, raise a challenge to the justified nature of a principle of equality for IACs. First, situations in which non-state armed groups take part in an international conflict, following the model of partisan action during the Second World War, give rise to some of the same objections that have already been identified in the context of an internal conflict between a state and an insurgent group or among various non-state actors. Second, and much more radically, it could be argued that the theoretical sovereign equality of all states under international law rarely translates into equality of arms in the field. A *realpolitik* reason for this is that states tend to shy away from military solutions to their disputes with other states that are militarily their equal. On the whole, with the occasional counter-example, conflicts tend to involve powerful states and weaker neighbours. If we take the example of the military campaign of the United States against Iraq as a case study, it is easy to see that the United States' technological advantage and superior firepower placed it in a position that was very different from that of Iraq. It has been argued that the open-textured nature of some humanitarian norms, articulating obligations on the basis of the information available at the time of decision (e.g. from satellite surveillance, loitering drones, etc.) or the availability of alternate weapons (e.g. 'smart' weapons, automated weapons systems, etc.) or tactics (radio jamming, disinformation, etc.) to achieve a similar military advantage, means that, in the way in which these norms are applied, they translate into much more onerous duties for a country such as the United States than they did for Iraq. As noted by Shany, this is relevant to the interpretation and application in specific circumstances of a number of context-dependent standards.

Arguments may be made that this is unfair, amounting to a legal tactic wielded by the weaker party, but to such arguments can be opposed the fact that the rules of the laws of war will typically legitimize the tactics of the powerful parties and invalidate those of very weak ones. Beyond the simple interpretation and application of uniform standards, the emergence in other fields of international law in the last few decades of 'common but differentiated responsibilities' has introduced the notion that a regime may be fair and sound despite the fact that it formally imposes on participating states obligations that vary in their nature or degree. The same could be done for IHL applicable to armed conflicts among states, thus doing away with a requirement of formal equality.

A second line of enquiry flowing from the question put to us by the editors of the *Review* concerns the concept of equality operating not only in this question but more broadly in the doctrine analysing IHL. Equality as it emerges from the ways in which it is invoked in discussions of the laws of war evokes an idea of equality as necessarily grounded in sameness. Basically, belligerents can be equal if they are the same, which of course raises some eyebrows – and questions – when we ask whether a principle of equality obtains between state forces and insurgent groups during an NIAC. Indeed, in looking at the Geneva Conventions and Protocols as well as at customary law, it does seem that the applicability of the laws

of war turns to some degree on the insurgent's ability to remake itself as a proto-state or government-in-waiting hoping to replace the administration currently controlling the state. We see traces of this in the idea that rebels must control part of the national territory and be equipped with structures of command and institutions enabling them to apply humanitarian law. The notion of equality that this recalls is the one first advanced by liberal feminist legal scholars in the 1970s, essentially arguing that if women were treated like men then justice would be achieved. Later, critical feminists savaged this idea, mocking the suggestion that turning women into men was really the solution to the denial of equality for women. Women, they noted, simply *are* different from men, and so the solution must be one of acknowledging these differences and arriving at a regime that reflects a diversity of gender rather than imposing a male model as the necessary reference point and structuring concept. We find something of a similar trend in the discussion of the principle of equality under IHL: however much we might push to make non-state armed groups more like states, having courts with due process and so on, in the end they are *not* states at all. But equality does not necessarily entail turning women into men or insurgent groups into states: we can abandon a claim to sameness without jettisoning the idea of equality. What this brings us to is a conclusion that there can be a principle of substantive equality that infuses humanitarian law even if the obligations of different types of actors are not identical.

