11 Certain Factors Influencing Compliance with International Humanitarian Law

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Abstract
There are various mechanisms within and outside the sphere of international humanitarian law (IHL) which contribute to a better application, respect and enforcement of its rules. The present study takes stock of specific factors or mechanisms that may have an effect on better respect. This analysis attempts to demonstrate that even though states could not agree on the setting up of a permanent mechanism to meet regularly and discuss IHL-related issues (the so-called Compliance process), there are certain instruments which could lead to similar result. The UN's role with respect to IHL is examined. The International Criminal Court (ICC) is also briefly analyzed from this perspective, bearing in mind the international politics within which it has to function. The International Humanitarian Fact-Finding Commission (IHFFC) that has successfully completed its first mandate is a string of hope if more frequently used. Soft law documents are filling a void caused by the fatigue of states in adopting new rules, at the same time they start to have a similarly binding effect as legally binding obligations. All these factors become especially interesting if we understand that most conflicts today are fought with the involvement of non-state armed groups who are not involved in law-making. This reality gives training, both within state and non-state armed forces a special significance. States should also make efforts to undertake enquiries in cases of serious violations of IHL, as well as through exercising jurisdiction to repress violations, be they their own nationals or not.

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11.1 Introduction[1]

We are often struck by alarming accounts of international humanitarian law (IHL) being less and less complied with. Are we really living in a new era? Is compliance with IHL really worse than before? Is it not rather the issue that with the live streaming of conflicts, the spreading of social media and the CNN-effect we are in a position to follow conflicts more closely, even live, and obviously news will only reporting incidents of non-compliance? We often announce a new age of warfare upon the introduction of new technology. Our new technologies are no doubt novel in character, but so were the technologies introduced earlier. If we asked delegates on the field, we would probably be surprised by the variety of actors and often such actors' willingness to engage in a dialogue with each other. Today, we are witnessing terrible conflicts with a terrible toll on civilians, but, unfortunately, this is not necessarily new. This may lead us to think that our fight today for better compliance with IHL, for ensuring better enforcement of its rules is nothing new, and is in fact, a never-ending endeavor. The following article takes a broad look existing measures that enhance compliance with and enforcement of IHL, asking the question what other factors could be relevant to create an environment where IHL is better respected.

11.2 Relevant Enforcement and Compliance Measures and Mechanisms

In general, it can be said that enforcement is challenging in international law. As there is no global institutional framework for its ultimate enforcement, compliance with international law is largely left to the goodwill of states. While the basic principles of international law include the prohibition of the use of force and the *pacta sunt servanda* principle, if these were all respected, there would be very few armed conflicts in the first place. And even if such conflicts arose, there would be no violations of the law applicable in armed conflicts. Armed conflicts are typically situations where the rule of law suffers, the peaceful settlement of international disputes has clearly failed, and the warring parties are each other's worse enemies. To rely on the goodwill of states in such a situation seems paradox. Nevertheless, although there are numerous manifestations of violations, IHL is often, probably more often than we would think, complied with.

If it is true that international law generally lacks the teeth of effective enforcement, then this is all the more so for international humanitarian law. IHL treaties, especially the 1949 Geneva Conventions and their Additional Protocols adopted in 1977 tend to have

1 This article is based on a presentation delivered by the author at the Conference *'Seminar Humanitäres Völkerrecht und die Europäische Union – Aktuelle Entwicklungen während des österreichischen Ratsvorsitzes'*, organized by the Austrian Federal Ministry for Europe, Integration and Foreign Affairs, the Johannes Kepler University Linz, the University of Graz, and the Austrian Red Cross on 29 January 2019 in Linz.

much weaker enforcement/compliance provisions than other fields of international law.[2] In many instances, non-compliance with IHL was explained by the lack of reciprocity.[3] While inter-state relations are often based on reciprocity, this is not true for IHL obligations. Under international humanitarian law, parties' obligations remain unchanged irrespective of non-compliance by the other side. This is to ensure the protection of victims.

Moreover, one has to take into consideration the fact that non-state actors often play an equally big role in armed conflicts, consequently, they influence compliance/non-compliance with IHL. Therefore, traditional international law compliance mechanisms that are based on state-to-state relations (such as reporting, states meeting *etc*.) may not be appropriate in their case.

