

# Improving Compliance towards International Humanitarian Law: Filling in the Gaps

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## Abstract

International Humanitarian Law (IHL) aims to regulate the conduct of parties during hostilities to mitigate the horrors of war, providing safeguards for civilians through instruments such as the 1949 Geneva Conventions, 1977 Additional Protocols, customary IHL, and principles of IHL. Despite its comprehensive framework, applicable to both States and non-state armed groups, non-compliance remains a significant challenge, undermining its credibility and effectiveness. This paper analyzes the current compliance mechanisms, identifies gaps and factors influencing compliance, examines the impacts of these gaps, and proposes strategies to enhance the effective implementation and adherence to IHL in both international and non-international armed conflicts. To address gaps in IHL compliance mechanisms, this paper recommends that States establish permanent platforms for regular IHL discussions and provide institutional support to existing mechanisms. It also emphasizes that considering a multidisciplinary approach towards factors influencing compliance, the enhancement of the roles of national red cross and red crescent societies in the dissemination of IHL and non-governmental organizations and international organizations in humanitarian engagement with all parties to the conflict, as well as fostering cultural sensitivity through open and constructive engagements are essential to develop a holistic IHL compliance system.

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## Introduction

International Humanitarian Law (IHL) refers to a set of formal and customary legal principles that aim to regulate the behavior of conflicting parties during hostilities in order to alleviate the "horrific aspects of organized violence".<sup>1</sup> Commonly referred to as the law of armed conflict or the law of war, IHL governs the use of force during hostilities and provides safeguards for civilians. The 1949 Geneva Conventions along with the 1977 Additional Protocols, customary IHL, and principles of IHL collectively established a comprehensive legal framework for regulating international and non-international armed conflicts that are applicable to both States and non-state armed groups (NSA groups).<sup>2</sup> In situations where the Geneva Conventions do not apply,

<sup>1</sup> J. L. Dunoff, et. al., 2005, *International Law: Norms, Actors, and Processes*, at 501.

<sup>2</sup> N. Melzer, 2016, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, at 21-24; International Humanitarian Law Research Initiative, *Improving Compliance with International*

customary international law still governs the conduct of hostilities.<sup>3</sup> Therefore, IHL served as an anti-thesis to Cicero's dictum, *silent enim leges inter arma* (in times of war, the laws fall silent), as it ensures that armed conflicts and the parties involved in such conflicts are still bound by the law.<sup>4</sup>

Non-compliance with IHL remains the greatest challenge to its credibility, as it can lead to abuses and perpetuate suffering.<sup>5</sup> It is important to recognize that while the objective of IHL is to prevent human suffering and deter violations,<sup>6</sup> as well as to protect civilians and other non-combatants during armed conflicts,<sup>7</sup> the norms themselves cannot guarantee respect and compliance. Rather, they need to be implemented and observed in order to be effective. Consequently, it is necessary to promote and encourage compliance with IHL to uphold its credibility and effectiveness.<sup>8</sup>

However, despite the existence of various methods for ensuring compliance within the current IHL framework, there remain significant gaps and challenges that impede the protection objective of IHL. This academic paper will present (i) an in-depth analysis of the existing compliance mechanism under the current IHL framework, including the methods pursuant to the Geneva Conventions 1949, customary IHL, and other methods under international law. This paper will also (ii) identify the gaps in the current system, including the factors influencing the compliance of parties in an armed conflict with IHL and the causes and implications of these gaps. Moreover, this paper will (iii) examine the impacts of compliance gaps toward the protection objective of IHL. Finally, this paper will (iv) propose strategies or solutions for addressing the deficiencies in the current system to ensure effective implementation and compliance of IHL in international and non-international armed conflict.

### **Methods of ensuring compliance in the current IHL framework**

An effective implementation and compliance of IHL is essential to prevent its violation, minimize the suffering, and protect the rights of civilians and other non-combatants during armed conflicts.<sup>9</sup> Compliance mechanism of IHL comprises of prevention on one end and repressive mechanism for violation of IHL on the other hand. In between the prevention and repression of IHL, there are essentially three mechanisms: the Protecting Powers system, the Enquiry Procedure, and the International Fact-Finding Commission. Such mechanisms can be found under the framework of 1949 Geneva Conventions and customary IHL. Additionally, other branch of international law, such as International Criminal Law, provided additional mechanism to ensure compliance of IHL.

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Humanitarian Law by International Committee of the Red Cross (ICRC), Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, 25-27 June 2004, at 4.

<sup>3</sup> D. R. Atkins, 2007, Customary International Humanitarian Law and Multinational Military Operations in Malaysia, at 80-81.

<sup>4</sup> N. Melzer, Note 2, at 265.

<sup>5</sup> J. Pejic, 2016, Strengthening compliance with IHL: The ICRC-Swiss initiative, International Review of the Red Cross 98, at 316.

<sup>6</sup> K. Thynne, 2019, Implementation of International Humanitarian Law in Southeast Asia: Challenges in the Prevention of Violations, at 688.

<sup>7</sup> N. Melzer, Note 2, at 17.

<sup>8</sup> J. Pejic, note 5, at 316.

<sup>9</sup> N. Melzer, Note 2, at 265.

