



A Turn to Non-State Actors:

Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood

Heike Krieger



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A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood

Heike Krieger

Abstract:

Many of the perpetuated armed conflicts in the Great Lakes Region in Africa take place in war-torn areas of limited statehood. These conflicts are characterized by a high number of civilian victims, often resulting from utter disregard for international humanitarian law. Here, the rise of armed, violent non-state actors collides with the State-centric traditional nature of public international law. Thus, (classical) compliance structures seem to lose their significance, as they predominantly rely on the State for law enforcement and therefore mainly accommodate States' interests when inducing compliance. The working paper suggests that the international community responds to these challenges by allocating competences to other actors than the State. Particularly, international organizations increasingly contribute to enforcing international humanitarian law. However, since these organizations are dependent on their member States' political willingness to support measures for inducing compliance effectively, a proliferation of humanitarian non-state actors can be observed that step in where third States and international organizations are reluctant to act. The paper investigates reasons for compliance and arrives at the conclusion that traditional motives rooted in a logic of consequences, as well as appropriateness are still valid and must therefore be addressed by the corresponding compliance mechanisms. These compliance mechanisms are interdependent and mutually reinforcing. Persuasion and incentives work more effectively if they are used under a shadow of hierarchy thrown by coercive legal enforcement instruments, such as international criminal justice and UN targeted sanctions. These instruments are in turn more effective if they are part of a concerted effort.

Zusammenfassung:

Viele der Konflikte in der afrikanischen Region der Großen Seen werden in gewalttätigen Räumen begrenzter Staatlichkeit geführt. Die hohe Anzahl ziviler Opfer ist dabei auch auf die Missachtung des humanitären Völkerrechts zurückzuführen. Seine Steuerungswirkung ist im Hinblick auf bewaffnete Gruppen in Frage gestellt, denn seine Anreizstrukturen scheinen auf staatliche Interessen und staatliche Durchsetzungsinstrumentarien gerichtet zu sein. Der vorliegende Beitrag untersucht, inwiefern die Internationale Gemeinschaft auf diese Herausforderungen reagiert. Es lässt sich beobachten, dass vor allem internationale Organisationen Aufgaben bei der Durchsetzung des humanitären Völkerrechts übernehmen. Angesichts der Dominanz staatlicher Interessen in diesen Organisationen treten in zunehmendem Maße NGOs hinzu, die versuchen, bewaffnete Gruppen in Durchsetzungsinitiativen einzubinden. Der Beitrag beleuchtet Gründe für die Befolgung humanitären Völkerrechts unter den Bedingungen von Konflikten in gewalttätigen Räumen begrenzter Staatlichkeit und gelangt zu dem Ergebnis, dass traditionelle Befolgungsanreize auch weiterhin relevant sein können. Zugleich wird dargelegt, dass sich die Wirksamkeit der Durchsetzungsinstrumentarien erhöht, wenn sich hierarchische Steuerungsinstrumente, wie gezielte UN-Sanktionen und internationale Strafgerichtsbarkeit, sowie nicht-hierarchische Steuerungsmechanismen gegenseitig ergänzen.

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1. Introduction

Many of the perpetuated armed conflicts in the Great Lakes Region in Africa take place in war-torn areas of limited statehood. Fragmented armed groups fight each other or the armed forces of a government, which represents only the remainder of collapsed State structures. These conflicts are characterized by a high number of civilian victims, often resulting from utter disregard for international humanitarian law. While the government is unable to implement and enforce rules and decisions because the State has lost its monopoly over the means of force¹, the rise of armed, violent non-state actors collides with the State-centric traditional nature of public international law. Thus, (classical) compliance structures in international humanitarian law seem to lose their significance, as they predominantly rely on the State for law enforcement and therefore mainly accommodate States' interests when inducing compliance.²

However, if the State is no longer able to enforce the law or comply with it, the question arises as to who may replace the State and compensate for its failure (Risse/Börzel 2012: 9, 11). Beginning with an analysis of the State's restricted capabilities to induce compliance in areas of limited statehood (2.), this paper submits that, to some extent, non-state actors³ may compensate for the State's failure. Taking into account empirical political science studies on compliance, the paper argues that such non-state actors have a twofold role to play: as addressees of compliance efforts as well as normentrepreneurs and norm inducers. This paper contends that there is no real alternative other than to engage with armed groups (3.). Here, despite of the conflicts' changing character, traditional incentives (reciprocity, self-interest, reputation) still matter for inducing the willingness to comply with the law. Yet, a severe dilemma arises: the necessity to engage with armed groups contradicts basic interests of States in general, and of the governments concerned in particular. Since efforts to improve compliance with international humanitarian law must take into account the position and the interests of armed groups, non-state actors, NGOs in particular, have become an essential part in the overall pattern of inducing compliance, since they can act more independently of State interests (4.). However, even though their perceived neutrality increases their role in compliance, only a mix of instruments will improve the mechanisms' effectiveness.

1 Risse/Börzel, (2012: 10); see on failing States Geiss, (2005); Thürer (2009).

2 In the general discussion, the terms 'compliance' and 'enforcement' are used. While 'enforcement' refers to coercive measures, 'compliance' is a broader concept which includes both hierarchical and non-hierarchical instruments; see Bothe (2008).

3 The term is used here in a broad sense, encompassing all actors which are not directly related to the State; for such a use see Wagner (2010: para. 1); from a juridical perspective, the differentiation is often drawn between public actors such as the State or State-empowered international organizations, and private actors, such as transnational enterprises and non-governmental organizations; see Wagner (2010: para. 3).

2. Restricted capabilities of States to induce compliance

National enforcement mechanisms seldom work appropriately in areas of limited statehood. Armies often lack a strict and stable military hierarchy; hence, military discipline is barely maintained and the risk of mutiny is high. For instance, the armed group M23, which was responsible for a rebellion in the eastern DRC in 2012, consisted of soldiers who had mutinied against the Congolese State Army (HRW 2012). Moreover, it is at the very least doubtful that training and instruction of soldiers includes an adequate introduction to international humanitarian law as envisaged in Article 83 AP I. Since the criminal justice system is often affected by the breakdown of State structures, military justice may not work as a means of enforcement either (Lamp 2011: 233). This is acknowledged by Article 17 of the ICC-Statute, which lays down the principle of complementarity. According to Article 17 para. 1 lit a), a case before the ICC is inadmissible if it is being investigated by a State that has jurisdiction, unless the State is genuinely unable to carry out the investigation. Article 17 para. 3 of the ICC-Statute defines inability as follows: ‘In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’.

Based on an interpretation of Article 17 para. 3 of the ICC-Statute, some criteria can be identified that illustrate when and why a judicial system is incapable of enforcing international humanitarian law. The Trial Chambers, the reports of the Office of the Prosecutor, as well as international human rights standards, help to shape the meaning of a substantial collapse (Williams/Schabas 2008: 624) as the lack of a viable legal infrastructure, in particular with a view to protection of fair trial standards and rights of the accused; inaccessibility of the courts; insufficient material resources and experienced and independent judicial personnel; the lack of adequate operative law and of a sufficient infrastructure for investigations, in particular with a view to police capability; as well as an adequate system for the protection of victims.⁴ In addition to criteria concerning the quality of the judicial system, the general situation, especially with regard to the security situation, has to be taken into account.⁵ The latter criterion is particularly decisive because the *travaux préparatoires* reveal that many African States did not want Article 17 to apply in the absence of full compliance with human rights standards (Kastner 2010: 136). The situation in the DRC is a case in point. While President Kabila had admitted Congo’s inability to try Thomas Lubanga Dyilo in its national judicial system, upon referring the situation in the DRC to the ICC in 2004,⁶ Trial Chamber I decided in 2006 that the judicial system had

4 UNSC, 5459th meeting (14 June 2006) UN Doc. S/PV.5459, p. 3; HRW (January 2004: 6); Burke-White (2005: 576).

5 UNSC, 5459th meeting, above note 4, p. 3.

6 ICC-01/04-01/06-32-US-Exp-AnxA1, 21 March 2004: “En raison de la situation particulière que connaît mon pays, les autorités compétentes non sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d’engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale.”

already improved.⁷ In response to the ICC's activities with regard to the DRC, parts of the government had pushed for judicial reforms in order to claim that there was no need for complementary ICC proceedings (Burke-White 2005: 570). However, observers from the DRC suggest that the military justice system still faces severe handicaps when dealing with war crimes. As of 2012, only about 15 cases had been tried before military tribunals in the DRC concerning war crimes committed between 1998 and 2003. None of these cases concerned high-ranking commanding officers.⁸ The reasons for these shortcomings are diverse and reflect the challenges with which law compliance is confronted in areas of limited statehood. While the UN Security Council has repeatedly called on the DRC to stop impunity (UNSC Resolution 1565 01.10.2004: para. 5 g), national efforts on this topic have faced numerous legal, political and social challenges. It is doubtful that there is an adequately operative legal system in place to deal with serious human rights violations (Kumbu forthcoming). Criminal legislation enacted in the wake of the 'Second Congo War' lacked consistency and deviated significantly from the ICC Statute, for instance by omitting certain crimes such as forced disappearances and recruiting children in the armed forces, or entirely excluding penalties for the commission of war crimes (Kahombo forthcoming). Moreover, Congolese civilian courts are generally not competent to prosecute serious human rights violations; accordingly, military courts will decide on most cases (Kumbu forthcoming; Burke-White 2005: 583). It is widely believed that the judiciary is devoid of political independence (Kumbu forthcoming; Burke-White 2005: 577). A lack of material resources also hinders the judiciary from efficient investigations and domestic prosecutions (Burke-White 2005: 566). It is unlikely that victims will receive any monetary compensation (Kumbu forthcoming; Kahombo forthcoming). These shortcomings within the legal system are aggravated by a politically biased incoherent prosecution policy (Kahombo forthcoming; HRW 04.03.2012). Human Rights Watch stated in 2004:

"The DRC's judicial system has had little investment over the past decade. Most of the courts do not function. Its personnel have not been paid for years and magistrates are badly trained and unsupported. Mismanagement or corruption often characterizes cases that are heard, sometimes fuelling community grievances and furthering conflict. Lack of confidence in the judiciary's administration of justice is widespread. Not a single political crisis of a constitutional nature has been resolved by the judiciary. Politicians and businesses are reluctant to bring their disputes to the courts. The general population similarly lacks confidence in the judiciary. It is estimated that only a very small percentage of disputes end up in courts of law, not because parties to the disputes have better options, but because they are so suspicious of the judiciary that they prefer other means, including the police, security services, the military, or traditional arbitration in rural areas. Victims of human rights abuses are generally reluctant to utilize judicial mechanisms for redress.(HRW January 2004: 5)"

⁷ *Prosecutor v. Lubanga* (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/04-01/06-8 (10 February 2006), para. 36.

⁸ Kahombo (forthcoming); Kumbu (forthcoming); Report of the Secretary-General on the Protection of Civilians in Armed Conflict (22 May 2012) UN Doc. S/2012/376, p. 2; HRW (04.03.2012).