The Geneva Conventions and Additional Protocols include a few mechanisms aimed at facilitating compliance and enforcement. This includes the common Article 1, the grave breaches/war crimes regime, indirectly the command responsibility concept, the obligations to make legal advisers available to the armed forces, and mechanisms such as Article 36 of Additional Protocol I. There are also mechanisms that are foreseen in treaty law but, are rarely used. Parties to armed conflicts rarely make use of the special agreements under Article 3 of the Geneva Convention. The reality is that a state which considers the belligerent party to be a group of 'illegal' rebels is not inclined to enter negotiations with the adversary, since the latter could consider such a negotiation to be a manifestation of its recognition. Even though special agreements were not intended to affect the status of the parties,[4] there seems to be a general adversity towards the application of Article 3.[5] In summary, it seems there is no specific mechanism foreseen under international humanitarian law that would force or motivate states to comply with its rules.

The abovementioned mechanisms do not prescribe a regular meeting of state parties, regular reporting, let alone the establishment of treaty bodies aimed at monitoring the implementation of treaty rules. Recognizing this lacuna, the ICRC and the Swiss Government launched the 'Compliance initiative'[6] where states discussed the possibility of estab-

2 Yves Sandoz, 'How Does Law Protect in War?', *in Problems in the Implementation of International Law in General and International Humanitarian Law Specifically*, at https://casebook.icrc.org/law/implementation-mechanisms.

3 Daniel Munoz-Rojas & Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2004, pp. 9 and 13.

4 Article 3 common to the 1949 Geneva Conventions: "The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

5 Ben Clarke, 'Securing Compliance with International Humanitarian Law: The Promise and Limits of Contemporary Enforcement Mechanisms', *Journal of International Humanitarian Legal Studies*, Vol. 1, Issue 1, 2010, p. 215.

6 The facilitators received mandate from Resolution 1 on "Strengthening Legal Protection for Victims of Armed Conflicts" unanimously adopted by the 31st International Conference in 2011 and Resolution 2,

lishing a regular, voluntary forum for states where issues related to compliance with IHL could be discussed. However, notwithstanding numerous years of multilateral meetings and discussions, states failed to come to a common agreement on setting up such a mechanism.[7]

Although IHL treaties do not include such compliance mechanisms, bodies outside the IHL sphere have certain tools to promote better compliance with IHL. First and foremost, one has to mention the powers and the practice of the UN Security Council *vis-à-vis ius in bello* violations. Let us not forget that at the outset the UN was set up to maintain international peace and security, and not to ensure that armed conflicts are fought according to the rules. Still, while the Security Council remained silent on IHL matters for years,[8] it has demonstrated increased interest and activity with respect to IHL violations following the Cold War, and with the proliferation of non-international armed conflicts and their severe consequences for civilians.[9] Whereas the Security Council can only invoke Chapter VII when international peace and security is jeopardized, an argument can be made that serious and mass humanitarian law violations may pose a threat to international peace and security, hence the activation of Chapter VII. The Security Council regarded a situation where violations of international humanitarian law occur as a threat to international peace for the first time in its Resolutions setting up the two *ad hoc* Tribunals. These tribunals were established by Resolution 808 (1993)[10] with respect to former Yugoslavia, and later Resolution 995 (1994)[11] with respect to Rwanda. The Security Council then made a reference[12] to the possibility of systematic, flagrant and widespread violations being a

"Strengthening Compliance with International Humanitarian Law" unanimously adopted at the 32nd International Conference of the Red Cross and Red Crescent in 2015.

7 Helen Durham, *'Strengthening Compliance with IHL: Disappointment and Hope'*, December 14, 2018, Analysis/Generating Respect for IHL/Law and Conflict at https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/.

8 The first mention of international humanitarian law was made in the 1967 Resolution after the Six Days War in the Middle East. *See* Resolution 237 (1967), recommending for governments concerned to comply with the Geneva Conventions.

9 Marco Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law', *Israel Law Review*, Vol. 43, 2010, p. 331.

10 "Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of 'ethnic cleansing', Determining that this situation constitutes a threat to international peace and security,"; *See* S/RES/808 (22 February 1993).

11 "Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, Determining that this situation continues to constitute a threat to international peace and security,"; *See* S/RES/955 (8 November 1994).