The prevention of IHL violations during peace times fall within the obligation of States, as envisaged in the 1949 Geneva Conventions, and 1977 Additional Protocol I (AP I). Nevertheless, Red Cross societies and the International Committee of the Red Cross (ICRC) have, and still, contribute to this area.<sup>10</sup> Prevention can encompass a range of actions, such as the enactment of domestic laws that implement the obligations provided in IHL treaties, the provision of sufficient IHL training to armed forces during times of peace, the assignment of legal advisers to the armed forces, and the education and widespread dissemination of IHL principles among the civilian population.<sup>11</sup> Since the 1990s, the efforts to repress serious violations of IHL had also seen significant improvement by encouraging domestic prosecution of war crimes and establishment of international criminal courts.<sup>12</sup>

Therefore, the following sections will discuss the compliance methods provided under the legal framework of IHL.

### **Geneva Conventions and Additional Protocols**

Geneva Conventions stated States have the responsibility to enact any legislation necessary to provide effective penal sanctions for persons responsible for grave breaches of its Conventions. States also have the obligation to search and bring the persons responsible for such grave breaches before its national courts or to transfer the person to another state party of the Geneva Conventions for trial. Moreover, States also have the obligation to take measures necessary to suppress all acts contrary to the provisions of the present Convention aside from the grave breaches.<sup>13</sup>

The mechanism for ‘Protecting Powers’ and ‘Substitute’, which is provided by the 1949 Geneva Conventions and Additional Protocol I, requires both parties to a conflict to choose a neutral State, with mutual agreement, to protect their humanitarian interests and oversee the compliance to IHL. Pursuant to Article 2 of the Additional Protocol I (AP I), by definition, a Protecting Power is “*a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol*”. Meanwhile, a Substitute is usually a humanitarian organization that acts in place of a Protecting Power, such as the ICRC.<sup>14</sup> However, the ‘protecting power’ mechanism has been employed on very few occasions since World War II, with the most recent reported instance occurring more than thirty years ago.<sup>15</sup> Some of the tasks of a Protecting Power or a Substitute include visits of specially protected

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<sup>10</sup> J. Pejic, note 5, at 316.

<sup>11</sup> H. Jo, 2016, Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved? Yearbook of International Humanitarian Law Volume 19, at 65.

<sup>12</sup> International Humanitarian Law Research Initiative, note 2, at 1.

<sup>13</sup> Article 49, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949; Article 50, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949; Article 129, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949; Article 146, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

<sup>14</sup> Article 2 (c)-(d) and 5, 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; Article 10, The First Geneva Convention; Article 10, The Second Geneva Convention; Article 10, The Third Geneva Convention; Article 11, The Fourth Geneva Convention.

<sup>15</sup> J. Pejic, note 5, at 319.

persons,<sup>16</sup> supervision of humanitarian assistance operations and evacuations,<sup>17</sup> transmission of information, documents, and relief goods.<sup>18</sup>

Article 90 of the AP I also envisaged the establishment of an International Fact-Finding Commission, or currently known as International Humanitarian Fact Finding Commission (IHFFC), with an enquiry and good offices role with respect to IHL. However, the IHFFC does not have automatic jurisdiction over the High Contracting Parties of the AP I, as it requires a two-fold consent by ratifying the AP I and the declaration “*that they recognize ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission.*”<sup>19</sup> Currently, there are 76 High Contracting Parties that have accepted competence of the Commission.<sup>20</sup> Additionally, aside from the ICRC that has a broad mandate to maintain the IHL regime in both international and non-international armed conflicts,<sup>21</sup> the IHFFC could be employed on an *ad hoc* basis based on the consent of the parties to also address situations in a NIAC.<sup>22</sup>

### Customary International Humanitarian Law

Customary IHL provides additional rules to ensure compliance towards IHL by all parties to an armed conflict and supplemented the frameworks provided in the Geneva Conventions. The ICRC study identified customary international law in the humanitarian area applicable to international and non-international armed conflicts from state practices.<sup>23</sup>

Pursuant to Rule 139 of the ICRC Study on Customary IHL, “*Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.*”<sup>24</sup> The obligation to ensure respect for IHL is also found under Common Article 1 of the 1949 Geneva Conventions and Article 1(1) of AP I. It is also supported by numerous military manuals and case-laws.<sup>25</sup> In connection with Rule 139, Rule 141 requires States to provide legal advisers to ensure that

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<sup>16</sup> Article 126, The First Geneva Convention; Article 76 and 143, The Fourth Geneva Convention.

<sup>17</sup> Article 11, Additional Protocol I.

<sup>18</sup> Article 71-73, The Third Geneva Convention; Article 23, 55, 59, 61, The Fourth Geneva Convention; Article 70, Additional Protocol I.

<sup>19</sup> Article 90, Additional Protocol I; G. Porretto and S. Vite, The application of international humanitarian law and human rights law to international organizations, Research Paper Series, 2006, at 61-62.

<sup>20</sup> [https://www.ihffc.org/index.asp?page=statesparties\\_list](https://www.ihffc.org/index.asp?page=statesparties_list) (accessed on 15 March 2023)

<sup>21</sup> D. R. Atkins, Note 3, at 82;

<sup>22</sup> International Humanitarian Law Research Initiative, note 2, at 8.