Moreover, there is a continued risk that the fragile peace process will be undermined by serious criminal prosecutions (Burke-White 2005: 566; HRW 04.03.2012). Thus, it was reported that the M23 armed group justified its rebellion with the government's alleged failure to carry out the peace agreement of 23 May 2009. The agreement was concluded between the DRC government and the *Congrès National pour la Défense du Peuple* (CNDP), on the basis of which the CNDP was recognized as an official political party. Its military wing was also integrated into the State's armed forces.⁹ In part, the rebellion was led by General Ntaganda and seen as a reaction against the government's efforts to destabilize his position *inter alia* by pushing calls for his arrest and transfer to the ICC (HRW 2012).

3. Engaging armed groups

Where the State has lost control over territory and people, international humanitarian law assumes, as stated in Common Article 3 GC and Additional Protocol II that within their area of control armed groups assume responsibility. Thus, efforts to induce compliance must engage armed groups as much as they engage States.

3.1 Restricted capabilities of armed groups to induce compliance

However, a restricted capacity to comply is not only characteristic of State actors in areas of limited statehood. Violent non-state actors will often have not (yet) established stable and effective structures with strong leadership required to guarantee effective compliance. The capacity of armed groups to train and instruct members and to take disciplinary, as well as punitive, sanctions differs considerably.¹⁰ Likewise, the ability to act at the international level on the basis of central command and control structure also varies. However, empirical research strongly suggests that compliance with international humanitarian law requires an authority with competence for decision-making and negotiating with public and private international actors. Thus, accountability can be allocated to a central command with the minimum clarity legally required.¹¹

One way to address these challenges is for the law to try to adapt its normative preconditions to the facts on the ground by attempting to adequately address the factual situation. International humanitarian law has established a two-tiered system for the applicable law: only armed groups which fulfil the demanding threshold of Article 1 para. 1 are bound by Additional Protocol II. In all other cases of non-international armed conflict, the minimum standard of Common

9 <http://africanhistory.about.com/od/glossarym/g/def-M23.htm>; see also Special Report of the Secretary-General on the Democratic Republic of Congo and the Great Lakes Region (27 February 2013) UN Doc. S/2013/119, p. 4 et seq.

10 Official Working Document of the 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Geneva October 2007, at p. 47.

11 Jo/ Bryant(2013: 243); for a legal discussion of the required degree of centralization and organization see La Rosa and Wuerzner, (2008: 329); Sivakumaran (2012: 175).

Article 3 GC applies.¹² Such an approach is, *inter alia*, justified because compliance with some of the obligations under the AP II, such as Article 4 and 5 AP II, requires sufficiently stable (infra-) structures.¹³ This linkage between obligation and compliance is explicitly laid down in Article. 1 para. 1 AP II, which requires ‘dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’¹⁴ The high threshold of AP II can be seen as a realistic approach, since the prerequisites – ‘being under responsible command and in control of a part of the territory concerned’ – reflect those circumstances on the ground that will allow an armed group to comply with the Protocol.¹⁵ Thus, according to the ICRC Commentary, while it is not necessary that armed groups be organized as efficiently as regular armed forces, an organization is required that is *inter alia* ‘capable [...] of imposing discipline in the name of a de facto authority’.¹⁶ Likewise, in cases of Common Article 3 GC, a lower degree of organization and control is required, which nonetheless enables the armed group to comply with the obligations under that Article.¹⁷ Consequently, international humanitarian law has long acknowledged the rise of violent non-state actors and created obligations whose applicability depends primarily on the armed groups’ capacity to comply.¹⁸

3.2 Flaws in the willingness to comply

However, even if there is at least a rudimentary capability to comply, this is not sufficient to motivate any actor to actually do so. In some conflicts, at least half of the number of dead civilians can be attributed to the actions of armed groups (Bangerter 2011: 356). Thus, the question remains as to whether adequate safeguards to guarantee an armed group’s willingness to comply have been built into the international (legal) system.

3.2.1 Identifying an actor’s reasons for compliance

‘Compliance with an international obligation means a behaviour or a situation which is in conformity with the international obligations of a subject of international law.’¹⁹ In order to induce such behaviour, it is necessary to identify reasons why actors comply with the law. International Relations and International Legal Theory alike have identified manifold reasons for compli-

12 International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, 1987), Art. 1, p. 1348, no. 4447.

13 Ibid., Art. 1, p. 1352, no. 4466.

14 For indicia when the required degree of organization is fulfilled see Sivakumaran, (2012: 170 et seq.).

15 ICRC Commentary, above note 12, Art. 1, p. 1353, no. 4470; Sassóli / Shani (2011: 430 et seq.).

16 ICRC Commentary, above note 12, Art. 1, p. 1352, no. 4463.

17 Moir (2002: 36); see also on the linkage between status and ability to comply: *Prosecutor v. Ljube Boskoski and Johan Tarculovski* (Judgment) ICTY IT-04-82-T (10 July 2008), para. 196; Zegveld (2002: 140).

18 International criminal tribunals, however, apparently do not put much emphasis on this prerequisite, see Sivakumaran (2012: 177 et seqq.).

19 Bothe (2008: para. 1); from the perspective of social sciences: Jo/Bryant (2013: 241).

ance. Most of the conclusions are based on theoretical considerations, though some do stem from empirical analysis. Some approaches are concerned with international law in general; others focus on the laws of war in particular. In both fields, there are vivid discussions about which theory is most appropriate to explain the reason for compliance with international law. It is not the aim of the present analysis to discuss flaws in the various compliance theories, but rather to deduce reasons for compliance from the diverging theories, as well as from those few empirical studies of compliance with international humanitarian law. Such an eclectic approach might be criticized as lacking theoretical consistency. However, while coherence is an important advantage of an explanation based on one particular theory, at the same time it creates the risk of either an actor driven or structure driven bias (Finnemore/Sikkink 1998: 913). Since the different theories advance, at least partly, motives that derive from different levels of analysis, they work complementarily. Given the circumstances of its applicability in a 'situation of disorder' (Bothe 2008: para. 66), compliance with the laws of war is a particularly complex issue which requires taking into account these different perspectives and levels of analysis. This multilevel approach is reflected in the mix of instruments which international law has developed for ensuring actors' compliance with it (Bothe 2000: 23; Ratner 2011: 485).

The present analysis assumes that actors only partly – if at all – comply with a rule just because it is the law. Therefore, it does not focus on the structure of the norm, its coherence or its determinacy as a prerequisite for compliance (on these prerequisites: Franck 1995: 30). Instead, it inquires as to the relation between the law and an actor's social behaviour (Burgstaller 2005: 85). On this basis an actor's willingness to comply with a norm of international law can be conceptualized in two ways: by a so-called logic of appropriateness and by the logic of consequences (March/Olsen 1998: 949). Compliance because of self-interest and reciprocal behaviour, fear of sanctions and reputation follows the logic of consequences, while the logic of appropriateness furthers legitimacy, substantial moral agreement, as well as habit and a sense of duty, as compliance motives (Schmelzle 2011: 9). Accordingly, it is necessary to identify the relevant norm addressees, since motives for compliance may vary according to the position the actors hold in the international system. Traditionally, compliance theory focuses on the question of why States comply with international law (Bothe 2008: para. 4). Although these theories take into account that non-state actors play a decisive role, they ultimately focus on the State 'as the engine and target of compliance' (Ratner 2011: 485). However, this approach is flawed. It is the rise of non-state actors in war-torn areas of limited statehood that challenges the traditional compliance structure of international humanitarian law and requires a broader perspective. Especially in international humanitarian law and international criminal law, there are others actors with international legal personality that must comply with the norms. Armed groups are bound by the rules applicable in non-international armed conflicts according to Common Article 3 GC, as well as Additional Protocol II and customary international law. In addition, unlike other fields of international law, humanitarian law is not only concerned with policy decisions and their implementation by State organs, but also with acts of the individual, i.e. combatants or civilians during wartime. Responsibility is not only incurred by the State itself; the individual is also responsible for violations of the laws of war. Thus, reasons for compliance must also be explained from the perspective of individuals (3.2.2.) and armed groups (3.2.3.).

3.2.2 The danger of socializing individuals into violence

Efforts to induce compliance with individuals are confronted with the danger that individuals might be more prone to be socialized into violence under the conditions of war-torn areas of limited statehood than under traditional warfare.

Under the premise of the logic of appropriateness, it is somewhat astonishing that substantial moral agreement is not sufficient to induce a high rate of compliance with international humanitarian law if actors actually comply with norms because ‘they understand the behaviour to be good, desirable, and appropriate’ (Finnemore/Sikkink 1998: 912). Many of the obligations, in particular those concerning protected persons, are so fundamental, and concern such basic human needs, that most of them can be seen as a manifestation of general moral agreement.²⁰ In principle, many rules of international humanitarian law are intuitive, and their content reflects efforts to confine the effects of war on civilians and prevent escalation. Accordingly, the fundamental rules of international humanitarian law, such as the principle of distinction and non-combatant immunity, are considered to be *ius cogens* (Greenwood 2008: 135; Oeter 2008: 447).

Yet such substantial moral agreement alone is apparently insufficient to instil compliance under the particular circumstances of armed conflict. A study conducted by the ICRC, on ‘the Roots of Behaviour in War’, explains that group pressure is a major reason an individual soldier may not conform to substantial rules by which he or she would abide as a single individual:

“The individual may not normally be a killer but the group certainly is. [...] The combatant is no longer a totally autonomous individual. [...] This is a situation that favours the dilution of the individual responsibility of the combatant. [...] The individual within a group has a “natural” tendency to assign a higher value to his own group and a lesser one to other groups, [...] It has to be emphasized that when another group is declared to be an enemy, these tendencies become all the more acute. Thus, it is quite easy for the group to slide into criminal behaviour and perhaps even to end up promoting and encouraging it.”²¹

One consequence of group conformity is the tendency to depersonalize, which in turn promotes the loss of a sense of individual responsibility. These tendencies are aggravated by the inclination of combatants to perceive their superiors in the chain of command as those responsible.²² Moreover, a spiral of violence can be observed. If soldiers are victimized, humiliated and traumatized during an armed conflict, there is a higher likelihood that they themselves will perpetrate violations of the laws of war. A moral disengagement of combatants can also result from certain mechanisms to justify violations that they, themselves, have perpetrated. For in-

²⁰ This is particularly true for the rules concerning protected persons, see Krieger (2011); however, for an increasing uneasiness with the concept of collateral damage, see: Hankel (2011); Merkel (2012).

²¹ International Committee of the Red Cross, ‘The Roots of Behaviour in War – Understanding and Preventing IHL Violations’, Geneva 2004, at 6 et seq.

