

Minimizing Human Suffering and Protecting Persons Affected by Conflict: A Critical Appraisal of the Compliance System of International Humanitarian Law

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How to cite this paper: Kremte, H. A. (2017). Minimizing Human Suffering and Protecting Persons Affected by Conflict: A Critical Appraisal of the Compliance System of International Humanitarian Law. *Beijing Law Review*, 8, 440-450.

<https://doi.org/10.4236/blr.2017.84024>

Received: October 2, 2017

Accepted: November 26, 2017

Published: November 29, 2017

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Abstract

Egregious violations of international humanitarian law (IHL) are being committed every day both by states and non-state parties to a battle. This does not, however, mean that all contemporary armed conflicts are always and inexorably characterized by sweeping and widespread violations. Nevertheless, the disregard of IHL causes devastation and appalling suffering for the victims. What makes such violations even more reprehensible is that the sufferings could be avoided had the pertinent IHL rules were respected. Hence, initiatives should focus on enhancing the efficacy of IHL compliance mechanisms to ensure the lofty aim of IHL, minimizing human suffering and protecting victims. In this essay, a scrutiny on the adequacy of current IHL compliance system in light of contemporary armed conflict is made and a conclusion as to the existence of loopholes has been reached.

Keywords

Compliance System, Contemporary Armed Conflicts, Human Suffering, Protected Per-Sons

1. Introduction

It is axiomatic that the overriding objective of IHL is to lighten the suffering of persons affected by war regardless of the underlying causes or the justification of the conflict by defending those not or no longer taking part in a conflict and by regulating the means and methods of combat. In contemporary armed conflicts, however, protected persons are indebted to pay high price including death, injury

and lasting disability as well as widespread annihilation of their homes, livelihoods and infrastructure. All this materializes as the ICRC said in multifarious fora, not because of the lack of rules but rather the widespread blatant violations of those that already exist. This could be attributable to lack of satisfactory enforcement mechanisms or knowledge of IHL or both (*International Institute of Humanitarian Law, 2013: p. 55*).

Finding ways and means to ensure greater respect for IHL is, thus, one of the most demanding humanitarian challenges. Recent developments in Mali, Nigeria, Cameroon Chad, the Arab Spring uprisings, the persisting civil war in Syria and the endless crisis in Afghanistan are also constant reminders of the need to focus on strengthening compliance system of IHL (*International Institute of Humanitarian Law, 2013: p. 9*). This is because the grand aim of IHL, minimizing human suffering and protecting person affected by violence, could not be achieved by the mere existence of the law rather it must be coupled with strong compliance system.

This essay has the aim of exploring and discovering the situation in contemporary armed conflict in tandem with the rules of war, the inadequacy of current IHL compliance system and the possible recommendation to strengthen compliance mechanism to minimize horrible effect of war. In general, it addresses the following major issues: the degree of respect for IHL in contemporary armed conflict is examined, an evaluation as to the adequacy of the existing compliance system of IHL in ensuring respect for the rule of war is made, and the ways to strengthening the compliance system of IHL are recommended. These include, among other, forwarding means for revitalization of the existing system and adoption of additional mechanisms. Finally, the essay contains conclusion.

2. Overview of Contemporary Armed Conflicts

Nowadays, armed conflicts are taking place in almost all regions of the world, the majority being non-international (NIAC) (ICRC, 2008, p. 5). The behaviors observed therein are increasingly defying the very notion of humanity. For example, by the year 2014 alone, 40 armed conflicts were active in 27 places worldwide, which is the highest number of conflicts reported since 1999 (*Pettersson & Wallensteen, 2015: p. 537*)¹.

In the face of their prohibition, we are witnessing to sustained daily transgressions of IHL, including thoughtful attacks against civilians, the destruction of infrastructure vital to the civilian population, the forcible displacement of entire communities from their habitual places and various forms of sexual violence inflicted against vulnerable individuals and groups (*ICRC, 2007: p. 720*).

Persons deprived of liberty in armed conflict are likewise recurrently susceptible to appalling behavior by their captors, including murder, torture and other

¹Among other, Iraq, Syria, Libya, Afghanistan, Somalia, Central Africa Republic, Nigeria, Pakistan and South Sudan can be cited. However, this does not mean that all of the 40-armed conflicts were regulated by IHL.

forms of ill-treatment, inhuman conditions of detention and denial of procedural safe-guards and fair trial rights. Medical personnel and philanthropical workers are also becoming an increased target of attack (ICRC, 2007: p. 20).