<sup>23</sup> Resolution 1, International humanitarian law: From law to action 26th International Conference of the Red Cross and Red Crescent, 3-7 December 1995; ICRC, 1996, Report on the follow-up to the International Conference for the Protection of War Victims, International Review of the Red Cross No. 310, at 58.

<sup>24</sup> J. Henckaerts and L. Doswald-Beck, 2005, Customary International Humanitarian Law, Volume I: Rules, International Committee of the Red Cross (ICRC), at 495.

<sup>25</sup> Australia, Law of Armed Conflict, Commanders' Guide, Australian Defense Force Publication, Operations Series, ADFP 37 Supplement 1: Interim Edition, 7 March 1994, para. 1209; ICJ, Armed Activities on the Territory of the DRC case (Provisional Measures), Order, 1 July 2000, para. 47(3).

decisions taken by the commanders are in line with IHL. This rule was based on Article 82 of AP I, however it is also contained in military manuals and supported by non-parties to the AP I.<sup>26</sup>

Furthermore, Rule 140 of the ICRC Study on Customary IHL stressed that the obligation to respect and ensure respect for IHL does not depend on reciprocity.<sup>27</sup> It follows the language in the Geneva Conventions that the obligation applies “in all circumstances”.<sup>28</sup> Some military manuals clarify that the practical benefit of adhering to the IHL is that it might inspire the other party to do so, but they do not suggest that respect is subject to reciprocity. For instance, Canadian military manuals required its personnel to treat detained persons properly regardless of how the opposing party treats their personnel.<sup>29</sup> *Kupreskic* supported this rule, stating that legal ‘obligations of a humanitarian nature should not depend on reciprocity’.<sup>30</sup>

Rule 142 of the ICRC Study on Customary IHL provided that parties to an armed conflict have the obligation to provide instruction and education of IHL to their forces, even during peace time.<sup>31</sup> Meanwhile, Rule 143 requires States to educate the civilian population of IHL.<sup>32</sup> Customary IHL also recognizes the use of reprisal as tool to ensure compliance to IHL in international armed conflicts (IAC) based on state practice, however reprisal action against certain persons and objects is now prohibited under customary international law.<sup>33</sup> To employ reprisal, it must follow strict conditions which include the sole purpose of inducing the adversary to comply with the law,<sup>34</sup> as a measure of last resort,<sup>35</sup> proportional,<sup>36</sup> the decision must be taken at the highest level of

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<sup>26</sup> Article 82, Additional Protocol I; Australian Commanders’ Guide, note 24, para. 1206; The Netherlands, *Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412*, Koninklijke Landmacht, Militair Juridische Dienst, 2005, paras. 250–251; Israel, *Rules of Warfare on the Battlefield*, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, at 47.

<sup>27</sup> J. Henckaerts and L. Doswald-Beck, note 24, at 498.

<sup>28</sup> Common Articles 1 and 3, The 1949 Geneva conventions.

<sup>29</sup> Canada, *Code of Conduct for CF Personnel*, Office of the Judge Advocate General, 2005, Rule 6, § 12

<sup>30</sup> ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96; ICTY, *Kupreškić case*, Judgment, 14 January 2000, paras. 515–518.

<sup>31</sup> J. Henckaerts and L. Doswald-Beck, note 24, at 501; Australia, *The Manual of the Law of Armed Conflict*, Australian Defense Doctrine Publication 06.4, Australian Defense Headquarters, 11 May 2006, paras. 13.2 and 13.9; Canada, *The Law of Armed Conflict at the Operational and Tactical Level*, Office of the Judge Advocate General, 1999, Introduction, at i, para. 5.

<sup>32</sup> Additional Protocol I, Article 83; Australian *Manual of the Law of Armed Conflict*, Note 31, para. 13(8); Canadian *Law of Armed Conflict*, Note 31, at 15-1, para. 6.

<sup>33</sup> J. Henckaerts and L. Doswald-Beck, note 24, Rules 146-147, at 519-526.

<sup>34</sup> Australian Commanders’ Guide, note 25, at xxiii; Canadian *Law of Armed Conflict*, Note 31, at GL-17; Indonesia, *The Basics of International Humanitarian Law in Air Warfare*, Indonesian Air Force, 1990, § 15(c).

<sup>35</sup> South Africa, *Advanced Law of Armed Conflict Teaching Manual*, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 3, p. 194; United States, *Field Manual 27-10, The Law of Land Warfare*, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976, § 497(d).