²² Ibid.

stance, illegal acts may be considered as legitimate means for certain ends, such as a group's or a State's survival. Effects might be euphemistically minimized or denied, and such behaviour might be coupled with a tendency to dehumanize the enemy.²³

Conflicts in war-torn areas of limited statehood are characterized by many of the preconditions for entering into a spiral of violence. In the context of normalization of war, fighters and soldiers are victimized, humiliated and traumatized, often by their own superiors, and socialized into war. This development is particularly apparent in the cases of child soldiers.²⁴ The first UN Report on the Impact of Armed Conflict on Children stated:

‘The progressive involvement of youth in acts of extreme violence desensitizes them to suffering. In a number of cases, young people have been deliberately exposed to horrific scenes. Such experience makes children more likely to commit violent acts themselves and may contribute to a break with society. In many countries [...] children have even been forced to commit atrocities against their own families or communities.’²⁵

Yet, it is important to keep in mind that forms of socializing individuals into violence equally apply to international armed conflicts, such as World War II (Browning 1998), and are by no means exclusive to wars in areas of limited Statehood. What are required, in any event, are efforts on the side of the responsible, commanders of armed groups and States' armed forces alike, to prevent or break the spiral of violence. If group pressure and a shift of individual responsibility to the command level are typical preconditions for committing war crimes, it is evident that egregious violations of the laws of war are in general systematic crimes and only occasionally individual ones (Bussmann/Schneider 2012: 4). Consequently, efforts to induce compliance with the individual must be initiated by the military and political command level and must aim to create a habit and sense of duty within the individual.

In order to overcome an individual's tendency to enter into a spiral of violence, international humanitarian law has traditionally been enforced through a professionalized process of norm internalization. The laws of war were traditionally seen as a code of honour for the military profession laying down ‘how an honourable soldier would behave in a certain situation’ (Oeter 1997: 214). This approach corresponds to findings in social science that ‘professional training does more than simply transfer technical knowledge; it actively socializes people to value certain things above others’ (Finnemore/Sikkink 1998: 905). Adequate military training, integrating rules of international humanitarian law, is considered to be essential for creating respect for the

23 Ibid., at 8 et seq.

24 Despite modern discourses on child agency and child soldiers joining armed groups voluntarily, the effects of victimization, humiliation and traumatization, which also apply to adults, should not be overlooked; for a particularly skeptical view of the dominant perception of child soldiers as victims, see: Drumble (2012: 12 et seqq).

25 Report of the expert of the Secretary-General ‘Impact of Armed Conflict on Children’ (26 August 1996) UN Doc. A/51/306, para. 48.

law because iterated behaviour and habit consolidate norms among the members of a profession (Finnemore/Sikkink 1998: 904; Morrow 2007: 571). Accordingly, Article 83(1) AP I stipulates an obligation of the State parties ‘to include the study of [international humanitarian law] in their programmes of military instruction’. The importance of adequate dissemination of international humanitarian law and training of soldiers has been confirmed by UNSC Resolution 1894 of 11 November 2009.²⁶

While there are certain attempts among armed groups to rely on norm internalization, such as in the case of the *Mouvement des Nigériens pour la Justice* (MNJ), which made its members swear an oath on the Quran including the pledge to refrain from harming civilians (Bangerter forthcoming), empirical findings show that only a minority of individuals living in areas of armed conflict know about the rules of international humanitarian law (Sivakumaran 2012: 434). If there is no room for professional training in order to create a habit of norm-compliance, the logic of consequences, particularly the fear of sanctions, may induce individual soldiers and fighters to comply.

Based on its experience, seen in practice as well as in empirical research, the ICRC emphasizes the importance of the fear of sanctions as an instrument for inducing compliance of the individual soldier. The ICRC starts from the assumption that

‘the behaviour of combatants is determined mainly by three parameters: (1) their position within a group, which leads them to behave in conformity with what the group expects of them, (2) their position in a hierarchical structure, which leads them to obey authority (because they perceive it as legitimate or it acts on them as a coercive force, or a mixture of the two), (3) the process of moral disengagement favoured by the war situation, which authorizes recourse to violence against those defined as being the enemy.’²⁷

Under these conditions, a spiral of violence can only be interrupted if group behaviour is controlled by superiors through strict orders accompanied by a realistic threat of swift and immediate sanctions. Only such swift and immediate sanctions can stop a constant increase in violence, because otherwise violations become continuously more severe and more acceptable.²⁸ In order to instigate a fear of sanctions, these instruments need to be imposed coherently. Individual

²⁶ The UN Security Council “calls upon all parties concerned, (a) to ensure the widest possible dissemination of information about international humanitarian [...] law [, and] (b) to provide training for public officials, members of armed forces and armed groups, personnel associated to armed forces, civilian police and law enforcement personnel, and members of the judicial and legal professions; and to raise awareness among civil society and the civilian population on relevant international humanitarian [...] law, as well as on the protection, special needs and human rights of women and children in conflict situations, to achieve full and effective compliance; for a corresponding obligation under customary international law see Rule 142 of the Customary International Humanitarian Law (CIHL).

²⁷ International Committee of the Red Cross, ‘The Roots of Behaviour in War’, above note 21, at 15.

²⁸ *Ibid.*, at 16

combatants would otherwise not be stopped from committing violations of international humanitarian law, as they would assume that they are highly unlikely to be punished. The threat of punishment must be a realistic one.²⁹ Since war crimes are, in general, systematic crimes in that the command level fails to prevent or even incites soldiers to customize to violence,³⁰ there appears to be a stronger pull for leaders at the command level to socialize individuals into violence than into norm compliance in war-torn areas of limited statehood.

3.2.3 No more compliance-pull for warlords?

Some authors explain this pull not to comply on the basis of the ‘new wars’ theory (proponents of this theory include: Kaldor 2006; Münkler 2005). These authors hold that international humanitarian law can no longer direct actors’ behaviour in conflicts in war-torn areas of limited statehood. They argue that the parties’ interest is, per se, incompatible with the law because they pursue a policy of ethnic cleansing and economic exploitation. It is held that actors would neither care for considerations of reciprocity, nor reputation or fear of sanctions.³¹ Under such conditions, it would indeed be hard to conceive how the logic of consequence could be applied, at all. However, such an approach partly works on the underlying assumption that violent non-state actors, such as warlords, would not be rational actors whose behaviour could not be affected by strategic considerations.

This interpretation neglects to acknowledge that the use and non-use of force may still be instrumental, and that armed groups pursue coherent strategies and demands which are at least partly based on political motivations.³² Violence against civilians is rarely an aim in itself, but rather regularly an instrument for attaining a different goal (Bussmann/Schneider 2012: 15). Voices from practice argue that random violence hardly ever occurs, but that even the most shocking atrocities are politically motivated, sometimes with the aim of gaining the attention of the international community (Bangerter forthcoming). There is strong empirical evidence to suggest that political aspirations and strategic considerations are decisive, even if observers tend to classify conflicts as mere irrational ‘warlordism’.³³ The ICRC emphasised in its empirical report, ‘The Roots of Behaviour in War’, that ‘violations of international humanitarian law are not generally the work of sick, sadistic or irrational individuals’.³⁴ Accordingly, Reed Wood criticizes assumptions based on the ‘new wars’ theory from the perspective of political science; empirically, it is difficult to prove that genocide has replaced military victory as a political aim, since there appears to be no clear relation between ethnic conflicts and the number of civilian victims of any type of conflict (Wood forthcoming; Wood 2010: 601). The ‘new wars’ theory can-

29 Official Working Document of the 31st International Conference of the Red Cross and Red Crescent, ‘International Humanitarian Law’, above note 10, at 32.

30 International Committee of the Red Cross, ‘The Roots of Behaviour in War’, above note 21, at 8.

31 Lamp (2011: 242 et seqq.); Geiss (2006: 770, 773); Bassouni (2008: 765 et seqq.); Sassóli (2007: 49).

32 The genuinely political approach of armed groups is emphasized by Bassouni, (2008: 767).

33 On the danger that international criminal courts and western perceptions of armed conflicts on the African continent construct stereotypes, see Cryer (forthcoming).

34 International Committee of the Red Cross, ‘The Roots of Behaviour in War’, above note 21, at 8.

not explain variations in violence across conflicts and over time. Thus, it does not sufficiently take into account the dynamics of conflict and overemphasizes its static elements (Wood forthcoming). In an empirical study, Reed Wood illustrates that even the Uganda Lord Resistance Army (LRA), which is known for its particularly heinous violence towards civilians, changed its strategy over time. He proves that incentives for increasing violence against civilians are a lack of resources, military capabilities and civilian support. Armed groups turn to violence in order to compensate for a loss of resources. In war-torn areas of limited statehood, rebels and warlords aim to affect civilian activities and use violence against civilians in order to avoid military defeat (Wood forthcoming; Bussmann/Schneider 2012: at 18 et seq.).

Moreover, empirical research on governance insurgency and compliance with international law demonstrates that armed groups tend to provide governance structures, including security, if they have established effective and centralized control of a territory with unified command structures (Mampilly 2011; Wood forthcoming). Thus, armed groups, such as the RCD in Congo, the UCS-faction in Somalia or SPLM/A in Sudan, have granted the ICRC access.³⁵ Correspondingly, Mampilly illustrates that, among the 40 warring factions in the DRC, many of the organizations have attempted to establish governance structures. Their failure to do so is not based on a disinterest in civilian protection, but rather stems from organizational reasons, among others. Even the RCD, which is generally regarded as a typical example of warlordism, attempted to provide for civilian welfare (Mampilly forthcoming). There is a presumption that traditional incentives for compliance still matter but need to be adjusted to the particular situations of conflicts in war-torn areas of limited statehood.

3.3 The remainders of traditional incentives: Self-interest and expectations of reciprocal behaviour

In social science, realism and the rational choice theory have drawn attention to the interests of the relevant actors as a major reason for compliance. Essentially, realism³⁶ disputes the idea that the legal nature of an international obligation is of any significance for compliance. Its most rigorous proponents suggest that international law does not, in and of itself, influence an actor's behaviour at all, if vital (national) interests are concerned (Mearsheimer 1995: 9 et seq.; Boyle 1980: 198). Traditional realists focussing on the State hold that the anarchic character of the international system prompts States to protect their vital interests and to strive for power and security (Grieco 1988: 488). From this point of view, compliance with international law will only take place if it reflects a State's self-interest, not because of its character as a normative commitment (Morgenthau 1940: 277). Since interests are uncertain in the realm of high politics, for instance in national security, 'the validity of the rules depends upon a balance of power'

³⁵ Jo/Bryant (2013: 244). However, granting access can have reverse effects insofar as reports of human rights violations can be unfavorable to their international reputation. The RCD, for instance, tried to restrict access to certain areas or used violence in rural areas which were not under local or international observation, see Mampilly (forthcoming).

³⁶ The most prominent works include: Morgenthau (1948); Morgenthau (1940); Kennan (1951); Carr (1964).

which will be subject to constant changes (Morgenthau 1940: 278 et seq.). A more recent variant of realism is reflected in the instrumentalist and the rational choice strand,³⁷ which also start from a concept of interests and submits that international law will only be relevant if it has an effect on an actor's calculation of interests. Accordingly, non-compliance is an option, if it appears to be more rational to further short-term self-interest, while others obey the law (Keohane 2002: 119).