In many instance, banned means and methods of warfare are employed by state and non-state armed groups. For instance, in Syria, war is being fought street by street, in trenches, through sieges and starvation. Noncombatants are being used as human shields. Armed groups such as the Syrian National Coalition and the Kurdish Supreme Council, and Syrian government forces fight for control over territory using all available means. Specifically, the Syrian government has deployed more imprecise weaponry such as unguided missiles, cluster munitions and thermo-baric bombs. Civilians have been killed by mortars landing in the streets; others have been crushed by rubble after their homes are destroyed by barrel bombs. Chemical weapons are also used though they are banned (United Nation's Human Rights Council, 2013: p. 6).

In addition, attacks by using explosive weapons towards populated areas like towns, market centers, ritual places and schools are rampant. Due to this, the civilians in Syria, Gaza, Libya, Iraq, Eastern Ukraine, Somalia, Nigeria, and many more have experienced, and continue to experience, the horrible effect of explosive weapons (Belete, 2015: p. 3).

These substandard respects for the rules have been a constant- and unfortunate result of the lack of political will and practical ability of states and armed groups engaged in armed conflicts to abide by their legal obligations (ICRC, 2003: p. 20). In many situations, this is linked to a repudiation of the applicability or relevance of IHL. The fact that armed groups usually enjoy no immunity from domestic criminal prosecution for mere partaking in hostilities (even if they respect IHL) remains an important disincentive in practice for better IHL compliance by such groups (ICRC, 2003: p. 23). The strategy employed by non-state actors in asymmetric warfare, including terrorism, also constitutes a big challenge for IHL.

Though the existing rule is sufficient to protect civilians and civilian objects from the act of terror committed in armed conflict, such assault remains common (ICRC, 2007: p. 723). From the non-state actors point of view, the targeting of civilians and civilian objects is often seen as a necessary mean to obtain a certain goal, which means there is a deliberate non-compliance of IHL.

It remains the case that some states appear increasingly reluctant to admit that they have become parties to an armed conflict even if facts on the ground prove otherwise, and, therefore, deny that IHL applies to their actions.

Thus, the entire horrific situation is a deep alarm to the ICRC and other stakeholders to work on strengthening compliance system of IHL thereby exerting the effort to minimizing human suffering.

3. Adequacy of the Existing IHL Compliance Mechanisms

Over the years, states, supported by other actors, have devoted a substantial effort

to formulating and implementing peacetime preemptive measures aimed at ensuring better respect for IHL (ICRC, 2004: p. 1). Despite these preventive and repressive measures, however, insufficient respect for the rules of IHL during armed conflict remains an abiding problem (Ibid).

As time went by, human casualties and civilian object highly escalated. For instance, in 2014, “the number of people killed as a direct consequence of conflicts passed 100,000 for the first time in more than 25 years” (Gates, Nygård, Strand, & Ur-dal, 2016: p. 2). This reality of war questioned the adequacy of the existing IHL compliance system².

At this juncture, there are two lines of arguments advocated by scholars and stakeholders³. The first line is all about adequacy of the compliance system. Those who argue in favor of this line reiterate their view saying that the potential for reinforcing existing mechanisms has not yet been fully explored. In their view, any effort should concentrate on ways and means of strengthening the application of compliance mechanisms provided for by the Geneva Conventions of 1949 and Additional Protocol I, as well as enable an overview of mechanisms established under other bodies of international law before they could concur with the view that there is a need for new mechanisms (ICRC, 2014: p. 5). This argument does not seem to hold water because the existing compliance systems of IHL are of limited scope, they were crafted for international armed conflict (IAC) only, and they have rarely, if ever, been used. Further the Specificities of armed conflict, the lack of a specific IHL mandate and of the non-obligatory nature of other body of law with respect to the behavior of non-State armed groups, once and again, questioned their position (ICRC, 2013: p. 5). The second line of argument, on the other hand, advocates that existing mechanisms do not

²IHL treaties establish three main compliance mechanisms applicable during armed conflicts: Protecting Powers, the International Humanitarian Fact-Finding Commission, and a formal enquiry procedure. Common article 8 of the Geneva Conventions introduced the system of appointing Protecting Power. It is a neutral state authorized by a warring state to defend its welfares and those of its nationals’ vis-a’-vis an adversary state. It has two major roles. In one hand, it can conduct relief and protection operations to the victims. On the other hand, it supervises the belligerents’ compliance with their legal undertakings. However, if protecting powers are not appointed by any means, common article 10 of the Geneva Conventions provide for the ICRC to take the place of the Protecting Power, and make provision for the ICRC to visit prisoners of war and detained civilians. Article 5 of Protocol I, which gives the ICRC a new role, lets it to tender its good offices to the Parties to the battle. Be that as it may, the role of Protecting Powers has been ever more neglected. It has been appointed in only five IACs since the adoption of the 1949 GCs. Further, Article 90 of Additional Protocol I announced the International Humanitarian Fact-Finding Commission with the role of inquiring into any accusations of serious violations of the Geneva Conventions or API. It is also competent to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol. The international community thought that the doings of the Commission should help to prevent polemics and violence from escalating during a conflict. However, to date the Commission has not been used, despite more than 70 States having made a general declaration accepting the competence of the IHFFC. An enquiry procedure is provided for under the Geneva Conventions, but to date has not worked at all since its inception. It intended to resolve dispute between state parties to an IAC regarding alleged violations. However, any attempt to establish enquiry procedures have failed in the past. Its ultimate reliance on the belligerents’ consent is undoubtedly one of the reasons for its failure.