12 "Notes that the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and, in this regard, reaffirms its readiness to consider such situations and, where necessary, to adopt appropriate steps;" *See* OP 5, SC Res 1296, para. 5, UN Doc. S/RES/1296 (19 April 2000).

threat to international peace and security without mention of any specific armed conflict.[13] Also, there are interpretations of the Geneva Conventions' common Article 1 "respect and ensure respect" provision which assert that since this customary rule is a "general principle", it constitutes a legal ground for the Security Council to exercise its enforcement powers to ensure compliance "in all circumstances".[14]

Further examples for the UN's (softer) measures contributing to compliance with IHL are the biennial reports of the Secretary General on the status of the implementation of the 1977 Additional Protocols, prepared upon request of the UN General Assembly. The Secretary General requests states to provide, every two years on a voluntary basis, information on the status of implementation of the Additional Protocols. These voluntary national reports may be useful exercises for states to take stock of developments and lacunae in their implementing legislation or practice. These reports may also serve as a useful mirror on the state of implementation of IHL globally, although it should be mentioned that only 19 Member States submitted their national reports for the 2018 report.[15]

There are many primarily human rights bodies, most importantly the Human Rights Council that also address IHL issues. The Human Rights Council (HRC) was established to "address situations of violations of human rights" and "make recommendations thereon".[16] Even though it is clear that the mandate does not cover IHL, nor does it mention armed conflicts, the HRC examined IHL violations more than once. It also provided an extended understanding of human rights when it stated in its Resolution 9/9 (2008) that "conduct that violates international humanitarian law […] may also constitute a gross violation of human rights."[17]

Whether examination of IHL violations by an essentially non-IHL body is good or bad for IHL can be examined from many angles. Those in favor argue that the HRC is only filling the gap where IHL treaties are silent on enforcement mechanisms, and this is still better than nothing. In addition, such commissions or inquiries are usually tasked to merely cover the documentation and investigation of serious violations, in order to ensure some kind of accountability for the future. From this perspective, so goes the argument, it is irrelevant whether these are IHL or human rights violations.[18] Those against claim that the experts sitting on HRC commissions and inquiries are for the most part not trained

13 Roscini 2010, pp. 334-335. *See* SC Res 808 at 2, UN Doc. S/RES/808 (22 February 1993).

14 Id. p. 340. *See* SC Res 808 at 2, UN Doc. S/RES/808 (22 February 1993).

15 *See* Report of the Secretary General A/73/277 (30 July 2018) and the subsequent GA Resolution A/RES/73/204 (9 January 2019).

16 GA Resolution A/RES/60/251 (3 April 2006), OP 3.

17 Human Rights Council Res. 9/9, Annual Reports of the HRC, 9th Session, 8-24 September 2008, A/HRC/RES/9/9 at 1 (18 September 2008).

18 Zsuzsanna Binczki, 'Summary of the Conference on "Victims or Armed Conflicts at the Juncture of International Humanitarian Law and Human Rights Law" (presentation by Luc Côté), *'Hungarian Yearbook of International Law and European Law'* Vol. 5, 2017, pp. 379-380.

in IHL, or are not even lawyers but diplomats.[19] Meanwhile, the HRC is being over-politicized, which is not for the benefit of IHL. A more observational standpoint claims that the correlation between IHL and human rights law has grown so strong[20] that it is impossible to reverse this trend.[21]

The establishment of the International Criminal Court (ICC) was clearly a huge step towards the enforcement of IHL. Many thought that the ICC could have an impact in two ways: directly through its own procedures, and indirectly through the inevitable effect it has on domestic legislation.

Many scholars and commentators were very satisfied with the Rome Statute having been drafted in a way that the UN has no or not too much influence over its jurisdiction or overall function. The Rome Statute foresees a role for the UN – most importantly from the point of view of the present article – in two ways: in referring cases to the ICC and in respect of the crime of aggression. In the first case, the UN's role is limited by its political possibilities to adopt a Security Council resolution on referral. Similarly, in the second case the determination of an act of aggression is highly politicized. Nonetheless, these roles do not appear to provide for the possibility that the UN intervenes in or influences the ICC's functioning too much. Marco Sassóli wrote in 2006:

> "Once the ICC Statute has been universally accepted and the ICC functions effectively without too much direct interference by the UN Security Council and its permanent members, this geographical limitation will be overcome. The very credibility of international justice depends on this: justice which is not the same for everyone is not justice."[22]

Today, we have come to understand that international politics and non-state parties have a larger influence over the ICC than we had anticipated. Campaigns against the ICC by certain states, either generally or linked to specific cases, are no doubt weakening the Court and making its space narrower. Even though the ICC is not, and shall not be dependent on politics, and while it is making tremendous efforts to navigate the given circumstances, the ICC does not operate in a political void.