International law has long acknowledged that self-interest is a major compliance-pull in a decentralized legal system by building international treaties on reciprocity (Simm 1972). As long as international law lacks centralized enforcement mechanisms, reciprocity, as a particular form of self-interest, is a major instrument to stabilize international relations (Simm 2008: para. 1). However, as a legal concept, reciprocity must not be confused with social aspects of reciprocity where motivations to comply are based on an expectation of in-kind responses. As a principle of international law, reciprocity refers to 'the maxim that a State basing a claim on a particular norm of international law must accept that rule as also binding upon itself [so that] a certain conduct by one party is [...] judicially dependent upon that of the other party' (Simm 2008: para. 2). While this understanding holds true for general international law,³⁸ international humanitarian law builds on the aspect of social expectations in terms of expectations of reciprocated behaviour, since 'the obligation to respect and ensure respect for the Geneva Conventions does not depend on [legal] reciprocity'.³⁹ Therefore, international humanitarian law relies on the actor's motives insofar as its enforcement presupposes that no party to a conflict can expect the adversary to respect the legal limitations of warfare if the party itself violates those rules.⁴⁰

Empirical research in social science suggests that, in international armed conflicts, reciprocal expectations are the major reason for compliance for the State as well as for the individual soldier (Morrow 2007: 561 et seqq). Accordingly, the German Military Manual states: 'Soldiers must treat their opponents in the same manner that they themselves wish to be treated'.⁴¹ Reciprocal expectations are particularly significant because they can instil compliance in the combat theatre itself (Geiss 2006: 760). Unlike other instruments of compliance, fear of retaliation does not work *ex post*, but in the heat of an on-going armed conflict (Dinstein 2010: 254). In the words of Dinstein: 'Many norms [...] (usually accepted in peacetime, when the exigencies of war

37 Major works include: Goldsmith/Posner (2005); Posner (2003: 1917).

38 Reciprocity as a legal concept is particularly important in relation to *ius ad bellum*, law of diplomatic privileges and immunities, international economic relations and the treatment of aliens, see Simm (2008: para. 8 et seq).

39 Rule 140 CIHL: Netherlands, Special Court of Cassation, *In re Rauter*, Judgment of 12 January 1949 (1955) Annual Digest 16, 526 § 202; United States, Military Tribunal at Nuremberg, *United States of America v. Wilhelm von Leeb et al.* (Case No. 12 – the High Command Trial), Judgment of 27 October 1948, 9 Trials of War Criminals Before the Nuremberg Military Tribunals 1, 481; see however, Art. 2 Hague Convention IV Respecting the Laws and Customs of War on Land (1907); see in general de Preux (1985: 25 et seqq); Provost (2002: 136 et seqq).

40 Wolfrum/Fleck (2008: 1402, 1404); Oeter (1997: 214); Sivakumaran (2012: 245).

41 Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, ZDV 15/2 (1992), no. 1204.

do not loom on the horizon) may prove too onerous once put to test. [...] If belligerent Parties refrain from contravening them, notwithstanding a perception that these norms tie their hands too strenuously, it is largely due to the knowledge that any deviation is likely to entail painful retaliation' (Dinstein 2010: 254). Consequently, belligerent reprisals are considered to be a very important means of enforcing international humanitarian law.⁴²

The empirical argument that expectations of reciprocal behaviour are decisive for compliance by the individual soldier is based on the observation that compliance is worst where treatment of civilians is concerned; the record of compliance improves where there is a direct threat of retaliation for soldiers, for instance in cases of treatment of prisoners of war. While every soldier is, in principle, capable of committing atrocities against civilians, civilians will, in most cases, not be able to attack soldiers (Morrow 2007: 567 et seqq). This demonstrates that reciprocal expectations have a 'Janus-face' (Simma 2008: para. 16), since fear of individual retaliations will only direct the soldier's behaviour if there is a certain prospect that the enemy soldier will actually fight back and violate the laws of war in response to an infringement. Since individual soldiers are not entitled to undertake belligerent reprisals,⁴³ reciprocal expectations on the level of the individual only appear to induce compliance if individuals are prepared to infringe the laws of war regardless of their legal obligations.

The 'Janus-face' character of reciprocal expectations as a means for inducing compliance is also present at the State level. While fear of retaliation is the major argument for the permissibility of belligerent reprisals as an instrument for enforcing international humanitarian law, the danger of abuse and escalation inherent in the concept of unilateral counter-measures has triggered a wide-ranging prohibition of reprisals against specific categories of protected persons and objects (Bothe 2008: para. 67). While expectations of reciprocal behaviour may thus further compliance, they may simultaneously endanger the stability of the international order (Geiss 2006: 771; Simma 2008: para 16).

When considering armed groups in war-torn areas of limited statehood, some authors have doubted that reciprocal expectations and self-interest have any role to play in inducing compliance with international humanitarian law (Lamp 2011: 248 et seq.; Pfanner 2005: 161). International humanitarian law (no longer) appears to be in and of itself entirely beneficial for all relevant actors, due to a lack of strict legal reciprocity and asymmetries in regard to reciprocal expectations (Geiss 2006: 776). Such expectations presuppose parallel interest of the conflicting parties. Research in social sciences has stressed that self-interest as a content-dependent compliance motive requires that the rules are more or less in every actor's self-interest (Schmelzle 2011: 11). Such a common ground appears to be unlikely in non-international armed conflicts (Geiss 2006: 760; Pfanner 2005: 161). Moreover, according to this argument, international humanitarian law no longer corresponds to other self-interests of the conflicting parties because

⁴² US, *The Commander's Handbook on the Law of Naval Operations*, Edition July 2007, 6.2.4.: belligerent reprisals constitute 'an act that would otherwise be unlawful but which is justified as a response to the previous unlawful acts of an enemy'.

⁴³ The decision to use reprisals must be authorized by the highest political level, Oeter (2008: 477).

military victory no longer appears to be the parties' primary interest in war-torn areas of limited statehood (Lamp 2011: 234, 243). Since international humanitarian law is built on the compromise between military necessity and humanitarian considerations, the balance will dissolve if overcoming the enemy is no longer the parties' main goal (Lamp 2011: 243).

However, a closer look at practical experience and empirical research demonstrates that reciprocal expectations and self-interest still matter as a motive for compliance in war-torn areas of limited statehood. While economic exploitation and ethnic motivations play a considerable role in such conflicts, one must bear in mind that self-interest in particular is context-dependent as a motive for compliance. Accordingly, in its 2007 report on international humanitarian law and the 'Challenges of Contemporary Armed Conflicts', the ICRC stressed that any attempt to induce compliance must start from a strategic approach and must consider 'the unique characteristics of a specific situation [and] understand a party's motivations and interests in order to explain why it is in the party's interest to comply with the law'.⁴⁴ In war-torn areas of limited statehood there is a great diversity of parties. Consequently, conflict structures vary considerably, as do motives.⁴⁵ There are examples from the conflict in Chad where expectation of reciprocal behaviour also affected the decisions of armed groups. Fighters were given orders not to harm civilians because rebels feared retaliation by families and clans (Bangerter forthcoming). This example reflects that many of the conflicts in war-torn areas of limited statehood are in fact symmetrically fought between various armed groups; hence, expectations of de facto reciprocity still matter. Accordingly, in his 2009 report on the protection of civilians in armed conflict, the UN Secretary General argued that 'the incentives for armed groups to comply with the law should be emphasized, including increased likelihood of reciprocal respect for the law by opposing parties'.⁴⁶

From a normative perspective, the law of non-international armed conflict was created with the awareness that reciprocal expectations are more limited in this field (Geiss 2006: 760). Accordingly, the high threshold of applicability in Additional Protocol II also tries to guarantee some conditions for reciprocal expectations (Geiss 2006: 777). Only armed groups which are similar to a State are bound by the Protocol's obligations. Thereby the Protocol creates a certain symmetry within the regime of non-international armed conflict. Moreover, it is conceivable that armed groups have certain interests in common with States' armed forces. Rules on prisoners and wounded and sick soldiers spring to mind (Geiss 2006: 760; Bangerter 2011: 366). Although the law of non-international armed conflict does not provide for an adequate prisoner of war regime, in the past, armed groups have issued commitments to apply the Geneva Convention III (Sivakumaran 2011: 479). Efforts to ban landmines are another area where States and armed groups have common interests. Both actors are affected by their indiscriminate effects and therefore both have an interest in their removal or non-use. (Schneckener/Hofmann forthcoming)

⁴⁴ Official Working Document of the 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law', above note 10, at 49.

⁴⁵ *Ibid.*, at 46 et seq.

⁴⁶ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 41.

ing). In some cases, accession of armed groups to the Geneva Call Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action⁴⁷ prompted the territorial State to accede to the 1997 Ottawa Treaty (Schneckener/Hofmann forthcoming).

Moreover, other forms of self-interest might also have a bearing on compliance by armed groups and States' armed forces alike. Certain norms foster a greater interest in international co-operation than others. Schneckener and Hofmann have shown that norms with a technical dimension, such as a ban of landmines, evoke several aspects of self-interest from armed groups. Since removal of landmines requires a certain technical know-how, the willingness to co-operate internationally increases (Schneckener/Hofmann forthcoming). Military efficiency as a self-interest is also involved when norm entrepreneurs can raise the argument that compliant behaviour will have a positive impact on the efficiency, discipline and internal functioning of an armed group (Ratner 2011: 478). Economic interests are in general a major self-interest that influences the behaviour of non-state actors. The ICRC is reported to use economic arguments underpinning the prospect that compliant behaviour might result in (additional) foreign economic support for the armed group or for a State (Ratner 2011: 478; Jo/Bryant 2013: 242; Mampilly forthcoming). Thus, it would be premature and hasty to negate that self-interest and reciprocity do not have a role to play in inducing compliance in war-torn areas of limited statehood.

3.4 Fostering an armed group's interest in international reputation as an enduring dilemma

Interest in international and national reputation represents a particular form of self-interest. Rational choice theory and constructivism alike have drawn attention to rewards as another motive for compliance. Guzman has based his state-centred rational choice approach to international law on reputation as the major factor for a compliance pull of international law. He submits that self-interest is decisive for a State's compliance decision, but international law influences this decision, on the one hand because of fear of sanctions, and on the other hand because non-compliance may result in a loss of reputation (Guzman 2002: 1825; Guzman 2006: 386 et seq.). He holds that this impact will not always be strong enough to change the State's behaviour. According to Guzman, the impact depends, *inter alia*, on the identities of the States involved (Guzman 2002: 1825; Delcourt 2008: para. 11). Also, from the perspective of constructivism, reputation plays a major role as a reason for compliance. Finnemore and Sikkink have argued that it is the State's identity in relation to the international community that renders reputation a decisive incentive for compliance. 'We argue that [...] state leaders conform to norms in order to avoid the disapproval aroused by norm violation and thus to enhance national esteem (and, as a result, their own self-esteem)' (Finnemore/Sikkink 1998: 903 et seq.). Not only do the costs incurred by being labelled a 'rogue state' trigger States' compliance, but also the fact that

⁴⁷ For a text of the Deed, see <http://www.genevacall.org/resources/deed-of-commitment/f-deed-of-commitment/doc.pdf>.

international reputation ‘has become an essential contributor to perceptions of domestic legitimacy held by a state’s own citizens [...] international legitimation is important insofar as it reflects back on a government’s domestic basis of legitimation and consent and thus ultimately on its ability to stay in power’ (Finnemore/Sikkink 1998: 902 et seq.).

