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978-1-107-10205-7 - Inducing Compliance with International Humanitarian Law:

Lessons from the African Great Lakes Region

Edited by Heike Krieger

Excerpt

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## 1

## Introduction

HEIKE KRIEGER

Enforcement and compliance have always been the Achilles heel of international humanitarian law. Despite all efforts to minimize human suffering in wartime, atrocities seem to be an endemic component of warfare. This observation prompted Hersch Lauterpacht's famous statement that 'if international law is . . . at the vanishing point of law, the law of war is . . . at the vanishing point of international law'.<sup>1</sup> With the rise of the so-called 'new wars',<sup>2</sup> after the end of the Cold War, a wide-ranging perception crystallized that these wars pose an even stronger challenge to the enforcement of international humanitarian law than more traditional forms of armed conflicts. Already in 1999, in its first resolution on the protection of civilians in armed conflict, the Security Council expressed 'its deep concern at the erosion in respect for international humanitarian . . . law' in contemporary armed conflicts.<sup>3</sup>

Many of the perpetuated armed conflicts in the Great Lakes Region in Africa are considered to be representative of this phenomenon. Fragmented armed groups fight each other or armed forces of a government, which represents only the remainders of collapsed State structures. In addition, both sides might receive support from third States or armed groups based in third States. These kinds of conflicts typically occur in war-torn areas of limited statehood.<sup>4</sup> Political science has labelled areas of limited statehood as 'those parts of a country in which central authorities lack the ability to implement and enforce rules and decisions and in which the legitimate monopoly over the means of violence is

<sup>1</sup> H. Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Yearbook of International Law* 360, at 382.

<sup>2</sup> M. Kaldor, *New and Old Wars*, 2d edn (Cambridge: Polity Press, 2006).

<sup>3</sup> UNSC Resolution 1265 (17 September 1999).

<sup>4</sup> S. Chojnacki and Z. Branovic, 'New Modes of Security – The Violent Making and Unmaking of Governance in Areas of Limited Statehood', in T. Risse (ed.), *Governance Without a State? Policies and Politics in Areas of Limited Statehood* (New York: Columbia University Press, 2011), 89–114.

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consequently lacking.<sup>5</sup> Instead of failed or failing States, the book uses the social science term ‘limited statehood’ because the term neither implies a normative judgment that a State has failed nor suggests that State failure would be the definite result of a process. It is also broader in that only parts of a country as well as areas spanning over parts of several countries might be affected, and it can cover transitional States.<sup>6</sup>

In war-torn areas of limited statehood, the rise of armed, violent non-State actors collides with the State-centric traditional nature of public international law with apparently detrimental consequences to (classical) compliance structures in international humanitarian law. Even though in military terms, armed groups might be on equal footing with State’s armed forces or may even possess superior military capabilities, in legal terms, parties to the conflict are not equal; rights and obligations are thus asymmetrical. The most obvious example concerns the (national) criminal responsibility of members of the armed groups for their mere participation in hostilities against their government and their lack of a prisoner-of-war status. Thus, to put it in simple terms, non-State actors are expected to comply with not only norms in the creation of which they have never participated and to which they have never consented but also those which apparently do not even entail great benefits for them. This asymmetry directly affects the classically most important motive for compliance in international law – reciprocity – and seems to diminish the prospect of compliance based on the norm’s legitimacy.<sup>7</sup>

<sup>5</sup> T. Risse and T. Börzel, ‘Human Rights – The New Agenda’ (Working Paper No. 7, Transworld: Transatlantic Relations and the Future Global Governance, December 2012), at 10; T. Risse and T. Börzel, ‘Human Rights in Areas of Limited Statehood: the New Agenda’, in T. Risse, S. Ropp and K. Sikink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013) 63–84, at 63.

<sup>6</sup> T. Risse and U. Lehmkuhl, ‘Governance in Areas of Limited Statehood – New Modes of Governance?’, Research Program of the Research Center (SFB) 700 (SFB-Governance Working Paper Series No. 1, December 2006), at 9.