In addition, although the withdrawal of some African states has fortunately not become a general tendency, one cannot avoid facing the legal question posed first and foremost by African states challenging the Rome Statute's non-recognition of head of state immunity and diplomatic immunity. The Rome Statute excludes the application of immunity of

19 Clarke 2010, p. 216.
20 Id. p. 218.
21 Id. p. 216.
22 Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 45-73.

officials, including heads of states with respect to procedures in front of the Court, obliging States Parties to cooperate accordingly. This includes arresting persons enjoying immunity if they are wanted by the ICC. Several African states find this obligation to be in collision with customary and treaty international law obligations on diplomatic and head of state immunity. They claim that the rules on immunity enjoy precedence over the Rome Statute obligation. This question has become crucial for the states concerned and their ability to cooperate with the ICC. Thus, the ICC's efforts and effects are constrained both by its capability to deal with the magnitude of cases, and inevitably, by the politics surrounding it.

There are also arguments saying that the ICC's inability to exercise jurisdiction to deal with some of the most severe cases prompted bodies such as the Human Rights Council to increase their activities regarding IHL violations. It also led to the emergence of alternative bodies which serve the ultimate aim of promoting criminal accountability either on an international or national level. As an example of alternatives bodies, upon the initiative of Liechtenstein, the General Assembly adopted Resolution 71/248 on 21 December 2016 establishing the 'International, Impartial and Independent Mechanism'. It is to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM). The IIIM was tasked to collect and document evidence of crimes committed in Syria, which can then be used in national or international criminal procedures. A similar mechanism was later established in connection with crimes committed in Myanmar: on September 28, 2018, the UN Human Rights Council passed a resolution that calls for an independent mechanism to collect and analyze evidence in regard to the serious international crimes committed in Myanmar against Rohingya Muslims and other minorities since 2011. The resolution foresees that the independent mechanism

> "prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes."

The resolution mentions "most serious international crimes" and "violations of international law",[23] which would include human rights and humanitarian law violations.

Last but not least, mention must be made of the International Humanitarian Fact-Finding Commission (IHFFC), established by Additional Protocol I of 1977. The IHFFC is tasked to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol and

23 Human Rights Council Resolution A/HRC/39/L.22 (28 September 2019), OP 22.

facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."[24] The IHFFC has demonstrated its great value in inquiry during its first mandate received from the Organization for Security and Co-operation in Europe (OSCE) in 2017[25] to investigate an incident in Eastern Ukraine. The incident involved an OSCE car that drove over a landmine, the explosion resulted in the death of an OSCE paramedic and the injury of two other patrol members. The investigation revealed that the attack was most probably not directed against the OSCE,[26] possibly giving the OSCE a feeling of relative relief for not being a target, with an ability to carry out its important operations in the region. Because the IHFFC was established by Additional Protocol I of 1977, coming into force and effectively created in 1991, receiving its first mandate only in 2017, there were several analyses why its inquiry capability had not been used earlier. Many stressed that one reason the IHFFC had not been used was the complicated trigger mechanism foreseen under Article 90 of Additional Protocol I. The IHFFC nevertheless proved that its activity can easily be triggered by an organization and not a state through the 'good offices'[27] provision.[28] It also substantiated that it can contribute to the clarification of a situation and thus indirectly to fostering an attitude of respect for IHL. The IHFFC has also expressed its willingness to inquire into alleged violations of IHL in non-international armed conflicts, provided that all concerned parties agree.[29] In addition, one may argue that the setting up of *ad hoc* fact finding commissions by the Human Rights Council were meant to be a remedy for the earlier non-activation of the IHFFC. However, the existence of these *ad hoc* commissions may have also been the very causes of the inactivity of the IHFFC for long years.[30]

Summing up, it is probably fair to say that although IHL treaties are not especially strong on compliance and enforcement mechanisms, there are various other sources or procedures available through which compliance with IHL can be examined or supported.

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24 Article 90(2)(c) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

25 As a basic framework for the cooperation between the two organizations, the OSCE and IHFFC concluded a general Memorandum of Understanding, at www.ihffc.org/Files/en/pdf/osce-ihffc-memorandum-of-understand.pdf.