Accordingly, considerations for public opinion are considered to be essential motives for a State’s compliance with international humanitarian law, especially in view of the prominent role of mass media in armed conflicts. Public knowledge of gross violations may spoil the fighting moral, as well as the consent of the State’s population (Wolfrum/Fleck 2008: 1402 et seq.). However, this argument relies very much on the constructivist explanation that domestic legitimacy might depend on a State’s international reputation and the States’ perspective that international reputation is an asset at all. It is closely related to liberalism and democratic States (Delcourt 2008: para. 14). Consequently, Lamp has submitted that public opinion and reputation have no role to play in the ‘new wars’. Since the killing of civilians appears to become acceptable where ethnic conflicts are conducted, armed groups in such circumstances ‘usually do not have to fear that publicity for their actions would lose them support in their own populations. In some endemic conflicts in which perpetual warfare constitutes a form of life for the participants—the Hutu militias in Eastern Congo and the Lord’s Resistance Army (LRA) in Northern Uganda are examples—it is hard to imagine how public opinion could have any effect on the warring parties’ actions’ (Lamp 2011: 246 et seq.).

Nonetheless, one must also be aware that, in terms of reputation as a motive for compliance, armed groups vary considerably. While some groups operate as political actors pursuing long-term political goals, others may lack such goals, as well as any coherent and stable structure (Jo/Bryant 2013: 242; Mampilly forthcoming). Reputation will work as a motive for compliance only if an armed group cares about civilian support and relies on core constituents. Interest in reputation also depends on its military capability; the stronger the group, the more it will be interested in political aims, since it will appear to be a realistic scenario that the group might replace the government. In such a case, national and international reputation becomes important for political survival. The groups’ awareness of these mechanisms might depend on the existence of a political wing (Jo/Bryant 2013: 245; Mampilly forthcoming). Irrespective of the variations in armed groups, all these groups have to address the question of how to relate to the civilian population. Controlling and winning over the local population is a way to demonstrate the strength of an armed group, while a failure to do so might cause their control to be challenged. ‘In order to ensure their viability, insurgencies cannot rely solely on coercive means, but must also gain a degree of consent from the civilian population’ (Mampilly forthcoming). Moreover, armed groups can promote their legitimacy in the eyes of the civilian population in their territory by improving the populations’ living conditions, which in turn will affect the political stability of the group’s control (Mampilly forthcoming). In addition, the practice of the ICRC is partly built on the assumption that the ‘target’s domestic or international reputation’ still matters (Ratner 2011: 478; Schneckener/Hofmann forthcoming). Thus, the ICRC has experienced that only very exceptionally armed groups are unwilling to engage with humanitarian organizations at all (Bangerter forthcoming). Some of the measures of the UN Security Council,

such as the so-called ‘List of Shame’, also rely on the assumption that reputation matters for armed groups (Bangerter forthcoming). The UN Secretary-General has repeatedly stated that factors inducing compliance ‘include the need for popular support and the group’s self-image and self-interest’.⁴⁸ Thus, reputation at the local level, as well as on the international level, remains a powerful motive for compliance.

Consequently, empirical research unfolds a severe dilemma: the likelihood that armed groups will comply with norms of international humanitarian law increases as the a group grows stronger. By contrast, if a group is weakened, it will most likely increase its levels of violence against civilians. As a hypothetical consequence one option might be to stabilize rebel groups. The more stable and effective an armed group becomes, and the more it complies with international law and negotiates with international public and private actors, the more it gains in terms of legitimacy. Of course, it is highly unlikely that States or international organizations would directly pursue such an approach. The States’ unwillingness to engage with armed groups is not only a matter of vested interests, but also of law. It is primarily the prohibition of intervention into the internal affairs of a State that restricts corresponding efforts. Some forms of material assistance might amount to subversive intervention, thereby violating the principle of non-intervention (Kunig 2008: para. 24). Since training, for instance, is in principle forbidden,⁴⁹ supporting armed groups in teaching international humanitarian law during training might be considered illegal too. In situation, the classification will depend on the evaluation of whether a particular form of promoting international humanitarian law compliance amounts to humanitarian help, which is in principle permissible, or not (Kunig 2008: para. 35). Moreover, while support of a people exercising its right to self-determination would be privileged (UNGA Resolution 3314 (XXIX) 14 December 1974), contemporary conflicts do not fall under this category since the decolonization process has come to an end. Many of the present day conflicts are therefore categorized as terrorism and thus criminalized. Armed groups such as the Liberation Tigers of Tamil Eelam (LTTE) were or are still included on lists of terrorists. In other cases where armed groups are striving for independence, such as in Somaliland or South Sudan, self-determination could not be invoked for privileging support of the armed groups involved. The restrictive traditional interpretation of self-determination and secession also draws legal limits for States who wish to promote a rebel group’s stability for the sake of compliance with international humanitarian law.

Nonetheless, some States acknowledge more and more a need for directly engaging with armed groups, as long as “engagement does not constitute political recognition of these groups”.⁵⁰ Similarly, the UN Secretary-General has accepted the need for directly engaging with armed groups and has ‘emphasized repeatedly the need for consistent engagement with those groups

⁴⁸ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 42.

⁴⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Reports 168, paras. 161 et seqq.

⁵⁰ UNSC, 6790th meeting (25 June 2012) UN Doc. S/PV 6790, Statement of the Representative of Germany, p. 23.

to seek improved compliance'.⁵¹ However, there are still reasons to assume that such a development contradicts basic interests of State actors in general, and of the governments concerned in particular.⁵² This approach is, for instance, reflected in UN Security Council Resolution 2078 (2012), in which the council 'condemns the attempts by the M23 to establish an illegitimate parallel administration and to undermine State authority of the Government of the DRC' (UNSC Resolution 2078 (28 November 2012) para. 6). States' scepticism about engaging armed groups is repeatedly revealed by the UN Security Council's discussion on Protection of Civilians in Armed Conflicts. For instance, in 2012, Colombia — a state currently fighting armed groups in its territory — fiercely rejected the suggestion of the UN Secretary-General to engage more actively with armed groups:

'Nevertheless, the existence or absence of engagement on the part of the United Nations with these groups is not a decisive factor in the application of the rules governing armed conflicts. Focusing on the possibility of engagements of certain actors with illegal armed groups simply diverts attention from the truly fundamental issue — the lack of political will to comply with international humanitarian law. An effective guarantee of the rights of civilians during hostilities does not require engagement with non-State groups, but rather the decision on the part of those parties, either to abandon altogether the use of violence and pursue their goals through democratic debate, or, if they decide to persist in their armed struggle, to comply with international humanitarian law.'⁵³

Moreover, Colombia has criticized the idea that 'there should be ongoing and direct engagement between non-State armed groups and the relevant United Nations bodies'.⁵⁴ The dilemma was explicitly named by the UN Secretary-General when he stated that 'focus on recognition and legitimacy is problematic in that it detracts from the more serious issue of the consequences for civilians when engagement does not take place'.⁵⁵

3.5 Improving armed groups' perceptions of the law's legitimacy

The same dilemma develops out of the perspective of the logic of appropriateness and considerations of legitimacy. From the point of view of an armed group's command level, the logic of appropriateness might not exert a sufficiently strong compliance-pull, since the group perceives international humanitarian law as not sufficiently legitimate. Such an empirical legiti-

⁵¹ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 41.

⁵² *Ibid.*, paras. 44 et seq.

⁵³ UNSC, 6790th meeting (25 June 2012) UN Doc. S/PV 6790, Statement of the Representative of Colombia, p. 12.

⁵⁴ *Ibid.*, at pp. 12 et seqq.

⁵⁵ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 45.

macy, which describes the ‘beliefs and attitudes of the affected actors regarding the normative status of a rule, government, political system or governance regime’,⁵⁶ is an important element of inducing compliance, since compliance as a law-abiding behaviour will often be based on an actor’s perception that the rule has a high normative value. Research on governance in areas of limited statehood has identified various resources for the empirical legitimacy as a necessary prerequisite for the effectiveness, i.e. compliance-pull of (normative) orders: effectiveness as output-legitimacy, the adaptability of norms, i.e. the capability of international norms to be translated into the specific contexts of areas of limited statehood, participation of addressees and procedural fairness (input- and throughput-legitimacy), as well as the authority of the norm entrepreneurs⁵⁷ From a legal perspective, the latter two criteria are particularly significant, since they concern the process of norm-creation. Accordingly, they have also been highlighted in international legal theory. Thomas Franck, for instance, has identified some comparable pre-conditions for a compliance-pull of international norms. Franck starts from the assumption that the legitimacy of an international norm depends on the norm addressees’ belief that it has ‘come into being in accordance with the right process’ (Franck 1995: 24; Franck 1988: 706). As elements of the right process, Thomas Franck identifies, *inter alia*, symbolic validation. Accordingly, the legitimacy of an international rule also depends on its ability to communicate authority, i.e. ‘the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication’ (Franck 1988: 725; Franck 1990: 91 et seq. with reference to Schachter 1968: 309-311). He holds that a new rule will have a greater compliance-pull if it is introduced ‘under the aegis of a particularly venerable sponsor’ (Franck 1988: 727). Both aspects – procedural fairness and authority of the norm entrepreneur – advocate a greater participation of non-state actors in inducing compliance with international humanitarian law.

From the perspective of armed groups, legitimacy is particularly deficient in terms of procedural fairness; armed groups must comply with rules whose creation they never consented to.⁵⁸ It is a result of a gradual development of international humanitarian law that this lack of participation is increasingly seen as deficient. Traditionally, under Article 38 of the ICJ-Statute, it is only States that can create law under the three sources of international law: treaties, custom and general principles. This corresponds to their traditional status as original subjects of international law who can only be limited in their capacities upon their consent. From this perspective, armed groups, as much as individuals, were traditionally only seen as objects of the law. However, contemporary international law has broadened the categories of its subjects to now include international organizations as well as individuals. Correspondingly, the law of non-international armed conflicts confers the status of subjects of international law on armed

⁵⁶ Schmelzle (2011: 7); Cassese (2012: 429), who in principle also distinguishes between empirical and normative legitimacy. Sometimes empirical legitimacy is also described as perceived legitimacy, Ford (2012: 407 et seq.).

⁵⁷ Sonderforschungsbereich 700, Governance in Räumen begrenzter Staatlichkeit - Neue Formen des Regierens? Finanzierungsantrag 2014 - 2015 - 2016 - 2017, Berlin: Freie Universität Berlin 2013.