Importantly, a shift from formal to substantive equality in humanitarian law applicable to internal conflicts does not necessarily deny the reciprocal nature of such obligations. The much-maligned notion of reciprocity has often been reduced merely to an excuse handed to one side of the conflict to justify its own unwillingness to comply with humanitarian standards. A deeper study of the phenomenon suggests not only that it has not been 'widely outlawed', as suggested by Sassòli, but also that it retains a critical function in the creation and application of humanitarian norms, a finding not necessarily contested by Sassòli. The danger here is to define reciprocity as merely tit-for-tat, meaning that belligerents' obligations must be the same (formal equality) and that the binding nature of any obligation is dependent upon compliance by the other side. On the other hand, we do not need to cling to a model of sameness of obligations in order to retain the benefit of reciprocity as a tool to induce compliance, as suggested by Shany. At the same time, we must reject an impoverished idea of reciprocity and reclaim the notion as capturing a broader normative dynamic whereby the obligations of all participants in a legal regime are interconnected. Under such a model, insurgents and the state may be held to distinct obligations but compliance by one side is nevertheless taken as drawing compliance from the other. Ultimately, this opens the door to adopting rules on insurgent warfare that reflect the legitimate interest of non-state armed groups without having to abandon the normative *acquis* found in Common Article 3, Protocol II and customary law applicable to governmental armed forces.⁷

7 See René Provost, 'Asymmetrical reciprocity and compliance with the laws of war', in SSRN eLibrary, 14 January 2010, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427437, forthcoming in

A final consideration turns to the manner in which a re-think of the idea of the equality of belligerents can take place, given the reality of international relations and the state-centred nature of the international legal regime. It is simply no answer at all to argue that states, or international tribunals created by states, have concluded the existence of certain duties for insurgents in the context of a civil war. What is fascinating about the laws of war for someone interested in the nature of legal discourse is the fact that we seek to capture behaviour and direct decision-making in a context in which a sense of community seems absent and no standard legal institutions can intervene (tribunals come in, after all, after the fact). The force of the law must be explained in some way beyond a reference to state sovereignty. Legal pluralism offers a number of insights in this context, finding law to exist in parallel and intersecting spheres beyond the state. Legal norms arise whenever communities of practices can be found, linking actors on the basis of shared interests or practices. What this suggests is that a process for articulating norms relevant and meaningful for insurgents must be centred on the practices of these agents. Thus an ICRC study on customary law that excludes the legal impact of non-states' practice is devoid of much significance for non-state actors.

We can instead move towards 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. In this respect, let us consider the work of Geneva Call, an NGO based in Switzerland working to entice non-state armed groups to commit to stop using landmines and child soldiers. Since 2000, Geneva Call has managed to induce more than three dozen non-state groups engaged in armed conflicts in Asia and Africa to sign a 'deed of commitment' whereby they renounce the use of landmines. Although the work of the organization finds inspiration in the 1997 Ottawa Convention banning anti-personnel landmines,⁸ its activities are not part of the regime directed at states, and indeed most insurgent groups who have signed the deed of commitment operate in the territory of a state that has not ratified the Ottawa Convention. What is striking about this approach is not the engagement with rebel groups *per se*, which is something that the ICRC has been doing for many years as part of its dissemination campaign. The novelty lies in the normative dimension of the endeavour, in seeking to trigger the type of normative commitment that Robert Cover identified as essential to give meaning to any legal standard.⁹ It is not altogether clear whether Geneva Call considers its deed of commitment to be legally binding on the rebels, although the very label and formal signing ceremony unambiguously signal a ritualistic invocation of the force and majesty of the law. I would suggest that, in agreeing to live by certain humanitarian norms, whether such agreement is expressed in the formal signing of a deed of commitment or simply in the oral undertaking of a rebel leader, non-state

Benjamin Perrin (ed.), *Modern Warfare: Militias, Private Militaries, Humanitarian Organizations and the Law*, UBC Press, Vancouver, Spring 2012.

8 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 ILM 1507 (1997, entered into force 1 March 1999) (Ottawa Convention).

9 Robert Cover, 'Nomos and Narrative', in *Harvard Law Review*, Vol. 97, No. 4, 1983.

actors are creating IHL in a fashion that is as real and possibly as effective as states ratifying an international treaty on the same matter. All contribute in an asymmetrical but interrelated way to the creation of a community of practice that can attest to shared understandings of the acceptable limits of war.