26 *See* the executive summary of the report following the investigation at www.osce.org/home/338361?download=true.

27 "*c)* The Commission shall be competent to: […] *(ii)* facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol." *See* Article 90, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

28 Réka Varga, *'Reinforcing Respect for the Additional Protocols: The 40th Anniversary as an Opportunity?'* at www.iihl.org/wp-content/uploads/2017/11/Varga-REV.pdf.

29 *See* www.icrc.org/en/doc/assets/files/other/fact_finding_commission.pdf.

30 Roscini 2010, p. 343.

11.3 Emergence of Soft Law Documents Aimed at Promoting Compliance with IHL

We are witnessing a decreased interest of states in law-making, and a greater appetite for soft law. Soft law documents in the realm of international law are generally understood as documents which have been adopted and agreed generally in the form of non-binding political declarations. However, these texts are not completely without legal significance:[31] although they normally indicate voluntary commitments by the signatories to respect its contents, due to many circumstances and

> "a number of enforcing soft mechanisms such as shaming, conformity, persuasion, self-interest, opportunity, or fear are effective. From this perspective, soft or non-binding rules can be as coercive as binding rules and agreements. This is why it seems appropriate to refer to soft law also as 'non-binding coercions' […]"[32]

and are thus often considered to be quasi-binding.

There are many soft law documents in IHL, such as the Safe Schools Declaration, the Montreux Document, the Guideline on Direct participation in hostilities or the Vancouver Principles. Some of these were prepared by States, some by international organizations or NGOs. Some can be endorsed by states, some cannot. All these documents are attempts at addressing questions of the interpretation of provision regarding contemporary conflicts, with the aim to come up with an answer acceptable to all states, or at least, to identify divergences of opinions or to provide some sort of guidelines for application. The relative reluctance of states towards international law-making may be regarded as missed opportunity for the states, since the vacuum left by them is filled by NGOs, academics or tribunals interpreting the law,[33] eventually bringing these actors in a position to contribute to the formation of new customary law. States should probably resume their functions in legal interpretation and law-making, while academics, tribunals, NGOs also have their own role. Michael Schmitt argues that because states have withdrawn from the role of law-

31 Andrew T. Guzman & Timothy L. Meyer, 'International Soft Law', *Journal of Legal Analysis*, Vol. 2, Issue 1, 2010, pp. 172-173.

32 Filipp M. Zerilli, 'The Rule of Soft Law: An Introduction', *Focaal – Journal of Global and Historical Anthropology*, Issue 56, 2010, pp. 5-6.

33 *'Is the Law of Armed Conflict in Crisis and How to Recommit to its Respect?'* comments by Michael N. Schmitt, 3 June 2016, ICRC at www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect.

making and interpretation, NGOs and academics shape the law in a way that states in the end may then reject.[34]

The legal and political nature of soft law documents has also become an increasingly interesting question. While basically it should be clear that soft law documents do not have a legally binding nature, there are some non-binding documents that may have achieved a quasi-binding character due to the will of the parties concluding it or due to pressure exerted over non-signatory states.

The IHL soft law documents mentioned above were undoubtedly adopted with the understanding that these do not have a binding effect. Many of these documents expressly state this.[35] Politically, however, there seems to be a tendency where such documents, even though intentionally put in a non-legally binding form with non-binding language, become politically *quasi* binding. This is a result of intensive, sometimes aggressive campaigning by states/NGOs/international organizations that have embraced the document and are often naming and shaming states that are not behaving the way the document prescribes.

Such effects of soft law documents may lead to several outcomes. If states are not expressing discontent with the document and follow practice akin to its contents, with all relevant conditions fulfilled, it may become customary law. From this perspective it makes no difference whether the soft law document can be or was endorsed by states or not, because it operates the same way: the 'rules' contained therein are referred to as those that should be followed or conduct that States should and do adhere to. It may also lead to a situation where the state may simply feel that due to political or diplomatic pressure it actually has to follow the document, even though at the time of signing or adoption everyone declared it to be non-binding, and its non-legally binding nature was probably one of the baits used to convince states to sign. This effect could equally work with documents that cannot be endorsed by states, if the document is often referred to as providing for the appropriate conduct in certain fields by a large number of actors and all the, more if political pressure is exerted to follow its contents.