<sup>36</sup> Canadian *Law of Armed Conflict*, Note 31, para. 1507.3

government,<sup>37</sup> and that reprisal must be terminated as soon as the violation of IHL has been discontinued.<sup>38</sup>

On contrary, Rule 148 specified that parties to NIAC do not have the right to resort to reprisals to ensure compliance of IHL. This follows the language of Common Article 3 of Geneva Conventions which prohibitions are applicable “at any time and in any place whatsoever”. Therefore, any reprisals that violate the prohibitions are also prohibited.<sup>39</sup> Moreover, States may also establish universal jurisdiction over all war crimes for their domestic courts, including those not considered as ‘grave breaches’ of the 1949 Geneva Conventions and AP I.<sup>40</sup>

### Other Methods Under International Law

Although the body of IHL is separate from International Criminal Law, the institutions set up under the latter may also serve as a tool to ensure adherence to IHL by prosecuting perpetrators responsible for violations of IHL. The International Criminal Tribunal for former Yugoslavia (ICTY) was established through a UN Security Council resolution,<sup>41</sup> it had jurisdiction over grave breaches of the Geneva Conventions committed in the context of an IAC and NIAC through a broad interpretation of ‘violations of the laws and customs of war’.<sup>42</sup> The International Criminal Tribunal for Rwanda (ICTR) was also established through a UN Security Council resolution and had jurisdiction over ‘serious violations’ of Art. 3 common to the Conventions and of Additional Protocol II. It explicitly provides, for the first time, that IHL violations committed in a NIAC may also constitute as international crimes.<sup>43</sup>

When the Rome Statute of the International Criminal Court (ICC) was adopted in 1998, it included all grave breaches of the Geneva Conventions in international armed conflicts to fall within the jurisdiction of the Court.<sup>44</sup> It is the first treaty that comprises a detailed list of war crimes committed in the context of NIAC, affirming that the notion of war crimes applies to such situations. The list includes serious violations of Article 3 of the Geneva Conventions as well as other violations.<sup>45</sup> The ICC could exert jurisdiction provided that the territorial State or national State is a State Party to the Rome Statute, have accepted jurisdiction of the ICC, or through a referral by the UN Security Council under Chapter VII of the UN Charter.<sup>46</sup>

The existence of the courts aforementioned provided a measure to implement IHL and ensure punishment for violations of IHL, but it is not enough by itself. Nevertheless, successful

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<sup>37</sup> United States, *Field Manual 27-10, The Law of Land Warfare*, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976, para. 497(d).

<sup>38</sup> ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96; Canadian Law of Armed Conflict, Note 31, para. 1507.3; ICTY, *Kupreškić case*, Judgment, 14 January 2000, para. 535.

<sup>39</sup> J. S. Pictet (ed.), 1952, *Commentary on the First Geneva Convention*, ICRC, p. 55.

<sup>40</sup> N. Melzer, note 2, at 271.

<sup>41</sup> UNSC, ICTY Statute, 25 May 1993

<sup>42</sup> ICTY, *Tadić case*, paras. 86-136.

<sup>43</sup> <https://casebook.icrc.org/law/criminal-repression> (accessed on 17 March 2023)

<sup>44</sup> Art. 8(2)(a), Rome Statute of International Criminal Court

<sup>45</sup> Id., Art. 8(2)(c) &(e)

<sup>46</sup> N. Melzer, note 2, at 297.

prosecution of war criminals by international courts and tribunals may serve as a powerful deterrent and strengthen respect for and compliance with IHL.<sup>47</sup>

### **Gaps In the Current System of Ensuring Compliance With IHL**

Despite the existence of the measures and methods to ensure compliance to IHL, the problem of inadequate respect for IHL still remains. To identify the gaps in the current compliance system, it is important to examine the factors that may influence the parties' compliance with IHL.

### **Factors Influencing Compliance With IHL**

Throughout an armed conflict, states and NSA groups frequently change their behavior, which causes an increase or decline in their degree of IHL compliance. This is especially noticeable during ceasefire or peace processes. Each party may use this moment to gain political recognition from local or international audiences, whereas they might want to demonstrate their military strength during active hostilities.<sup>48</sup> For instance, an NSA group in Colombia stopped kidnapping civilians following the initiation of peace negotiations.<sup>49</sup> An NSA group in Uganda initially decreased their attacks against civilian population during a negotiation with the government, but when the negotiation failed the number of attacks increased again.<sup>50</sup>

One consideration in analyzing compliance of IHL is to acknowledge that States and NSAGs may have differing perspectives on different thematic areas. This is especially important because the underlying reasons of violations and compliance will differ depending on the rules. For instance, the reasons behind a party's views on recruitment of child soldiers may differ from those related to the treatment of detainees, and the international community's response should reflect those differences.<sup>51</sup> For States, some scholars opined that governments will likely comply with the treaties they ratified as it is within their interest, which might not always be the case since interests could change over time.<sup>52</sup> Other factors that may need to take into consideration include the self-interest of the parties, their expectation of reciprocity, mutual trust and respect, the public opinion, and criminalization of violations as a deterrent factor.<sup>53</sup>

Furthermore, one of the obstacles to ensure compliance is the unwillingness of States to acknowledge the existence of a non-international armed conflict (NIAC) and out of fear that it will give legitimacy to the NSA groups, which resulted in the denial of applicability of IHL in the conflict. Meanwhile, the NSA groups might find little benefits from adhering to IHL as their participation in the conflict itself warrants a sanction under domestic laws, unlike combatants whose participation in conflict is not subject to prosecution according to IHL.<sup>54</sup>

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<sup>47</sup> Id.

<sup>48</sup> <https://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/> (accessed on 18 March 2023)

<sup>49</sup> ICRC, The Roots of Restraint in War, 12 June 2020, at 41.

<sup>50</sup> J. A. Stanton, 2016, Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law, at 265.

<sup>51</sup> <https://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/>, note 48.