⁵⁸ Lamp (2011: 241); Sivakumaran (forthcoming) utilizes the example of the Viet Cong, which explicitly stated 1965 that it is not bound by the Geneva Convention since it did not participate in norm creation process.

groups. Yet, while international organizations are entitled to conclude treaties under international law in the sphere of their competences, armed groups still do not participate in the creation of the law applied to them (Roberts/Sivakumaran 2012: 111 et seq.). However, the underlying idea of procedural legitimacy is that ownership of the norms is created (Sassóli 2007: 64; Sassóli 2010: 6, 20 et seq.), insofar as ‘involvement in a process can lead to support for the results of that process’ (Sivakumaran forthcoming). There are numerous suggestions on how to create ownership despite the limits of traditional international law. The approaches include considering the practice of armed groups and their *opinio juris* in the process of creating customary international law, inviting such groups to participate in treaty-making processes or bestowing ad hoc commitments and unilateral declarations by armed groups with legal force in the context of a particular conflict (Sassóli 2010: 21 et seq.; Sivakumaran forthcoming).

Without evaluating the validity of these different proposals, what remains clear is that such efforts are more easily promoted by non-state actors. They enjoy a high standing as norm entrepreneurs because organizations such as Geneva Call, or a neutral organization such as the ICRC, can act more independently from States’ self-interests than UN organs (Sassóli 2010: 23; Zaum 2009: 27). They are not subject to certain (legal) limitations of the international order. Again, empirical research supports these findings. Jo and Bryant have shown on the basis of a case study from Sudan that political interaction among non-state actors – rebel groups and international humanitarian organizations – furthers compliance with international humanitarian law, and that, correspondingly, the most successful of the Sudanese rebel groups, the SPLA/M, followed a strategy of engaging with civil society as a means to attain status at the international level (Jo/Bryant 2013: 258). Here, symbolic validation is important. Both Geneva Call and the ICRC can claim considerable standing as norm entrepreneurs, which adds to the empirical legitimacy of the norms they are promoting (see, in general, Finnemore/Sikkink 1998: 906). Both institutions can rely on the so-called ‘Swiss-factor’ as actors coming from an internationally highly respected country’ (Schneckener/Hofmann forthcoming).

The ‘Swiss factor’ adds to the general perception that these institutions are neutral and impartial actors and lack a ‘State-bias’. At the same time, both can also rely on the expertise and standing of their personnel.⁵⁹ The often technical dimension of their advice, for instance in the case of landmines, adds to their perception as neutral institutions (Zaum 2009: 29). Empirical research proves that such ‘approaches to engaging armed actors are often viewed as being more sincere and dedicated to a sustainable resolution of the conflict based on the demands and preferences of the parties to conflict rather than being interested in the maintenance of the status quo’ (Schneckener/Hofmann forthcoming). Unlike (powerful) State actors, they are unable to exert pressure to influence the behaviour of the parties to the conflict. Thus, the norm diffusion process appears to be (more) genuine and does not depend on pressure scenarios (Schneckener/Hofmann forthcoming). Accordingly, NGOs have become an essential part in the overall pattern of inducing compliance with international humanitarian law.

⁵⁹ Schneckener/Hofmann (forthcoming); for the International Committee of the Red Cross: Ratner (2011: 491).

4. Turning to non-state actors as norm entrepreneurs inducing compliance

Empirical research has prompted a turn to non-state actors as norm entrepreneurs. For inducing compliance, diverging instruments⁶⁰ may be combined by different actors in order to overcome, at least to a certain extent, the limitations that State interests pose. Hierarchical coercive mechanisms by State-empowered international organisations might accommodate certain State interests while effectively ameliorating compliance using instruments of law enforcement (4.1.). Where State interests impede effective action, the responsibility of inducing compliance may be handed over to private non-state actors that act on the basis of non-hierarchical instruments such as persuasion and rewards (4.2.).

4.1 Coercion: Extending the responsibility of the international community

Coercion can be defined as a hierarchical instrument to direct an actor's behaviour by leaving the actor no alternative but to comply with the norms. Thus, coercion is directly linked to law enforcement.⁶¹ Law enforcement does not only build on actual coercion, but also on the threat of sanctions as well. This is particularly apparent in international criminal law that relies, not only on special, but also on general deterrence, each with a positive and a negative component (Cryer et al. 2007: 20). The punishment of the offenders is not only directed at stopping them from committing a specific crime, but also from repeating criminal behaviour in the future. In addition, the threat of sanctions is also supposed to work as an incentive for others to remain law-abiding (Cryer forthcoming). In law enforcement, the effectiveness of these sanctions relies heavily on the real threat of coercion, which a legal system with effective hierarchical instruments can exert.

Coercion as a means to enforce international humanitarian law is increasingly exercised by international institutions such as the ICC and the UN Security Council. These institutions have taken over responsibilities which traditionally lie with the State. In particular, experiences with conflicts in war-torn areas of limited statehood have pushed and prompted the creation of instruments that subsidiarily assume the responsibilities of States unable or unwilling to exercise them. This compensatory function of international organs is particularly evident in the case of the International Criminal Court.

4.1.1 Waning legitimacy of international criminal justice?

According to Article 17 para. 3 of the ICC-Statute, the ICC can intervene to replace the national judiciary if national judicial systems are ineffective (Burke-White 2005: 575). However, efforts of the international community to take over a residuary responsibility by providing for inter-

⁶⁰ Social sciences have identified four social mechanisms for inducing compliance: coercion, incentive structures, persuasion and capacity-building; see: Risse/Börzel (2012: 3 et seq).

⁶¹ Ibid.

national criminal justice will only work if these efforts are seen as legitimate by the communities affected.

What is needed is the creation of empirical legitimacy. Here, the criterion of adaptability of an institution to the context of local communities becomes important.⁶² Efforts by international actors require clear strategies on how to communicate their activities to local communities. Otherwise, the actor's work may be undermined by processes of rejection.⁶³ Criteria for creating such empirical legitimacy include the court's location, the composition of the staff and the court's outreach efforts (Ford 2012: 412; Stromseth 2007: 268). A particularly important criterion concerns the question of whom the court prosecutes, as decisions on prosecution might conflict with 'a group's dominant internal narrative about responsibility for the conflict' (Ford 2012: 410). By perceiving the Court as biased, members of a group are able to maintain their own interpretation of the conflict (Ford 2012: 410). The latter phenomenon appears to be part of the ICC's legitimacy problem in the DRC. Courts can counteract such perception if they are able to bring the 'internal narratives' in line with a more objective perception of the conflict in the long run (Ford 2012: 411). The process of rejection might also be fostered if the court's activities are seen as biased and selective – a perception which affects the procedural fairness.⁶⁴

There is a widespread perception in Africa that the ICC applies double standards in decisions concerning indictment and prosecution (du Plessis/Louw/Maunganidze 2012: 2 et seq.). Indeed, as of 2012, all situations pending before the Court still concern African conflicts. Thus, in the DRC there appears to be a widespread negative perception of the ICC within the local communities. A majority of citizens in eastern DRC seem to prefer national over international prosecution (Kumbu forthcoming; Cassese 2012: 500), notwithstanding the severe shortcomings of the national judicial system. In this context, empirical research demonstrates that, in contrast with traditional perception of public international law,⁶⁵ consent of the State concerned is not sufficient to create empirical legitimacy (Ford 2012: 408; Stromseth 2007: 260, 268-69, 281).

In any event, a process of rejection can also be observed on the State level. There are several initiatives on the regional as well as on the national level to reduce the impact of the ICC. A pertinent example on the national level involves the efforts in the DRC to improve the criminal justice system, in regard of the prosecution of war crimes described.⁶⁶ Efforts on the regional level are more ambiguous. In 2012, the African Union Assembly Meeting considered a draft amended protocol on the Statute of the African Court of Justice and Human Rights⁶⁷ which intended to extend the Court's competence to prosecute individuals for international crimes

⁶² See above 3.2.3.

⁶³ Sonderforschungsbereich 700, Governance in Räumen begrenzter Staatlichkeit - Neue Formen des Regierens? Finanzierungsantrag 2014 - 2015 - 2016 - 2017, Berlin: Freie Universität Berlin 2013.

⁶⁴ On the ICC and selectivity, see Cryer (forthcoming).

⁶⁵ For such a view: Cassese (2012: 496).

⁶⁶ Kumbu (forthcoming); see for such a prognosis: Cassese (2012: 499).

⁶⁷ On the role of this court in inducing compliance see Ntoubandi (forthcoming); see also Löffelmann (2010: 161).

by establishing an International Criminal Law Section of the African Court with criminal jurisdiction over such crimes as genocide, war crimes and crimes against humanity.⁶⁸ The draft did not mention the relation between the Court and the ICC (du Plessis/Louw/Maunganidze 2012: 7). The friction between African States and the ICC is partly based on their perception that the cases concerning Al-Bashir (Wedehaimanot 2011: 208) and Kenya's post-election violence⁶⁹ formed a kind of 'top-down' intervention by the ICC, which prompted domestic rejections of prosecuting those responsible (du Plessis/Louw/Maunganidze 2012: 9). On the other hand, there are voices which hold that the split between the AU and the ICC over the Al-Bashir case serves interests of African heads of States because they are trying to protect themselves from the danger of prosecution (Jalloh et al 2011: 8).

Since both aspects have a role to play, there is interest in the involvement of NGOs. An example for such involvement is the South African legislation. Under Art. 38 of the Constitution, NGOs have a standing 'to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened'. They may request investigations and challenge the prosecution's refusal to do so before the courts (du Plessis/Louw/Maunganidze 2012: 11). This concept of NGO-standing was confirmed by South Africa's High Court in the Zimbabwe Torture Docket case. In the case, which was launched by the South African Litigation Centre, the Court confirmed that South Africa had jurisdiction to prosecute crimes committed in Zimbabwe under the concept of universal jurisdiction, and that the South African ICC Act⁷⁰ removed immunity *ratione personae* for government officials.⁷¹ Thus, while the ICC is a clear symbol for the International Community's willingness to take over responsibility for enforcing the laws of war where States fail to do so, it also demonstrates the limits of this approach. State empowered institutions remain subject to governments' interests, which may be constrained by international politics. There is a strong presumption that effective enforcement requires a multilevel system, involving not only the State, regional and international institutions, but also NGOs which help to limit sovereignty concerns.

On the basis of an empirical study, Reed Wood submits that threats of criminal prosecution might not direct armed groups' behaviour at all. Starting from his analysis that violence against civilians serves short-term interests to guarantee a group's survival, he argues that these interests and a group's strategy are hardly influenced by a threat of future prosecution (Wood forthcoming). Indeed, especially during an on-going armed conflict, immediate reactions will be necessary in order to address actors that predominantly pursue short-term interests (Dinstein

68 African Union, Meeting of Government Experts and Ministers of Justice and Attorneys General on Legal Matters (Addis Ababa, Ethiopia, 7-11 and 14-15 May 2012) Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7 of 15 May 2012.

69 Sriram/Brown (2012: 219); see on the crisis: Sharma (2012: 27-38).

70 Republic of South Africa: *The Implementation of the Rome Statute of the International Criminal Court* (Act No. 27 of 2002), 18 July 2002.

71 North Gauteng High Court: *Southern African Litigation Centre and Others v. The National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61; 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP) (8 May 2012).