³Stakeholders include states, ICRC, publicists and other organs.

work effectively and calls for the introduction of a new compliance system (Ibid).

I opined out that the main existing compliance mechanisms such as protecting powers⁴, enquiry procedure⁵, IHFFC⁶ and other mechanisms are suffered with lacunae. This is because, firstly, in a global context where most contemporary armed conflicts are NIAC, none of the prevailing IHL supervision mechanisms, apart from the ICRC's role referred to in article 3 common to the Geneva Conventions, is expressly authorized to address situations of NIAC. These unfortunately add to their obsolescence. Secondly, the execution of IHL suffers from a lack of institutionalization and coordination. For instance, practical measures to improve compliance are implemented without the wider international community being informed (Halter, 2014: p. 7). Even the meeting of state contemplated by article 7 of Additional protocol I is limited only to an examination of "general problems" but not of compliance more broadly. Moreover, it applies only to State parties to the Protocol. Thirdly, the above three existing IHL compliance mechanisms have never or rarely been used even though egregious violation of IHL is committed. Hence, they are considered as archaic mechanisms by many (International Institute of Humanitarian Law, 2013: p. 113). Fourthly, most of existing IHL mechanisms relies on the sole initiative or acceptance of the parties to a conflict to act. Fifthly, implementation of the protecting power mechanism is most likely cumbersome since the three states concerned must come to an agreement on the principle, which is difficult when two of them are at war. Six, while it is today uncontroversial that armed groups, like state, are internationally responsible for violations of IHL, the exact rules on attribution, content and implementation of such responsibility are not yet clarified (Sassoli, 2010: p. 44).

All in all, the inadequacy of existing IHL compliance mechanisms is not doubtful. They merely rely on the will of the parties to a conflict to act. They also lack attachment to a broader institutional compliance structure. To the worst, none of the existing IHL supervision mechanisms, apart from ICRC, is expressly authorized to address situations of NIAC. They are provided for in treaties that were crafted to regulate IAC though NIAC now constitutes the great majority.

4. The Way Forwarded

The challenges to the effective implementation of IHL self-evidently exist (International Institute of Humanitarian Law, 2004: p. 45). Hence, it is undeniable for the need of strengthening the compliance system of IHL. This can be made

⁴Geneva Convention I of 12 August 1949, Article 8; Geneva Convention II of 12 August 1949, Article 8; Geneva Convention III of 12 August 1949, Article 8; Geneva Convention IV of 12 August 1949, Article 9; and Additional Protocol I to the Geneva Conventions of 12 August 1949, Article 5.

⁵Geneva Convention I of 12 August 1949, Article 52; Geneva Convention II of 12 August 1949, Article 53; Geneva Convention III of 12 August 1949, Article 132; Geneva Convention IV of 12 August 1949, Article 149.

⁶The International Humanitarian Fact-Finding Commission (IHFFC) was created in 1991 pursuant to Article 90 of Additional Protocol I.

possible both by improving the existing system as well as by introducing new mechanism to this effect. This section thus forwards means to strengthening IHL compliance system to alleviate the legal as well as extra legal problems in relation to the insufficiency of respect for IHL in contemporary armed conflicts.

4.1. Dissemination

States have a duty, in peace and during armed conflicts, to take certain legal and practical measure, in good faith⁷, aimed at guaranteeing full compliance with IHL. Dissemination of IHL both before and after the eruption of armed conflict remains an essential step to observe such obligation because the knowledge of IHL is a condition of its respect. Thus, States parties to the 1949 Geneva Conventions and their 1977 **Additional Protocols** should strive to disseminate the provisions of those instruments as widely as possible. Besides, ICRC and other organs shall continue their astonishing effort to assist the state in this regard.