Another layer of the same tendency is when there is mounting pressure on states that have not signed such documents. Those promoting the soft-law document often end up

34 Guzman & Meyer 2010, pp. 172-173.

35 "While reflecting the ICRC's views, the Interpretive Guidance is not and cannot be a text of a legally binding nature." *See* Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC, May 2009, p. 10. at https://shop.icrc.org/guide-interpretatif-sur-la-notion-de-participation-directe-aux-hostilites-en-droit-international-humanitaire-2601.html. "We welcome the development of the Guidelines for protecting schools and universities from military use during armed conflict. The Guidelines are non-legally binding, voluntary guidelines that do not affect existing international law." *See* Safe Schools Declaration at www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf.

naming and shaming such states, what's more, signing these may appear in UN's,[36] NGO's[37] or other bodies' recommendations, or even requirements. In the end, sometimes these documents are treated the same way as if they were legally binding. Hence, documents non-binding at their inception have become a sort of must-do for states.

Whether soft law documents are contributing to better respect and compliance with IHL needs to be considered from different angles. On the one hand, specifically due to the fact that the need for interpretation does not necessarily mean that the law must be changed, and also considering states' unwillingness to make new law, the emergence of soft law documents, aimed at analyzing different interpretations, experiences and practices may be a welcome development. On the other hand, one must recognize the changing nature of such documents and be aware that they often, albeit not always, become more than simple recommendations, studies, interpretations. This may lead to a sense of fatigue by states towards soft law documents, and hence, a reluctance to adopt new ones.

11.4 Hopes and Opportunities

There are certain trends that give cause to optimism and opportunities that could be further explored.

Even though IHL is a part of international law, that is, a normative framework among states regulating their conduct in armed conflicts, the increasing role played by non-state armed actors in armed conflicts[38] is also considered as a topical feature.[39] There are authors who suggest that since non-state actors have not participated in the making of international law and have not consented to it, one cannot be surprised that non-state actors do not respect the law (even though they are also bound by it). Thus, it seems necessary to adopt IHL rules that are more suitable to contemporary conflicts.[40] This is an argument is based on a paradox. First, were we to develop new law, non-state actors would not participate in its formulation either. Second, many of the basic IHL rules are based on rules of human conscience shared by the entire international community Therefore, the argument that they have not consented to them seems unfounded. Third, were we to embrace this argu-

36 Report of the Secretary General on the protection of civilians in armed conflict, S/2017/414 (10 May 2017), para. 14.

37 *See* www.hrw.org/news/2018/06/19/opportunity-ukraine-endorse-safe-schools-declaration.

38 The number of parties to armed conflicts has exponentially increased in the past decades. In Libya, by the end of the conflict, 236 armed groups were registered, while in Syria 1000 armed groups have been counted in 2014. *See* Munoz-Rojas & Frésard 2004, p. 13.

39 *See* Varga 2017.

40 Thomas Previ Botchway & Abdul Hamid Kwarteng, 'Developing International Law in Challenging Times', *Journal of Politics and Law*, Vol. 11, Issue 3, 2018, p. 55.

ment, it would result in an endless debate on the adequacy of sometimes century-old rules. After all, the task of the lawyers is to apply existing rules.[41]

In 2017, 17 international and 38 non-international armed conflicts took place worldwide.[42] Non-state armed actors do not participate in diplomatic conferences, intergovernmental meetings, the Compliance process, and do not benefit from common training exercises. Hence, they don't have the same level of ownership of international humanitarian law as states do.[43] The ICRC and certain NGOs, such as Geneva Call, make efforts to provide training for or engaging in dialogue with non-state actors. Geneva Call often concludes Deeds of Commitment with them, where the non-state actor voluntarily undertakes to provide training in IHL or, comply with basic IHL rules. Such Deeds of Commitment, although non-binding in nature, often serve as catalysts for non-state actors to make efforts to comply with IHL.

Many thus claim that non-compliance with IHL can be led back first and foremost to non-international armed conflicts, and highlight the importance of involving non-state armed groups.[44] Non-state actors, which may not have a strict hierarchy and bureaucratic system similar to states, have a more difficult time enforcing rules within their group. Even though there are armed groups that are not interested in respecting IHL, or their aim is precisely to cause as much terror and loss as possible, other groups are more serious about compliance with IHL and about their public perception, in particular, if they want to receive international recognition.

