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Towards the establishment of a new international humanitarian law compliance mechanism: lessons learned from monitoring systems within the international humanitarian and human rights law frameworks

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Summary

The monitoring of the implementation of International Humanitarian Law (IHL) by parties to armed conflicts is mainly undertaken by procedures external to the IHL framework given the lack of effective compliance mechanisms under the 1949 Geneva Conventions and their Additional Protocol I. For instance, the United Nations human rights monitoring mechanisms, which comprise the human rights treaty bodies and the Charter-based Human Rights Council, have increasingly dealt with situations of armed conflict. Given the close relationship between IHL and International Human Rights Law and the latter's application during armed conflict, the aforementioned mechanisms often take IHL in consideration when exercising their monitoring functions and therefore supervise the implementation of IHL.

In spite of the above, the global human rights monitoring system cannot make up for the monitoring gap caused by the lack of functioning compliance mechanisms under the 1949 Geneva Conventions. This shortcoming needs to be addressed from within the IHL framework through the establishment of compliance mechanisms that can supervise in practice the implementation of IHL by parties to armed conflicts. This is the objective pursued by this thesis. Nonetheless, considering the complementarity and close relationship between IHL and International Human Rights Law, monitoring approaches and practices by the United Nations human rights mechanisms are used in support of the above research objective.

This thesis seeks to answer the following research question introduced in Chapter 1:

Which lessons can be identified by examining monitoring mechanisms and procedures within the International Humanitarian Law and International Human Rights Law frameworks, and which of these lessons can be applied to a future compliance system under the 1949 Geneva Conventions?

The scope of the enquiry encompasses the following components: (i) the existing compliance system of the 1949 Geneva Conventions and their Additional Protocol I; (ii) the compliance systems of other treaties within the IHL framework including conventions regulating or prohibiting certain means of warfare and those instruments protecting cultural property during armed conflict; (iii) the United Nations human rights monitoring system comprising the human rights treaty bodies and the Human Rights Council; and (iv) a select

number of mechanisms that supervise respect for humanitarian norms by States and/or armed non-State actors given that armed groups' respect for IHL cannot be considered by the monitoring mechanisms of instruments within the IHL framework. These mechanisms form part of the monitoring systems developed by the International Committee of the Red Cross, Geneva Call and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict. By bringing these threads together for the first time with the objective to identify lessons learned for a future compliance mechanism under the 1949 Geneva Conventions, this thesis makes an original contribution to existing scholarship on the implementation and monitoring of IHL.

To set the scene, Chapter 2 of the thesis examines the existing compliance system of the 1949 Geneva Conventions and their Additional Protocol I. The analysis demonstrates that the compliance system of these treaties is not institutionalised. Their compliance system also follows a consent-based approach which ends up obstructing the set-up and operation of its mechanisms. Furthermore, the design, mandate and status of the compliance mechanisms does not allow for the creation of synergies in their work. In addition to the above, except for the International Humanitarian Fact-Finding Commission, the current compliance system is limited to international armed conflicts.

Chapter 3 enquires into the monitoring systems of instruments that regulate or prohibit specific means of warfare. While self-reporting is an important component in all monitoring systems examined, only in the context of the Chemical Weapons Convention is the information reported by States Parties reviewed and verified. The analysis further shows that gaps in a monitoring framework can be filled at a later stage. Moreover, besides informal consultations among States Parties and a formal clarification procedure, the Chemical Weapons Convention and the Anti-Personnel Mine Ban Convention provide for fact-finding as a means of clarifying compliance concerns. Nonetheless, this option has never been utilised in the aforementioned Conventions. The lack of practice can be attributed to the fact that States need to initiate the process and to their reluctance to address compliance issues through fact-finding.

Chapter 4 examines the compliance system of the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict and the 1999 Second Protocol to the Hague Convention. Reporting obligations are imposed on States Parties to both instruments. However, only in the context of the Second Protocol is the reporting function supervised. This task is undertaken by the Second Protocol Committee which is an inter-governmental body mandated with supporting and supervising the implementation of the Protocol. However, the Second Protocol Committee does not exercise the above mandate in practice. This may be explained by the fact that neither the Second Protocol nor its Implementation Guidelines specify how the Committee shall exercise this monitoring function. Concerning the Meeting of the High Contracting Parties to the 1954 Hague Convention, the analysis reveals that this forum cannot

undertake any substantive tasks related to the reporting function. This conclusion also applies to the Meeting of the Parties to the Second Protocol despite the fact that the Meeting of the Parties could have been assisted by the Second Protocol Committee in this regard.

Chapter 5 delves into the monitoring procedures developed by the International Committee of the Red Cross, Geneva Call and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict which oversee the implementation of IHL by States, armed non-State actors or both. The analysis demonstrates that the nature and mandate of the aforementioned organisations affect their approach to monitoring and the tools utilised to enhance respect for IHL. Moreover, the practice by the Office of the Special Representative of the Secretary-General for Children and Armed Conflict highlights that the capacity of a monitoring mechanism to exercise its mandate can be compromised if the engagement with armed non-State actors is made dependent on the agreement of the governments concerned. In addition, the monitoring process followed by Geneva Call and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict rely extensively on external monitoring to verify the implementation of the commitments undertaken by armed non-State actors and/or States.