<sup>52</sup> J. A. Stanton, Note 50, at 60-61.

<sup>53</sup> N. Melzer, note 2, at 265-267.

<sup>54</sup> International Humanitarian Law Research Initiative, note 2, at 4.

## Identification Of the Gaps or Challenges in The Current System

The compliance mechanisms that are available are not integrated into a larger institutional compliance framework. It is worth to be noted that the legal framework of IHL under the Geneva Conventions and the Additional Protocols do not include a mechanism for States to meet or report the implementation of their treaty obligations.<sup>55</sup> The absence of such institutional framework means that the three compliance mechanisms do not have the much-needed support of institutions and become a gap in the compliance system. These mechanisms are not equipped to fulfil the role of a standing institution as their purpose is not to act as a forum for dialogue and cooperation between States on IHL issues.<sup>56</sup> Moreover, these compliance mechanisms were envisaged in treaties that only apply in an IAC when the majority of armed conflicts at the moment are taking place in the context of NIAC.<sup>57</sup>

Due to the lack of compliance mechanisms for NIAC, the UN Commission on Human Rights and the Inter-American Commission on Human Rights put an effort to fill in such gap. However, such effort was limited by the fact that they do not have a formal mandate to deal with IHL, especially with violations committed by NSA groups. Mostly, these bodies would report issues of IHL in NIAC through their findings or recommendations.<sup>58</sup>

As a result of the absence of the platform, there is a disconnect between the actors at the national and international levels in terms of exchange of information and supervisory of States' implementation measures to ensure compliance with IHL.

## Impacts Of Gaps in Compliance Mechanism Toward the Protection Objective Of IHL

One of the main objectives of IHL is to "*limit the means and methods of warfare that may be employed by parties to an armed conflict and to protect persons who are not, or no longer, involved in hostilities.*"<sup>59</sup> Scholars commented that the present level of suffering and humanitarian needs resulting from armed conflicts would be significantly lower if States and NSA groups properly implemented IHL both before and after the occurrence of an armed conflict.<sup>60</sup>

With the lack of institutional support that could normally be provided through a regular overseeing of the practice and compliance of IHL by States and NSA groups, it would affect the ability of IHL as a body of international law to achieve its aim to provide protection for prisoners of war, medical personnel, civilians, and those who are not taking active part in hostilities. Without the existence of a platform or a regular body that allow states to discuss issues relating to implementation and enforcement of IHL,<sup>61</sup> it will also be harder for States to reach an agreement or cooperation with other States when urgent measures to are needed to fulfil the protection objective.

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<sup>55</sup> <https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/> (accessed on 14 March 2023)

<sup>56</sup> 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015, strengthening compliance with international humanitarian law: Concluding report (2015, 32IC/15/19.2) at 9.

<sup>57</sup> Id., at 9.

<sup>58</sup> International Humanitarian Law Research Initiative, note 2, at 9.

<sup>59</sup> N. Melzer, note 2, at 17.

<sup>60</sup> 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent Concluding Report, note 56, at 4.

<sup>61</sup> Id., at 14.



## Strategies For Fulfilling the Gaps in The Current IHL Compliance System

This section will propose strategies or solutions that could be taken to fill in the gap within the IHL compliance system. It will also discuss the potential role of organizations in promoting compliance with IHL. Lastly, it will discuss strategies to address the compliance challenges in the context of NIAC and NSA groups.

### Strategies To Improve the Effectivity of The Compliance Mechanism and Implementation Of IHL

In 2015, the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent failed to gain consensus on the establishment of a global 'forum' for this purpose. However, the resolution did state that States (with the assistance of the ICRC and Switzerland) are encouraged to explore the concept further. It also stated that the role of regional fora, as well as the International Conference itself, should be examined.<sup>62</sup> Therefore, it is recommended that States continue to with an 'inclusive and state-driven intergovernmental process' to reach an agreement on the establishment of a potential forum or body as a platform for regular discussion on issues related to IHL, as well as discussing the ways to maximize the potential use of the International Conference and regional IHL forums.<sup>63</sup>

The 32<sup>nd</sup> International Conference generally affirmed that a platform for regular meetings of States should be established as the core element of a potential new IHL compliance system. As previously stated, such platform would serve as a venue for states to have dialogues and engage in cooperation regarding IHL issues which concern multiple states, carry out functions connected with implementation and enforcement of IHL in order to strengthen respect and compliance with IHL, and serve as the institutional foundation of the future IHL compliance system.<sup>64</sup> The mandate of the platform for meetings of States will focus on improving the 'understanding and implementation of IHL' instead of developing the rules of IHL. This platform shall give States the opportunity to "*examine practical experiences in the application of IHL*", "*observe challenges in IHL implementation*", "*share best practices*", "*flag capacity-building needs and foster international cooperation in addressing such needs with the consent of the States concerned.*"<sup>65</sup>

However, the possibility for such platform to enact resolutions resulting from the discussion based on its foreseeable functions should not be completely taken out of the picture. States had generally shared the same view regarding the possible compliance functions of the platform, which may include a reporting mechanism concerning the States' compliance with IHL on the national level, thematic discussion on IHL issues that is attached to the platform for meetings of States, as well as the possibility to include more compliance mechanisms based on the participating States' agreement.<sup>66</sup>

Additionally, national red cross and red crescent societies may have a crucial role in the education and dissemination of IHL toward general population to enhance respect for IHL. By

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<sup>62</sup><https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/> (accessed on 14 March 2023).