As the ICRC's 'The Roots of Behaviour in War' study has shown, combatants' illegal actions are frequently down to a lack of specific orders not to violate the law.[45] While training provided for states' armed forces always includes IHL elements, this may not be true for trainings, if any, of non-state armed actors. At the same time, criminal responsibility is equally applied to individuals from state and non-state armed groups. This is why training/dissemination of IHL is equally important among armed groups, and while training itself may not necessarily have a direct effect on the correct application of IHL, it may have an indirect effect in helping prevent combatants enter into the cycle of violence.[46] Individual criminal responsibility is based on the individual's actions, while combatants submit to an authority and are psychologically shifting their focus from conforming to

41 Morgan Kelley, 'Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare', *Independent Study Project (ISP) Collection*, 2013, p. 29.

42 Annyssa Bellal (ed.), *The War Report. Armed Conflicts in 2017*, Geneva Academy of International Humanitarian Law and Human Rights, 2018, p. 29.

43 Id. p. 29.

44 Clarke 2010, p. 219.

45 Munoz-Rojas & Frésard 2004, p. 7.

46 Id. p. 11.

their own moral sense to satisfying their superiors.[47] This means they assess their own actions *vis-à-vis* the morale of the group, and not according to their own moral standards. Socialization within armed groups thus has a direct influence on how fighters behave. Socialization can go both ways: individuals can be socialized to commit violations, but also to demonstrate restraint.[48] This gives military training particular importance at all levels and makes us understand how important it is for commanders of non-state armed groups to understand the rules.

In light of new technologies, regular state armed forces also need a new approach to training. Understanding the specificities of remote-control technologies and the ability to carry out deadly attacks from thousands of kilometers away, trainers need to recognize this remoteness may have on decision-making. While studies have shown that humans find it difficult to kill their fellow human beings at close range,[49] following movements and monitoring the situation on the ground from a far-away computer, and then adopting the decision whether or not to attack is done in a completely different psychological setting. Therefore, a firm knowledge of the rules and an adequate psychological state of mind could also contribute to IHL-compliant behavior.

The position and importance of military legal advisers in the eyes of their commanders has also favorably changed. A couple of decades ago in many countries a military legal adviser was considered a necessary evil for the commander, someone who only puts obstacles in his way, without brining any benefits. Today (the Rome Statute greatly furthered this, not only by forcing states to voluntarily implement command responsibility provisions in their legislation, but also by making known that such concept exists, even though it had already existed in the 1977 Additional Protocol) legal advisers are often considered as useful contributors who can eventually help the commander prevent or avoid criminal responsibility. In addition, and equally important, they help avoid bad public relations. It has been recognized that IHL became an increasingly important factor in how military actions are considered by the public and the international community, and even big and powerful nations were forced to align their attitude to such expectations.

One serious demonstration by States to show they take IHL seriously would be to carry out genuine inquiries in case of alleged violations and make the results of such inquiries public.[50] Such voluntary inquiries would also be beneficial to close the credibility gap

47 Id. p. 7: "The disappearance of personal responsibility is by far the most serious consequence of submission to authority. Although, under these conditions, the individual commits acts which seem to violate the dictates of his conscience, it would be wrong to conclude that his moral sense has disappeared. The fact is that it has radically changed focus. The person concerned no longer makes value judgements about his actions. What concerns him now is to show himself worthy of what the authority expects of him."

48 Botchway & Kwarteng 2018, p. 25.

49 Munoz-Rojas & Frésard 2004, p. 10.

50 *'Is the Law of Armed Conflict in Crisis and How to Recommit to its Respect?'* comments by Marco Sassòli, 3 June 2016, ICRC at www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect.

between the alleged importance of IHL and inaction in the face of violations. We all remember the tragic attack at Kunduz hospital in Afghanistan in 2015. The US Air Force attacked a hospital operated by *Médecins Sans Frontières* (MSF) in Kunduz, resulting in the death of most of the patients and many of the medical staff.[51] Upon the MSF's call on the US to request an inquiry from the IHFFC, the US responded that it saw no need for the IHFFC to carry out fact-finding, since it can conduct its own inquiry.[52] The US did carry out its own inquiry amounting to a file of more than 3000 pages,[53] and made the executive summary public. Emphasizing that it is not common US policy to make the results of its inquiries public, it is significant here that the US government felt that the incident was so severe it had to act, make the findings public, and understand lessons learnt. The result was still criticized as unsatisfactory because no serious accountability measures were taken.[54] It may nevertheless be a noteworthy example where a state realized it had to adopt special measures to seem credible, to identify lessons learnt and to show the world it took IHL safeguards seriously.