Chapter 6 examines the treaty-based monitoring system of the international human rights instruments. The discussion and analysis in this Chapter reveals that the establishment of groups of independent experts grants flexibility to a supervisory system and allows it to evolve and adapt to challenges. With regard to the reporting procedure, its supervision by the treaty bodies takes place independently of the consent of States Parties. The consent of the State Party concerned is also not required for the activation of urgent action procedures. With regard to enquiries, individual communications and inter-state complaints, these monitoring functions require their prior acceptance by States Parties. For instance, the monitoring body of the Convention against Torture, namely the Committee against Torture, can undertake an enquiry on its own initiative in relation to a State Party that has previously accepted the Committee's competence in this regard. In the case of inter-state complaints, States also need to initiate the process given the nature of this monitoring function.

Chapter 7 enquires into the monitoring system of the Human Rights Council. Among its monitoring functions, the Universal Periodic Review and its Special Sessions are procedures not shielded from politicisation. Furthermore, the Human Rights Council comprises a permanent expert body, namely the Advisory Committee, while ad hoc independent experts are appointed by the Human Rights Council in the context of its Special Procedures. The Advisory Committee can neither undertake action on its own initiative nor adopt decisions or recommendations and therefore its full potential as an expert body cannot be realised. In addition, the Advisory Committee is only involved in the admissibility stage of the complaint procedure of the Human Rights Council which is meant to address gross human rights violations.

Moreover, the various ad hoc inquiries into violations of International Law that have been authorised by the Human Rights Council take place independently of the consent of the country concerned, a factor that is key for their successful set-up and has been facilitated by the inter-governmental nature of the Council.

Regarding the second component of the research question, namely which of the lessons learned can be applied to the IHL framework, the thesis sets out certain parameters against which the monitoring approaches and practices identified in its chapters are assessed in terms of their suitability for the IHL framework. These parameters include the requirements of impartiality, non-selectivity, non-politicisation, feasibility, and non-duplication of existing monitoring functions and mechanisms. Having relied on the above parameters, Chapter 8 of the thesis proposes that a future compliance system under the 1949 Geneva Conventions should comprise thematic reporting, an annual Meeting of the High Contracting Parties to the 1949 Geneva Conventions, and an inter-governmental IHL Committee. The Meeting should be the main decision-making body of the compliance system and it should work closely with the inter-governmental IHL Committee which will supervise, among other functions, the reporting procedure. Furthermore, the above mechanisms should be attached to an institutional structure.

Concerning the other monitoring functions examined and the lessons learned, the thesis considers that the establishment of an expert body to review national reports and, in line with the approach followed by the Committee against Torture, undertake enquiries on its own initiative (in relation to States Parties that have previously accepted its competence) would not be feasible. It has been deemed highly unlikely that an expert body would be vested with the above functions if both an expert mechanism and a Meeting of the High Contracting Parties to the Geneva Conventions co-existed in the same monitoring system and the Meeting exercised a supervisory role over the expert body. An inter-governmental IHL body would fit better within the structure of a future IHL compliance system. With regard to enquiries and the possibility that a future inter-governmental IHL Committee could authorise them, the analysis demonstrates that the approach by the inter-governmental Human Rights Council in setting-up ad hoc enquiries without the consent of the State concerned would not be suitable for the IHL framework given the politicisation risks that such an approach carries. Given the above, the thesis concludes that enquiries should not form part of a future IHL compliance system.

In relation to inter-state complaints, the thesis considers that the establishment of an inter-state IHL complaint procedure would duplicate a function that already exists within the current IHL compliance system and which States are reluctant to use, namely the conciliation functions of the International Humanitarian Fact-Finding Commission. With regard to individual complaints, the incorporation of this monitoring function into a future IHL monitoring framework raises legal and practical challenges. This observation also applies

to the complaint procedure by the Human Rights Council alongside other concerns related to the nature and modalities of this procedure. Concerning the urgent action procedures developed by some of the human rights treaty bodies in response to emergencies, the analysis shows that their practical value would be limited for the IHL framework and would not justify any associated politicisation risks. Because of that, the thesis does not consider the above monitoring procedures suitable for a future IHL compliance system.

Regarding armed non-State actors, the thesis submits that a future treaty-based compliance system under the 1949 Geneva Conventions cannot monitor the implementation of IHL by both States and armed non-State actors. Given the above, the implementation of IHL by armed non-State actors should be overseen by separate monitoring procedures. Furthermore, the creation of synergies in the work of existing and future mechanisms that monitor the implementation of IHL by armed non-State actors should be explored to promote respect for IHL by armed groups.