<sup>63</sup> 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015, Resolution 2: Strengthening compliance with international humanitarian law (32IC/15/R2).

<sup>64</sup> 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent Concluding Report, note 56, at 14.

<sup>65</sup> Id., at 14.

<sup>66</sup> Id., at 14.

fulfilling their role at the national level and contributing to the potential new IHL compliance mechanism through specific modalities as to be determined by States, the national societies could provide significant difference and help States take a more active part in promoting and ensuring adherence of IHL.<sup>67</sup>

Furthermore, to complement the efforts taken by States at the national level to ensure compliance with IHL, The ICRC and the Geneva Academy of International Humanitarian Law and Human Rights developed guidelines for investigating violations of IHL. These guidelines provide practical assistance by laying down a general framework for investigations in armed conflict and indicating the corresponding international principles and standards. These guidelines can be employed to ensure proper investigations undertaken by states in case of a suspected violation of IHL, which is crucial as investigations are also *“a form of accountability to a state’s own population, to the victims of violations of IHL and their families, to the population of another territory in which its military may be operating and to the international community.”*<sup>68</sup>

### **Potential Role of NGOs, Ios, And Other Actors in Promoting Compliance With IHL**

The UN Security Council recognized the need for ‘consistent engagement by humanitarian agencies with all parties to armed conflict’ for humanitarian purposes, including through the activities that are aimed at ensuring respect for IHL.<sup>69</sup> They affirmed that humanitarian engagement with NSA groups is critical to obtain safe and timely access to populations who live under the control or influence of these groups, as well as promoting respect for IHL. In 2021, the engagement of a non-governmental humanitarian agency known as Geneva Call with NSA groups regarding the promotion of IHL managed to convince an armed group in the Syrian Arab Republic to move some of its military bases from civilian areas to other areas. Its engagement with an armed group in Yemen resulted in the signing of a unilateral declaration on the protection of health care. Additionally, over 1,000 members of non-state armed groups were provided training on the protection of children, education and the prohibition of sexual violence.<sup>70</sup>

Prior to that, in 2017, Geneva Call also successfully managed to urge parties to armed conflict in the Democratic Republic of Congo to release children from their involvement in the conflict and convinced a Non State Armed Group to ban the use of child soldiers by signing the Deed of Commitment protecting children in armed conflict.<sup>71</sup> Geneva Call’s work in 2015 which pursued the banning of anti-personal landmines also resulted in the destroying of antipersonnel mines by a NSA group in Sudan following the group’s signature of a deed of commitment to do so.<sup>72</sup>

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<sup>67</sup> Id., at 35.

<sup>68</sup> ICRC, Twelve Issues for 2022: What States can do to Improve Respect for International Law, 21 March 2022.

<sup>69</sup> UNSC, Statement by the President of the Security Council, S/PRST/2013/2, 12 February 2013, at 4; UNSC, Protection of civilians in armed conflict: Report of the Secretary-General, S/2022/381, 10 May 2022, para 66.

<sup>70</sup> UNSC, Protection of civilians in armed conflict: Report of the Secretary-General, S/2022/381, 10 May 2022, para 65.

<sup>71</sup> <https://www.genevacall.org/dr-congo-child-soldiers-leave-armed-actors-following-geneva-calls-awareness-raising-efforts/> (accessed on 18 February 2023)

<sup>72</sup> <https://www.genevacall.org/sudan-sudan-peoples-liberation-movement-north-neutralizes-211-stockpiled-anti-personnel-mines/> (accessed on 18 February 2023)

As Heffes pointed out, the evaluation of adherence to any legal framework, whether in times of peace or armed conflict, necessitates an “*understanding of both rational (and collective) and emotional (and individual) drivers*”. Despite the widespread recognition of the latter's significance in transitional justice, it is often disregarded in the measures intended to promote respect for IHL in regions affected by armed conflict. To address such gap, consideration should be given to engage with experts from diverse disciplines, including social psychology and organizational sociology, which possess the necessary expertise in dealing with issues of group identity and intergroup conflict, in discussions regarding compliance of IHL. These experts can offer valuable insights to individuals and institutions seeking to understand patterns of behavior in conflict settings.<sup>73</sup> Therefore, an integrated and multidisciplinary approach through cooperation with experts and non-governmental agencies specializing in social psychology or organizational sociology should be considered to promote respect for IHL.