It has become apparent that international criminal justice cannot be exhaustive, neither in including all the situations and cases due to political sensitivities, leaving entire conflicts or parties free of criminal accountability, nor in numbers: it is impossible to try all those responsible. A very positive effect of the International Criminal Tribunal for the Former Yugoslavia has been the 11bis procedures, through which a larger number of perpetrators could be tried in domestic courts, and through which domestic capabilities have strengthened. This strengthening of domestic capabilities has welcome long-term effects in that a number of judges, prosecutors, defense lawyers are trained in IHL and international criminal law and become familiar of the specificities of war crime trials. Handing over trials to domestic structures may also be a source of legitimacy for international or hybrid tribunals, since they need to garner recognition within the local population.[55] Recognizing that domestic trials may be one way out of impunity, it would be important to put more efforts into increasing domestic capabilities, giving domestic enforcement more teeth.

We need to believe in domestic trials and universal jurisdiction. It is probably easier to apply the more efficient, organized and cheaper domestic mechanisms, than to persuade sovereign states that a case should be submitted to the ICC, or that a new mechanism should be established. Exercising universal jurisdiction may have its political sensitivities,

51 *See* www.msf.org/kunduz-hospital-attack.

52 "Following the attack, we demanded an independent investigation by the International Humanitarian Fact-Finding Commission (IHFFC). In April 2016, the US military released its own investigative report. The request for an independent investigation has so far gone unanswered." Id.

53 *See* www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html.

54 Only disciplinary measures have been adopted. *See* www.bbc.com/news/world-us-canada-36164595.

55 Juan Ernesto Mendez, 'Preventing, Implementing and Enforcing International Humanitarian Law', *Studies in Transnational Legal Policy*, Vol. 39, 2008, p. 97.

but it shall not be forgotten as a means to fight impunity. Enforcement should go hand in hand with prevention, dissemination, training, dialogue, and international processes. If we look at the disagreement among states to initiate proceedings before the ICC in the Syria case, and generally all the political attacks against the ICC, the only permanent international body available to try the most heinous cases, we realize that there is little global will to make use of this body. Even though alternative mechanisms are emerging, it is safe to say that international mechanisms alone will not be able to put an end to impunity and ensure better respect for IHL.

11.5 Conclusion

The Compliance mechanism was meant to provide, among others, a forum for discussion on the interpretation of law, its application and best practices. The inability of states to agree on a voluntary forum for regular discussions on IHL was seen by many as a sad and characteristic demonstration of the unwillingness of states to simply sit down and engage in structured discussions on IHL and their lack of interest in adopting procedures that would contribute to better respect of IHL.

The idea of the present article was triggered by the outcome of the Compliance process and attempted to demonstrate that the disagreement between states regarding the Compliance process does not necessarily mean that all is lost. While a regular meeting of states would have greatly contributed to a lively discussion on new challenges to the application of and compliance with IHL, there are many other mechanisms available that directly or indirectly contribute to compliance with IHL, both within the frameworks of IHL and beyond. It would be therefore important for states to map these mechanisms and to make better use of them.

The cornerstone of a successful application of IHL is that states and groups who are participating in conflicts understand the rules and enforce such rules within their own structures. Understanding the rules means that there is a general agreement on the contents, as well as on how to apply them in contemporary conflicts. Enforcing the rules means that there are internal structures available for enforcing them, both among and besides the armed actors. These require adequate and custom-built training, and an effective enforcement mechanism, as well as the will of states and armed groups to face their own failures and investigate them.

If we look at earlier projects, such as the Guidelines on direct participation in hostilities or the Montreux Document, even considering that not all states were happy with the outcome of such processes, we are already witnessing a huge amount of work, involving states, academics, practitioners and IGOs/NGOs from various geographic regions discussing specific IHL issues. Maybe states should continue with a step-by-step approach, with dis-

cussions centered around specific topics. We must also realize that even if such discussions result in heated arguments and disagreements, it is still a discussion on IHL. At the same time, we must not deceive ourselves. IHL violations will occur as long as armed conflicts exist. The best we can do is keep IHL on the agenda, and initiate procedures that assist in our common understanding of the rules, their application, and generally in raising awareness for IHL.