2010: 253 et seq.). While international criminal law aims at creating a real threat of coercion, its partly retroactive nature consequently limits some of its effects. Thus, a system built on penal sanctions alone would indeed be defunct. Under the conditions of the present international system, with its strict limitations on belligerent reprisal, an immediate and real threat of coercion may only be sustained by the UN Security Council (Oeter 1997: 215).

4.1.2 Shortcomings in the Security Council's effectiveness and legitimacy?

The UN Security Council has increasingly established its competence to enforce international humanitarian law. Although it has to be kept in mind that the Security Council is a political body with the primary responsibility of maintaining international peace and security, its competence is broad enough so that the Council can act as an enforcement organ of international (humanitarian) law if the violation of the law amounts to a breach of or a threat to peace. Efforts of the UN Security Council to enforce international humanitarian law began with its first thematic resolution on civilian and armed conflict.⁷² Today there are a number of measures contributing to the enforcement of international humanitarian law (Nolte 2005: 489; Roscini 2010: 330). Important instruments include the Monitoring and Reporting Mechanism on grave violations against children in armed conflict according to UNSC Resolution 1612 (26 July 2005), as well as the so-called 'List of Shame', which is accompanied by targeted sanctions against persistent violators. In the case of children and armed conflict, the Secretary-General uses the so-called List of Shame annexed to his reports to the Security Council, wherein he lists those who persistently commit the six grave violations in relation to children and armed conflict.⁷³ The Security Council also imposes targeted sanctions against persistent violators of international humanitarian law, which are then integrated into existing sanction regimes. As of late 2012, six out of thirteen sanction regimes listed violations of international humanitarian law as relevant criteria. The sanctions impose travel bans and financial measures on individuals in Libya, the DRC, Côte d'Ivoire, Somalia, Eritrea and Sudan.⁷⁴ Another response of the UN Security Council to persistent violations of international humanitarian law can be seen in the gradual changes in its peacekeeping system. Currently, a mandate for the protection of civilians is included in most of the UN Security Councils situation specific resolutions.⁷⁵ Civilian protection has become a central function of UN peacekeeping missions.

However, from an empirical perspective, the effectiveness of peacekeeping missions, as well as of targeted sanctions, is controversial. There are several studies which demonstrate that peacekeeping operations tend to lead to an increase in violence against civilians inflicted by armed groups (Bussmann/Schneider 2010: 6 et seq.; Hultman 2010: 29). Denis Tull has shown how MONUSCO failed to fulfil its protection mandate in the DRC, for example (Tull forthcoming).

⁷² UNSC Resolution 1296 (19 April 2000); UNSC Resolution 1539 (22 April 2004); Krieger (2006: 107).

⁷³ These six grave violations include killing or maiming of children, recruitment or use of child soldiers, rape and other forms of sexual violence against children, abduction of children, attacks against schools or hospitals and denial of humanitarian access to children.

⁷⁴ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 22.

⁷⁵ Ibid.

Likewise, Reed Wood has demonstrated that partial and half-hearted foreign interventions may have reverse effects, prompting rebel groups to use more violence against civilians. He names the examples of interventions against the LRA in 2008 and Sierra Leone in 1998, both of which resulted in increasing numbers of civilian victims (Wood forthcoming). However, these findings do not imply that the UN should not intervene to end civil war and protect civilians; they require that planning operations and the corresponding strategies respond to these dangers. Some studies submit that the operation's mandate is the decisive starting point and consider the extension of the mandates to protect civilians as a major step towards better compliance (Bussmann/Schneider 2012: 25). Other studies consequently view UN peacekeeping more positively (Fortna 2004: 269; Melander 2009: 389; Lamp 2011: 260). Eventually, the UN peacekeeping missions will face problems similar to those faced by other actors involved in inducing compliance, like a lack of financial and material resources, as well as personnel, so that only insufficient numbers of troops with often insufficient equipment will be able to be deployed.

In the case of the sanction regimes, there are notorious examples of persistent violators that evade the UN sanctions system, with Ntaganda Bosco being a particularly prominent case in the DRC.⁷⁶ Empirical research suggests that 'targeted sanctions are much more effective in signalling or constraining a target than they are in coercing a change in target behaviour'.⁷⁷ Although UN individually targeted sanctions appear not to be as efficient as anticipated, under certain conditions they can still generate a change in behaviour. This is the case if they pursue a narrowly defined goal, such as turning over suspects, if they are immediately imposed as a reaction to a breach of a rule and if they are part of concerted actions including other actors. Thus, there appears to be a stronger compliance-pull if actions follow earlier sanctions issued by regional bodies⁷⁸ and if they are part of a larger pattern of enforcement, including the presence of peacekeeping missions and referrals to legal tribunals.⁷⁹ For effectiveness, actions need to target those responsible for decision-making, preferably listing few people, since monitoring will be more effective in such a case (Wallenstein/Grusell 2012: 216). This observation corresponds to the finding that it is, normatively speaking, relatively expensive to rely exclusively on sanctions and rewards because, like governments, the international community has to spent meaningful resources on monitoring if it wants to make sanctions work (Levi/Sacks/Tyler 2009: 355; Schmelzle 2011: 10 et seq.). Civil society exerting strong pressure for resolute international action is therefore a further prerequisite for UN sanctions' effectiveness.

Moreover, the legitimacy of these actions strongly depends on the general perception of the UN Security Council's legitimacy (Peters 2011: 26). Quite like the ICC, the UN Security Council is often accused of selectivity. The selectivity reproach refers to the choice of situations in which the

⁷⁶ List of individuals and entities subject to the measures imposed by paras. 13 and 15 of UNSC Resolution 1596 (18 April 2005), as renewed by para. 3 of UNSC Resolution 2078 (28 November 2012), see http://www.un.org/sc/committees/1533/pdf/1533_list.pdf; see also Wallenstein/Grusell (2012: 225).

⁷⁷ Targeted Sanctions Consortium (ed.), *Designing United Nations Targeted Sanctions* (April 2012), p. 14; Shagabutdinova/Berejikian (2007: 70); Wallenstein/Grusell (2012: 223).

⁷⁸ Targeted Sanctions Consortium (ed.), *Designing United Nations Targeted Sanctions* (April 2012), p. 17.

⁷⁹ Ibid.; Wallenstein/Grusell (2012: 222).

Council is prepared to determine that violations of international humanitarian law constitute a threat to peace,⁸⁰ as well as the choice of the law that it enforces. Thus, it has been suggested that the Council has promoted the enforcement of Geneva Law more than that of Hague Law (Cryer 2006: 274; Roscini 2010: 353). However, even if the Security Council furthers law enforcement, the Council remains competent to act with a wide nearly unfettered discretion, and the maintenance of peace remains the primary goal of its activities, topping other goals and considerations like enforcing international humanitarian law.

The perception that the selectivity and inactivity of the Security Council in certain cases is not owed to a responsible exercise of its discretion, but is rather arbitrarily based on short-sighted national interests, is at the centre of present day international law. It has led to academic and political debates on how far the Security Council's and third States' discretion is curtailed by legal obligations. While there is a competence (permissive authority) for the International Community to enforce international humanitarian law via the ICC and Chapter VII of the Security Council, what is in question is whether and under what conditions there is also a duty to act. The most prominent attempt is the development of the concept of the responsibility to protect.⁸¹ States are legally responsible for their citizens' welfare. However, if they fail in this responsibility, whether out of sheer unwillingness or lack of capability, the international community obtains a – moral, political or even legal – responsibility to become involved or even to intervene (von Arnould 2009: 24 et seqq.; Bellamy 2011: 10; Risse/Börzel 2012: 15). However, at the present stage of international law, the responsibility to protect does not create an obligation of the United Nations, the Security Council or individual States to act if the national State has failed, let alone to intervene militarily. At best, the subsidiary responsibility to protect might be described as an emerging rule of customary international law (Peters 2011: 26), the emergence of which is still disputed, given that the UN Secretary-General stated in his 2012 Report on Protection of Civilians in Armed Conflict that 'the responsibility to protect is a political concept'.⁸² Moreover, the responsibility to protect is not identical with the enforcement of international humanitarian law. The latter is concerned with the most egregious violations of human rights, in particular genocide,⁸³ whereas the former might remain below this threshold. Moreover, international humanitarian law applies in times of armed conflict, while the responsibility to protect is applicable in times of peace and war alike.

⁸⁰ UNSC, 6151st meeting (26 June 2009) UN Doc. S/PV 6151 Statement of the Representative of Australia, p. 13: 'However, there is clearly a need for greater consistency in the Council's approach. Too often still, the Council appears unwilling to address the plight of civilians in many internal armed conflicts, notwithstanding the obvious destabilizing effects and regional consequences of such conflicts. In failing to do so, the Council falls short of its obligations under the Charter. [...] What is lacking at times, as we know, is the political resolve of the Council to use those tools to protect civilians and of the broader membership to support such Council action.'

⁸¹ See from the vast literature on the responsibility to protect: Hoffmann/Nollkaemper (2012); Nasu (2011); Orford (2010); Peters (2011).

⁸² Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 21.

⁸³ *Ibidem*, 5 et seq.

For the enforcement of international humanitarian law in times of armed conflict there is a more specific norm in Article 1 of the GC, which obliges States ‘to ensure respect for the present Convention in all circumstances’.⁸⁴ However, whether these obligations entail an obligation for State parties which are not participating in a particular armed conflict to ensure respect by other States and armed groups is highly disputed. Likewise, it is far from clear which measures States would have to take in such a case. Robin Geiss has suggested, on the basis of an analysis of the pertinent State practice, that Common Article 1 GC indeed possesses a collective-compliance dimension (Geiss forthcoming; Brollowski 2012: 95 et seqq.), including States as well as non-state actors (Geiss forthcoming). He expands on this premise by arguing that the obligation to ensure respect should be seen as ‘a continuous obligation to monitor compliance combined with a duty to take positive steps in reaction to serious breaches of humanitarian law obligations *erga omnes* during armed conflict’ (Geiss forthcoming). In such a case, ‘States are obliged to do what can reasonably be expected of them’ (Geiss forthcoming). This would include acting in co-operation with the United Nations according to Article 89 AP I. However, Common Article 1 GC would not impose a duty ‘to vote positively for whatever resolution is contemplated in the Security Council as a response to serious violations of international humanitarian law’ (Geiss forthcoming). Thus, within a legal system still based on the consent of those who are bound by the rules, inertia can hardly be overcome by creating new legal rules.

4.2 Rewards and persuasion: The increasing role for non-state actors

Therefore, international law might envisage a turn to alternative actors using an alternative instrument: persuasion by non-state actors. ‘Persuasion and discourse’ draws on the logic of consequences as much as on the logic of appropriateness. At first glance, it aims to induce voluntary compliance through arguing and learning, but without affecting the targeted actor’s interests. In the practice of the international system, however, persuasion is often directly combined with incentive-based mechanisms, and both mechanisms depend on each other (Risse/Börzel 2012: 3 et seq.).