Additionally, it is recommended that international organizations such as the UN and EU to introduce ‘standing and well-framed humanitarian exemptions in sanctions regimes’ to encourage and enhance further compliance with the rules, customs, and principles of IHL, which will be adopted and translated into domestic legislation by States to ensure its full effect.<sup>74</sup>

#### **NIAC: Addressing The Challenges of Non-International Armed Conflicts and Non-State Actors**

As previously mentioned, one of the significant challenges that has not been covered by the compliance mechanism in the current IHL framework is the fact that NSA groups have little incentives to adhering to IHL as their participation in the conflict will be met with penal sanctions even if they comply with IHL.<sup>75</sup>

Therefore, States might consider giving greater incentive such as the possibility of granting immunity from prosecution under domestic law or amnesty with condition that they did not commit any violations of IHL.<sup>76</sup> The connection between the grant of amnesty by the State and an commitment of compliance with IHL by the NSA group could also be made through a special agreement.<sup>77</sup> States could, in other words, make a grant of amnesty contingent upon the armed group’s commitment to and subsequent compliance with IHL.<sup>78</sup> Such special agreement was acknowledged by the ICTY and “*shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only.*”<sup>79</sup>

If a special agreement could not be achieved, a unilateral declaration by an armed group of its commitment to comply with IHL could be suggested in tandem with a verification mechanism that could ensure supervision of compliance IHL in the conflict. Through engagement

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<sup>73</sup> <https://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/> (accessed on 18 March 2023).

<sup>74</sup> ICRC, Twelve Issues for 2022: What States can do to Improve Respect for International Law, 21 March 2022.

<sup>75</sup> International Humanitarian Law Research Initiative, note 2, at 4-5.

<sup>76</sup> Id., at 5.

<sup>77</sup> Id., at 6.

<sup>78</sup> Id.

<sup>79</sup> ICTY, Tadic case, Decision, 2 October 1995, para. 73; International Humanitarian Law Research Initiative, note 2, at 6.

with the leaders of NSA groups, it could be advocated that compliance might lead to some benefits such as reciprocal respect by the State and enhanced legitimacy as a political actor.<sup>80</sup> Another solution that could be considered is the recognition of compliance with IHL as reduction of punishment in domestic trials, of which the commitment could be announced during or prior to the end of a NIAC.<sup>81</sup>

Moreover, NSA groups' compliance with IHL could be improved if measures are taken with consideration of the legitimacy of the law and the authority enforcing it which may also include local, customary and religious norms, the reputational element that NSA groups may gain by following or violating an IHL rule against the opposing party, the past experiences of members which may influence their decisions such as treatment of POWs or recruitment of child soldiers, and the existence of incentives or disincentives in form of punishments and rewards under social, material, or religious categories.<sup>82</sup>

### **Cultural Sensitivities in the Development and Implementation of IHL: A Case Study of Islam**

It has been over two decades since international law has been under fire for its Eurocentrism. A strong academic movement has emerged and strongly developed, pushing for inclusion of voices previously unheard in the development of international law.<sup>83</sup> Among these voices are from the Islamic world, inheriting a very rich body of intellectual heritage in various fields (including law) developed over a thousand years before largely ending up on the bottom end of colonialism. Today, Islamic law is on one hand (thanks to colonialism) largely eroded in application in Muslim nations, but is nonetheless one of the recognized major legal families of the world.<sup>84</sup>

Especially in context of IHL, many armed conflicts today involve religious but perhaps none as much as Muslims<sup>85</sup> and Islamic law has a very strong heritage of classical law resources regarding the conduct of war.<sup>86</sup> This is why scholars, Muslims and non-Muslims alike, have urged

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<sup>80</sup> International Humanitarian Law Research Initiative, note 2, at 7.

<sup>81</sup> *Id.*, at 5

<sup>82</sup> <https://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/> (accessed on 18 March 2023).

<sup>83</sup> See *inter alia*: Al Attar, "Reframing the 'Universality'"; Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?"; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*.

<sup>84</sup> Badar, "Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court," 412–14.

<sup>85</sup> The term "involvement" here includes as victim and/or party (or parties) to armed conflicts. See: Ahmed Al-Dawoody, *IHL and Islamic Law in Contemporary Armed Conflict: Expert Workshop, Geneva 29-30 October 2018* (Geneva, 2019), p. 13 <<https://www.icrc.org/en/document/eyeperts-workshop-report-ihl-and-islamic-law-contemporary-armed-conflicts>>.

<sup>86</sup> See *inter alia*: Muḥammad ibn Aḥmad ibn Abi Sahl Al-Sarakhsī, *Sharḥ Al-Siyār Al-Kabīr* (Egypt: Al-Shirkah al-Sharqiyah li l-I'lānāt, 1971); Abū Ishāq Al-Fazārī, *Kitāb Al-Siyar* (Beirut: Mu'assasah al-Risālāh, 1408); Abū Zakariyā Muḥī Al-Dīn Ibn Nuhās, *Mashāri' Al-Ashwāq Ila' Maṣāri' Al-Ushāq* (Beirut: Dār al-Bashā'ir al-Islamiyyah, 1990).

the inclusion of Islamic law to develop international law generally<sup>87</sup> and IHL specifically.<sup>88</sup> International organizations like the ICRC has, for decades, been committed to dialogues with religious circles including especially Muslim scholars.<sup>89</sup>

While these efforts are certainly appreciated, they do not come without problems. First, there is a tendency of Muslim scholars dishonestly cherry-picking Islamic traditions for the sake of showing that Islamic law is compatible with international law, whether generally or IHL specifically.<sup>90</sup> Badawi sees this as a display of inferiority complex on part of some Muslim figures.<sup>91</sup> The inferiority complex of some Muslims is met by superiority complex of the non-Muslims, who appear to only want to listen to Islam insofar as it fits their secular non-Islamic worldview.<sup>92</sup>