<sup>7</sup> N. Lamp, ‘Conceptions of War and Paradigms of Compliance’ (2011) 16 *Journal of Conflict and Security Law* 225, at 240–250, who bases his understanding of the characteristics of the so-called ‘new wars’ on the arguments of H. Münkler, *The New Wars* (Cambridge: Polity Press, 2005); R. Geiß, ‘Asymmetric Conflict Structures’ (2006) 88 *International Review of the Red Cross* 757, at 770, 773; C. Bassouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98 *Journal of Criminal Law and Criminology* 711, at 765 et seq.; M. Sassöli, ‘The Implementation of International Humanitarian Law: Current and Inherent Challenges’ (2007) 10 *Yearbook of International Humanitarian Law* 45, at 49.

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In these wars, it appears to be the case that warfare no longer aims at military victory. Parties to these conflicts ‘[are said] to rarely pursue their aims by attempting to defeat the military forces of the enemy; instead, a political or economic logic [is said] to infuse the conduct of war itself’.<sup>8</sup> Thus, civilian casualties are no longer an incidental side effect, but the actual essence of warfare in the form of ethnic cleansing or economic exploitation of civilians, for example, through slavery and trafficking,<sup>9</sup> sometimes even creating the impression that violence against civilians is used for no ostensible purpose at all. Therefore, assumptions about the so-called ‘new wars’ assert that the parties to these conflicts are only interested in preserving an endemic state of war. ‘Perpetual warfare’ is seen by some observers as a ‘form of life’ for many of its protagonists. If killing civilians is the actual goal of warfare, actors have no discernible interest in internalizing norms that prohibit such a use of force. Since their actions are illegal from the outset, the parties to the conflicts are considered unable to pursue their interest within the boundaries of international humanitarian law. It is argued that this inability leads to a lack of motives for voluntary compliance, which in turn makes persuasion to do so unfeasible and diminishes the influence which the public image of the conflict parties could exert on their behaviour. Thus, some observers hold that in places such as eastern parts of the Democratic Republic of the Congo (DRC) or in regard to the Lord’s Resistance Army (LRA) in Northern Uganda, ‘a paradigm of compliance which counts on the voluntary observance of the law by the warring parties and therefore has to presuppose that the law is compatible with their interests . . . becomes utterly inadequate under the circumstances of the “new wars”’.<sup>10</sup>

If reciprocity is really breaking away as a motive for compliance, classical enforcement instruments, such as reprisals, will lose their effectiveness. Moreover, the fragmentation of armed groups and their loose organizational structures appear to make enforcement through military hierarchy and discipline practically impossible. Where there are no strict military hierarchies and institutions, internalization of the laws of war is highly unlikely. In view of collapsing State structures, the same often holds true for remainders of the State’s armed forces.<sup>11</sup> Likewise, in

<sup>8</sup> Lamp, ‘Conceptions of War’, above note 7, at 234.

<sup>9</sup> Ibid. 234–35; Sassòli, ‘The Implementation of International Humanitarian Law’, above note 7, at 59.

<sup>10</sup> Lamp, ‘Conceptions of War’, above note 7, at 245.

<sup>11</sup> Sassòli, ‘The Implementation of International Humanitarian Law’, above note 7, at 59.

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areas of limited statehood, other State structures also fail to contribute to enforcing international humanitarian law. Corresponding national legislation, for instance, cannot be enforced through national institutions, such as criminal courts.<sup>12</sup>

This perspective indeed offers a bleak prospect for an effective compliance with international humanitarian law in conflicts such as those in the African Great Lakes Region. Against this backdrop, the present volume aims to inquire into traditional and alternative instruments for inducing compliance with the rules of international humanitarian law. In doing so, it concentrates on those compliance mechanisms which have been in the foreground of international efforts in recent years. This includes non-hierarchical instruments, such as persuasion, as well as hierarchical mechanisms, such as criminal prosecution and sanctions imposed by the United Nations Security Council. While these instruments predominantly rely on efforts of the international community, the book also inquires as to what responses might engage the actors in the war-torn areas of limited statehood themselves. Thus, by taking an interdisciplinary approach, the book challenges some of the assumptions underlying the concept of the so-called ‘new wars’ and its impact on compliance. It aims to shed some light on the different actors who must be involved in the process, as well as the extent to which their discretion is surrounded and curtailed by legal obligations.