As a soft compliance procedure, persuasion by institutions, such as Geneva Call and the ICRC, fits into the general compliance paradigm of international law. There is, among States in general, only a limited acceptability of hierarchical forms of compliance control. States prefer non-confrontational compliance mechanisms which rely on the fear of loss of reputation, since hierarchical law enforcement is considered to be too interfering (Bothe 2008: para. 142). More importantly, the ICRC and Geneva Call enjoy a greater flexibility than the State-empowered and dependent UN system. While the ICRC and Geneva Call can continuously adapt their line of argumentation to the exigencies of the particular conflict, UN institutions are forced to act with stricter coherence because they issue their findings publicly and also issue definite legal determinations (Ratner 2011: 489). At the same time, States will exert more political pressure within the United Nations in order to influence the context of such findings in their interest

⁸⁴ For an analysis of Common Art. 1 GC see: Boisson de Chazournes/Condorelli (2000: 68, 76 et seq.); Kessler (2001: 506 et seq.); Gasser (1993: 15-21); Palwankar (1994: 10); Azzam (1997: 68).

(Zaum 2009: 26). There is also greater flexibility from an organizational point of view, in that smaller informal institutions can react more quickly, and they do not need to pursue their aims via administrative channels in the States concerned (Zaum 2009: 26). Correspondingly, there is no need for feedback to the hierarchical UN organizations through time-consuming processes of co-ordination. In addition, the low media profile adds to this flexibility since there is less pressure to succeed. Thus, these institutions can invest time in building up stable relationships (Schneckener/Hofmann forthcoming). On the other hand, if required, they have sufficient possibilities to mobilize public opinion (Mampilly forthcoming). Moreover, for institutions such as Geneva Call, instilling compliance is easier insofar as it can concentrate on a single or only few issues, unlike UN institutions, which promote a complex legal system. For some years, for example, Geneva Call has only concentrated on the banning of anti-personnel mines. Focusing on a clearly delineated goal makes compromise easier and dialogue less complex (Schneckener/Hofmann forthcoming).

However, empirical findings on the effectiveness of these approaches are contradictory. Bussmann and Schneider have suggested in an empirical study that the work of the ICRC does not induce compliance effectively, if at all:

“Even if we test for the possible endogeneity of ICRC activities, we cannot find evidence that the ICRC presence in conflict zones makes a crucial difference and that especially rebel leaders are not deterred from pursuing one-sided violence as an integral part of their military campaigns. ... training seminars which are provided by the ICRC do not have the desired effect and that the presence of the ICRC is associated with more rather than fewer killings.’ (Bussmann/Schneider 9-11 2010: 1, 17 et seq.)’

However, the results of such empirical studies must be viewed with caution. While the Rwandan genocide demonstrates the limits of persuasion (Lamp 2011: 257), these cases cannot and should not be generalized. Improvement in compliance as a consequence of the ICRC’s involvement may be indirect and belated (Lamp 2011: 283). Its effects are difficult to prove, variables for empirical research difficult to determine. Accordingly, it will remain unclear whether a situation would even have been worse without the ICRC’s intervention. This is partly a consequence of the ICRC’s confidentiality, since few actors will be prepared to admit that they changed their behaviour due to the ICRC’s intervention (Ratner 2011: 483). Finally, cases such as Bosnia-Herzegovina, on which many empirical studies are based (Bussmann/Schneider 2012: 24-29), can be seen as a turning point in the international community’s approach to inducing compliance. Failure in these cases cannot be pinned to the ICRC alone. Many of the concepts currently being discussed, such as the role of Geneva Call, International Criminal Justice and UN Security Council activities, are a direct response to the experiences of the 1990s.

However, certain deficiencies in the work of NGOs cannot be ignored. Due to their limited financial and personal resources, NGOs’ efforts might not be sustainable (Schneckener/Hofmann forthcoming). An organization such as Geneva Call can only be successful in a clearly

circumscribed legal field, such as a ban on anti-personnel mines. If it tried to tackle the whole set of rules on the laws of war, Geneva Call would face the same difficulties as State-empowered international organisations. In addition, NGOs have become increasingly dependent on financial support from their seat States, impairing armed groups' perceptions of their impartiality (Zaum 2009: 28). This perception of impartiality has also been tainted by NGO contributions to peace-building efforts; their work appears to be increasingly political (Zaum 2009: 33 et seq.). Moreover, unlike within the UN system, NGOs', and to a certain extent also the ICRC's, efforts to persuade and to use incentives cannot be directly backed by a threat of coercion, e.g. targeted sanctions.⁸⁵ There are no direct and intentional ways available to co-ordinate the effects of different compliance instruments. By contrast, the ICRC explicitly pursues a policy not to share its information and observations with the ICC. At the same time, armed groups might be reluctant to grant access because they might be anxious that violations will be detected and reported. A certain level of scepticism on the side of armed groups apparently remains (Jo/Bryant 2013: 247).

Moreover, what armed groups might perceive as independence and impartiality might be seen as instrumentalisation by State actors (Zaum 2009: 23). Many States actively oppose efforts to engage more with armed groups. In particular, the criminalization of internal armed conflicts through the paradigm of terrorism restricts the wider legal margin which NGOs enjoy. The most striking example is US legislation, according to which 'it is a federal crime to knowingly provid[e] material support or resources to a foreign terrorist organization'.⁸⁶ Since material support encompasses training and expert advice or assistance, activities of NGOs, efforts of the ICRC or Geneva Call to disseminate international humanitarian law, to provide legal advice or to assist with the disposal of landmines might be covered by the legislation. Groups classified as terrorists include(d) the PKK and the Liberation Tigers of Tamil Eelam (LTTE). American NGOs have challenged the prohibition on the basis that it violates their rights under the Fifth and First Amendment of the US Constitution, particularly because the regulation prohibits engaging with armed groups by training 'members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief'. However, the US Supreme Court considered the statute to be constitutional.⁸⁷

Such practice does not only hinder humanitarian organizations from engaging with armed groups, but also aims to reduce their reputation. Accordingly, the practice of the US has attracted international criticism. The UN Secretary-General expressed his concern about such measures⁸⁸ and 'urge[d] all Member States to refrain from adopting national legislation, policies or other measures that have the effect of inhibiting humanitarian actors in their efforts to engage non-State armed groups for humanitarian purposes, including to undertake activities aimed at promoting respect for international humanitarian law'.⁸⁹ His approach was supported

85 For the channels of NGOs' access to the UN, see Hobe (2010: paras. 26 et seq).

86 *Holder v. Humanitarian Law Project*, 561 US _ 2010; 18 U. S. C. § 2339 B (a) (1), USA Patriot Act.

87 *Ibidem*.

88 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, above note 8, para. 46.

89 *Ibidem*, para. 76.

by Switzerland in the 2012 Security Council discussion on the protection of civilians in armed conflict, where the Swiss representative called:

‘on the Council and Member States to take into account the potentially negative effects of certain measures and legislation adopted while pursuing the legitimate goal of fighting terrorism. It would be regrettable if those measures complicated or even prevented the establishment of a dialogue for purely humanitarian purposes, prevented access to vulnerable populations by humanitarian staff or weakened respect for international humanitarian law by armed groups.’⁹⁰

5. Conclusion: Patterns of inducing compliance

The international community responds to the challenges which conflicts in war-torn areas of limited statehood pose for compliance with international humanitarian law by allocating competences to actors other than the State concerned. In this respect in particular, international organizations increasingly contribute to enforcing international humanitarian law. However, these organizations remain dependent on their member States’ political willingness to support measures for inducing compliance effectively. Therefore, a proliferation of non-state actors can be observed that step in where third States and international organizations are reluctant to act. Because armed groups in particular perceive these NGOs, including the ICRC, as neutral, they can significantly contribute to inducing compliance by using the instruments of persuasion. In such cases, traditional motives rooted in the logic of consequences, as well as appropriateness, are still valid and must therefore be addressed by the corresponding compliance mechanism.

These compliance mechanisms are interdependent and mutually reinforcing, forming a pattern of inducing compliance. Persuasion apparently relies at least partly on a direct and real threat of coercion. Persistent violators in particular can hardly be reached by persuasion. As much as national law works on the basis of an intertwined system of coercion and persuasion, inducing compliance with international law requires a mix of instruments. Even if these instruments are not purportedly combined, they are mutually reinforcing insofar as persuasion and discourse are used by non-state actors that act under a shadow of hierarchy. The concept of a shadow of hierarchy has been developed in social sciences and describes the observation that, in national systems, public and private actors usually bargain and collaborate under such a shadow of hierarchy. The shadow describes the indirect influence that hierarchical enforceable decisions of the legislative, executive and judicial branches of government exert on private actors. The concept of shadow refers to threats of these institutions to adopt, enact or enforce adverse legislation or decisions if private actors do not change their behaviour (Héritier/Lehmkuhl 2008: 2). Within the international community, persuasion and incentives work more effectively if they are used under a shadow hierarchy created by coercive legal enforcement instru-

⁹⁰ UNSC, 6790th meeting (25 June 2012) UN Doc. S/PV 6790, Statement of the Representative of Switzerland, p. 32.

ments, such as international criminal justice, UN targeted sanctions and peacekeeping efforts. These instruments are in turn more effective if they are accompanied by a concerted effort and not used as isolated measures in an isolated context. Thus, it is not only a shadow of hierarchy which furthers inducing compliance in cases of persuasion. Legal enforcement will also be more successful if it is accompanied by persuasion. Inducing compliance is done through all these different means, often applied concurrently. The choice of instruments will depend on the inducer using them (Ratner 2011: 493). The inducer's choice is determined by legal as well as social considerations, and the alternatives are delineated by legal competences and limitations, as well as by the anticipated impacts the instruments might have on the addressee's behaviour. Therefore, the inducer must take into account the special circumstances of conflicts in areas of limited statehood, as well as the special circumstances of the international system.

It needs to be borne in mind that, unlike other non-state actors, which are held captive by domestic rules, the behaviour of armed groups can, at least during an on-going conflict, only be dealt with by international law, since these groups are fighting the national (legal) system, which accordingly cannot be enforced against them (Sassóli 2007: 63). If international humanitarian law shall be enforced, there is no real alternative other than to engage with the armed groups. Improving civilian protection in war-torn areas of limited statehood requires accommodating the interests of armed groups, as much as State interests. In particular, empirical studies demonstrate that efforts by the international community to protect civilians may entail serious consequences for civilians, if these efforts work against the conflict dynamics and overturn political developments in the territory concerned (Wood forthcoming; Mampilly forthcoming). Mechanisms for inducing compliance must respond to these findings.

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Research Framework

Governance has become a central theme in social science research. The Collaborative Research Center (SFB) 700 *Governance in Areas of Limited Statehood* investigates governance in areas of limited statehood, i.e. developing countries, failing and failed states, as well as, in historical perspective, different types of colonies. How and under what conditions can governance deliver legitimate authority, security, and welfare, and what problems are likely to emerge? Operating since 2006 and financed by the German Research Foundation (DFG), the Research Center involves the Freie Universität Berlin, the University of Potsdam, the European University Institute, the Hertie School of Governance, the German Institute for International and Security Affairs (SWP), and the Social Science Research Center Berlin (WZB).

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