Second, partly (but not entirely) due to the first problem, there is a lethargy in Islamic scholarship of international law (*siyar*) generally and laws of war (*fiqh al-jihad*) specifically.<sup>93</sup> Particularly regarding Islam and IHL, there may be quite a lot of new literature emerging in the past decade but a vast majority of them are unnecessarily bizarrely repetitive.<sup>94</sup> Such literature focus on showing some compatibilities between Islam and IHL at some general and very shallow principle levels, but a multitude of potential incompatibilities in the extremely rich bodies of literature of both Islam and IHL remain largely unexplored. There have been some efforts lately, but there is a long path ahead.<sup>95</sup>

It is one thing to be grateful of compatibilities between various cultures, in this context we speak of Islamic law. However, it is another thing to honestly address the differences and perceived incompatibilities. Bridges are often built from both sides: there is room for Islam to accept some norms of international law, and there should be room for the (Eurocentrically) established international law and IHL to accept some norms of Islamic law. Ultimately, there will be limits of acceptance from each side to the other, but engaging in constructive dialogue to develop a truly universal international law.

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<sup>87</sup> See *inter alia* Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?"; Al-Khasawneh, "Islam and International Law"; C. G. Weeramantry, *Islamic Jurisprudence An International Perspective*.

<sup>88</sup> Fraser, "A Seat at the Table: Islamic Law's Neglected Potential in Universalising International Humanitarian Law"; Mutaqin, "Restraining Violence."

<sup>89</sup> See: Maurer, "International Conference on Islam and IHL - Statement by the ICRC"; Al-Dawoody, "IHL and Islamic Law in Contemporary Armed Conflict: Expert Workshop, Geneva 29-30 October 2018."

<sup>90</sup> Badawi, "Critical Comparativism."

<sup>91</sup> Badawi.

<sup>92</sup> See, for example, the curious case of the Beirut Declaration and the dialectics between Islam and Human Rights: Muhammadin, "The United Nations' Beirut Declaration and Its 18 Commitments on Faith for Rights: A Critique From An Islamic Perspective."

<sup>93</sup> See: Muhammadin and Azzahra, "The Role of Fiqh Al-Siyar"; Muhammadin and Wahab, "Fiqh Al-Jihād In."

<sup>94</sup> See a short review by: Fajri Matahati Muhammadin, 'Fiqh Al-Jihād In The Contemporary World: Addressing the Gaps in the Regulations on the Means and Methods of Warfare' (unpublished Ph.D. Thesis, International Islamic University of Malaysia, 2020), pp. 16–17.

<sup>95</sup> See *inter alia*: Muhammadin and Sadzali, "The International Criminal"; Muhammadin, "Fiqh Al-Jihād"; Muhammadin and Wahab, "Fiqh Al-Jihād In."

Crucially, if a people were forced to obey laws which's making never included them,<sup>96</sup> is it convincing to demand them to comply? Rules closer to home and heart might have a better chance of compliance.<sup>97</sup>

## **Conclusion**

To address the gaps in the compliance mechanism of IHL, States are encouraged to establish a permanent platform for regular meetings discussing issues of IHL and to give institutional support to the existing mechanisms. Based on the findings of this paper, factors that influence compliance should also be given heavy consideration in the formation of a new potential compliance mechanism to ensure better compliance with IHL by parties to an armed conflict.

Along with maximizing the roles of national Red Cross and Red Crescent societies in the education and dissemination of IHL and the roles of non-governmental organizations and international organizations in their humanitarian engagement with all parties to armed conflict to promote respect for IHL, putting more efforts into understanding the factors which influence compliance through an integrated and multidisciplinary outlook may provide a more holistic approach that is missing from the current IHL compliance system. Cultural sensitivity in the development of IHL specifically and international law generally should be escalated and manifested through honest, open minded, and constructive engagements, as part of bottom-up efforts to increase compliance. This could bring more positive outcomes in overcoming the challenges of non-compliance, particularly by NSA groups.

There are various ways to attempt to approach this problem, some more difficult than others. Nonetheless, IHL was meant to show restraint and compassion in times of war where such a thing is perhaps the most difficult.<sup>98</sup> Any solution would necessarily be difficult, but perhaps humanity cannot afford to spare any effort in making IHL compliance better.

## **CRedit Authorship Contribution Statement**

**Fitry Nabiilah Hamidah:** Conceptualization, Methodology, Writing-original Draft. **Fajri Matahati Muhammadin:** Supervision, Methodology, Writing - review & editing

## **Declaration of Competing Interest**

The authors declare that they have no competing financial interests or personal relationships that could influence the work reported in this paper.

## **Data Availability**

Data will be made available on request

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<sup>96</sup> This was the situation with newly independent states facing an international law regime already established by the colonizers: Anghie, "Towards a Postcolonial International Law," 137.

<sup>97</sup> Muhammadin and El-Mechwar, "Masyumi's" Djihad Dan Qitaal" and Islamic Laws of War: Ahead of Its Time?," 326–28; Bartles-Smith, "Religion and International Humanitarian Law."

<sup>98</sup> Wortel, "Humanitarians and Their Moral Stance in War: The Underlying Values."

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