The book’s approach is to focus on a particular region which is dominated by war-torn areas of limited statehood: the African Great Lakes Region. While international humanitarian law as a legal regime must be conceived in such a manner as to be applicable to all contemporary forms of war, understanding compliance requires concentrating on particular conflicts. The regional focus is prompted by the nature of enforcement. Setting legal standards and inducing compliance differ in this respect. While the process of standard-setting calls mainly for generalization and a more universal approach, inducing compliance is closely related to the concrete circumstances on the ground. Actual decisions to obey a legal norm result from a complex mixture of diverse motivations. Power relations as well as historical, political, social and anthropological conditions determine these motivations so that compliance is

<sup>12</sup> For an overview of classical enforcement measures of international humanitarian law, see S. Vöneky, ‘Implementation and Enforcement of International Humanitarian Law’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3d edn (Oxford: Oxford University Press, 2013), sections 1401–1436.

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context-dependent.<sup>13</sup> Therefore, understanding the mechanisms of compliance and enforcement requires a close look at what is occurring on the ground in specific conflict constellations. Accordingly, this book is conceived as an interdisciplinary one. If the law shall preserve its function of directing the conduct of actors (*verhaltenssteuernde Funktion*), it is necessary to understand the dominant political and social circumstances.

Hence, the book starts with two contributions from a political science perspective, which challenge some of the assumptions of the theory of the 'new wars'. On the basis of the rational choice theory, Reed Wood addresses the phenomenon that violence against civilians fluctuates over time in perpetuated conflicts. Starting from the assumption that the 'new war' theories fail to explain this variation, Wood illustrates that insurgents are more likely to target civilians when they face major military setbacks by means of a case analysis of the LRA. Zachariah Mampilly focuses on insurgent governance in the DRC. Mampilly analyses under which conditions insurgencies are likely to establish governance structures and what governance practices are used for which reasons, and scrutinizes reactions of civilians and other actors to those efforts. Thus, he tests the common understanding of Congolese insurgent groups as appalling examples of warlordism and calls for a more nuanced approach by external actors towards armed groups so that insurgent governance systems can contribute to civilian welfare. The contributions by Ulrich Schneckener and Claudia Hofmann, Olivier Bangerter as well as Sandesh Sivakumaran directly build on these insights. Schneckener and Hofmann analyse how international non-governmental organizations and private individuals try to persuade armed groups by mediation and norm diffusion. By focusing on the International Committee of the Red Cross (ICRC), Geneva Call, the Centre for Humanitarian Dialogue and the Carter Center, they develop their thesis that such actors enjoy more freedom and flexibility to communicate with armed groups than with State actors. They conclude that such activities will contribute to norm transfer if armed groups are interested in their public image and struggle to become political actors. In his comment, Bangerter explains how this process of persuasion works in practice.

Part I closes with a suggestion as to how to address the deficits in the legitimacy of international humanitarian law from the perspective of

<sup>13</sup> M. Bothe, 'Compliance', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition, [www.mpepil.com](http://www.mpepil.com)).

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armed groups. Since these legitimacy deficits are seen as a major obstacle to voluntary compliance, Sivakumaran looks for ways in which armed groups' accountability for international humanitarian law violations can be created. He favours allowing such groups to commit themselves to the norms by issuing unilateral declarations or by concluding ad hoc agreements and explores alternative options, such as participation in treaty creation or the use of their legally relevant practice in the process of creating international customary law.

Part II of the volume focuses on hierarchical enforcement of international humanitarian law and international criminal law through criminal prosecution. Criminal prosecution takes place on different levels: criminal courts operate at the national level established by the State as well as by armed groups (so-called rebel courts). Criminal prosecution can also occur at the international level, in particular before the International Criminal Court (ICC). Sivakumaran's suggestion that armed groups should at least be allowed to play a role in enforcing international humanitarian law is taken up by Jan Willms, who analyses rebel courts and their potential for law enforcement. If insurgent governance can be established even under the condition of armed conflict in areas of limited statehood, armed groups themselves may play a role in law enforcement. Though international law does not forbid such courts, their potential for enforcement and protection of civilians is impaired by the fear of the nation-State that these courts might legitimize insurgent governance. Based on a case study, Willms concludes that there is a limited potential for enforcement and suggests ways to improve it, thus stressing Sivakumaran's pledge for the need to create armed groups' accountability. Yet, in his comment, Dieter Fleck is more sceptical about the rebel courts' contribution to law enforcement.

The establishment of international criminal courts is one of the major responses through which the international community tried to address the challenge for compliance which stems from war-torn areas of limited statehood. It is telling that so far, all situations under investigation before the ICC deal with African non-international armed conflicts.<sup>14</sup> However, international criminal prosecution is criticized because it is difficult to demonstrate empirical evidence that it fulfils its deterrent and educative purposes in war-torn areas of limited statehood. Does this form of remote

<sup>14</sup> By 2014, situations under investigation before the ICC concern conflicts in the Central African Republic, Cote d' Ivoire, Dafur, Sudan, the Democratic Republic of the Congo, Kenya, Libya, Mali and Uganda.

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and slow international prosecution really have any deterrent effect, or is the threat of criminal prosecution too abstract for an individual fighter in the DRC to comply with a set of legal rules he may never have heard of? Robert Cryer addresses this criticism in his contribution to the volume, stressing that the selective approach of international criminal prosecution challenges its legitimacy. On the other hand, according to the ICC Statute, jurisdiction of the ICC is only complementary to national criminal jurisdictions. Criminal prosecution by the State concerned also contributes to ownership and might thus increase compliance. Therefore, efforts are sustained to improve national criminal prosecution. However, the contributions by Jean-Michel Kumbu and Balingene Kahombo provide a candid firsthand insight into the diverse legal and political obstacles a State, such as the DRC, would have to overcome to effectively prosecute war crimes.

Criminal prosecution on the international or national level does not stand alone; it is accompanied by other new (hierarchical) enforcement mechanisms which the international community has developed especially since the late 1990s. Part III deals with the most important initiatives. First, there are at present numerous attempts to enforce international humanitarian law through human rights bodies, especially at the regional level of the European Convention on Human Rights, as well as the American Convention on Human Rights, but also the African Charter on Human and Peoples' Rights. Dominik Steiger argues in favour of such an approach, since human rights bodies may be able to step into the gap which is left by the lack of an individual complaints procedure in international humanitarian law. He tries to rebut the widespread interpretation that, at least for the conduct of hostilities, international humanitarian law should prevail over human rights law<sup>15</sup> because States have agreed to the applicability of human rights law even in times of war. In his comment, Faustin Ntoubandi adds the perspective of the African Union's human rights organs.

Second, there are the activities of the UN Security Council. Focusing on the regime on children and armed conflict, Regina Klostermann analyses the role of the UN Security Council in enforcing the pertinent international norms, in particular through imposing targeted sanctions. On the basis of an interdisciplinary approach, she arrives at the conclusion that

<sup>15</sup> For an overview of the diverging opinions on the relationship between international human rights law and international humanitarian law, see R. Kolb, 'Human Rights and Humanitarian Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition, [www.mpepil.com](http://www.mpepil.com)), paras. 27 et seq.

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the Security Council's special compliance system for children and armed conflict is a promising step towards inducing compliance since it basically fulfils the requirements that political theory has identified as motives for compliance. It is not only the UN Security Council's sanctions system which has undergone major changes. The parameters of UN peacekeeping have also fundamentally changed. Above all, mandates have become more robust. Since 1999, these mandates regularly include an undertaking to protect civilians coupled with expanding authorities to use force.<sup>16</sup> This development has been welcomed as 'the only way to prevent massive violations of IHL [international humanitarian law] in the short term' in many so-called 'new wars'.<sup>17</sup> However, Siobhán Wills takes a more sceptical view of these changes in UN peacekeeping. In her contribution, she stresses that the effectiveness of the mandate to protect civilians is determined by the resources of the mission, its other aims, its relation to the host State and other local stakeholders, as well as the interest of the troop-contributing nations. On the basis of a case study about peacekeeping in the DRC and other African States, she illustrates the dilatory effect of these variables. These findings are aggravated if UN peacekeepers' complicity with the host State's violations of international law is at stake, or if peacekeepers themselves violate international humanitarian law. Therefore, Wills suggests revising the understanding of peacekeepers' obligations under international humanitarian law through, inter alia, an extensive interpretation of Common Article 1 of the Geneva Convention which would require peacekeepers to react to violations of the Conventions by others, provided the peacekeepers are able to do so. In his comment, Matthew Happold criticizes this approach from a legal perspective, while Denis Tull's comment furthers the argument that the effectiveness of UN peacekeepers' civilian protection missions is doubtful. However, on the basis of a case study of the Chapter VII-based United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), he concludes that MONUSCO's failure might have positive impacts on organizational learning, probably improving the international practice of civilian protection.

<sup>16</sup> Starting with UNSC Resolution 1279 (30 November 1990), such a mandate is, inter alia, included in UNSC Resolution 1291 (24 February 2000); UNSC Resolution 1493 (28 July 2003); UNSC Resolution 1756 (15 May 2007); UNSC Resolution 1856 (22 December 2008); UNSC Resolution 2053 (27 June 2012); UNSC Resolution 2078 (28 November 2012).

<sup>17</sup> Lamp, 'Conceptions of War', above note 7, at 260 with reference to Münkler, *New Wars*, above note 7, at 84.

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Not only is the effectiveness of UN peacekeeping hampered by third States' unwillingness to contribute troops, but all efforts to induce compliance from the outside require that the international community is willing to act at all. There is a widespread perception that the lack of a corresponding political will is a major reason for the lack of effective enforcement of international humanitarian law by some of the more powerful third States.<sup>18</sup> However, if there is no sufficient political will to act, the question arises whether the political discretion of third States may be curtailed by legal obligations. To curtail discretion is, after all, one of the aims of the concept of the duty to protect.<sup>19</sup> In Part IV, Robin Geiß, Helmut Aust and Kirsten Schmalenbach inquire as to whether there are other more forcefully binding legal obligations aiming in the same direction. Geiß starts by examining whether Common Article 1 to the four Geneva Conventions includes an external compliance dimension, that is, a duty to ensure respect vis-à-vis other States and/or non-State actors who violate the Conventions. On the basis of an analysis of the relevant State practice, the author submits that the obligation to ensure respect should be understood as a wide obligation which requires States to take positive measures whenever the Geneva Conventions are infringed. However, in the face of the perpetuated conflict in the Democratic Republic of the Congo, third States did not only refrain from taking meaningful measures to ensure compliance with the Geneva Conventions, but also even supported those committing wrongful acts. Aust addresses the question as to whether such States and international organizations could be held responsible under the law of State responsibility for their support. In response to the question, the author discusses the applicable international legal rules on complicity deriving from the law of international responsibility and its possible modifications which may stem from international humanitarian law. Aust's opinion that it can be seen as a new phenomenon to determine the responsibility of those aiding and assisting as much as the main actors' responsibility holds true even more when it comes to a State's support for armed groups. Kirsten Schmalenbach illustrates the responsibility gap that is created by the Draft Articles on the Law of State Responsibility, which start from the hypothesis that a State is only responsible for its own conduct and not for the conduct of non-State actors whose actions are in principle not attributable to the State. This responsibility gap works in

<sup>18</sup> Sassòli, 'The Implementation of International Humanitarian Law', above note 7, at 52.

<sup>19</sup> A. Peters, 'The Security Council's Responsibility to Protect' (2011) 8 *International Organizations Law Review* 15, at 31.

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favour of those States which support armed groups who fight against their government, such as in the Great Lakes Region. Although Schmalenbach can ascertain some further developments, she ends on a pessimistic note.

In her concluding contribution, Heike Krieger submits that the international community addresses the challenges for compliance with international humanitarian law which arise from war-torn areas of limited statehood by shifting competences to actors other than the State concerned. In particular, international organizations have developed a mix of instruments in order to enforce international humanitarian law. However, since these organizations are dependent on their member States, who might be reluctant to accept engagement with armed groups, activities of humanitarian non-State actors have become an important element in efforts to induce compliance. Based on the overall results of the book, Heike Krieger investigates reasons for compliance in war-torn areas of limited statehood and arrives at the conclusion that traditional motives are still relevant and must therefore be addressed by the corresponding mechanisms.