4.2. Revitalization of Existing Mechanisms

As part of strengthening the system, focus on the improvement of existing mechanisms and their adaptation to deal with situations of NIAC is one tool in minimizing casualties of war. Thus,

1) Renewed attention should be given to the IFFC, established pursuant to Article 90 of Additional Protocol I (**International Institute of Humanitarian Law, 2004: p. 25**). In doing so, its formal competence should be revised to cover all situations of armed conflict and with the capacity to trigger itself. It should also have its own follow-up procedures.

2) Armed groups should be encouraged to pledge themselves to respect IHL by increasing their sense of ownership over this law because having internal commitment by the group is psychologically and diplomatically nicer in ensuring better respect for IHL. Thus, the following can be cited as a means:

- ❖ Inspiring special agreements between states and armed groups, such as those envisioned under common article 3 of the Geneva Conventions. This offers the parties to the conflict with added incentive to comply based on mutual consent.
- ❖ Encouraging armed groups to issue and deposit unilateral declarations of their commitment to comply with IHL. For instance, in the non-governmental International Campaign to Ban Landmines, the Non-State Actors Working Group and Geneva Call have succeeded in obtaining adherence to a “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action” by 38-armed group⁸.
- ❖ Motivating armed groups to adopt their internal codes of conduct on respect for IHL. Particularly this could be effective where groups are worried about their public image and reputation. The case of ANC in South Africa, PKK in

⁷UN, Vienna Convention on the Law of Treaties, Treaty Series 1155 (1969), art. 26.

⁸See for the list online Geneva Call, <http://www.genevacall.org>.

Turkey, and Mujahedin in Afghanistan can be cited as an example.

- ❖ Easing the founding of monitoring body by armed groups. This body may be established based on either the individual codes of conduct of armed groups, their unilateral declarations of intention, special agreements concluded among competing factions (including States), or through soft law they establish among themselves (Sassoli, 2010: p. 41).
- ❖ Rewarding respect of the law is another means that would increase their sense of ownership.

a) The home state should provide immunity for mere participation in hostilities by whatsoever means, including amnesties⁹, because it is difficult to motivate members of an armed group to comply with IHL if their treatment by the government will not be affected by such compliance.

b) Foreign states could reward members of armed groups fighting abroad while respecting IHL by considering prosecution for mere participation in hostilities as persecution leading to eligibility as a refugee, while denying refugee status to members of armed groups who violated IHL (Sassoli, 2010: p. 24). Similarly, they could apply the exemption from extradition for political offenders in extradition treaties to members of armed groups involved in an armed conflict, except for acts contrary to IHL (Sassoli, 2010: p. 24).

3) States not party to an armed conflict should comply with their commitment to “respect and ensure respect” for IHL¹⁰. This involves negative and positive component. The former obliges them neither to encourage a party to an armed conflict to violate the rule nor take action that would assist in such violations¹¹. Such commitment also applies in respect of obligations provided for in common Article 3 to the Geneva conventions¹². For example, states that fund and support the Syrian armed opposition—namely Saudi Arabia, Qatar, Kuwait and the United States—ought to have ensured that those armed groups that benefit from their money and their arms conduct their hostilities in line with IHL.

The latter element demands state to undertake affirmative measure to “respect and ensure respect” for IHL. However, any action taken pursuant to common Article 1 must be in accordance with international law, including UN charter. To avoid abuse in this respect, meeting of states is an indispensable tool which is not adequately emphasized in the existing system.

Among others, state not party to the conflict should take the following measures in their attempt to comply with their positive obligations (ICRC, 2004: p. 3):

- ❖ Scheduling confidential, discreet negotiations with parties to the conflict to promote respect for IHL.

⁹This is in line with Article 6 (5) of Additional Protocol II of the Geneva Conventions of 12 August 1949.

¹⁰Geneva Conventions of 12 August 1949, Common Article 1; Additional Protocol I to the Geneva Conventions of 12 August 1949, Article 1.

¹¹Draft Articles on Responsibility of States for internationally wrongful acts, Article 16.

¹²See the International Court of Justice decision in the Nicaragua case, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, p. 14, Para. 115.

- ❖ States should exhaust the existing mechanisms of IHL, for example by referring situations of conflict to the IHFFC, or by offering to serve as a protecting Power.
 - ❖ States should take forcible measures against transgressor state in accordance with international law. For example; refusal to enter treaties; expulsion of diplomats and severance of diplomatic ties.
- 3) Although lack of formal mandate and specificities of armed conflict may challenge their effectiveness, the existing trend to ensure respect for IHL by bodies' and mechanisms of other branches of international law should be encouraged. This is because in times of armed conflict IHL and some other mechanism, such as human right, provide complementary protection to affected persons.
- ❖ UN Charter-based mechanisms: Particularly the Security Council and the UN Human Rights Council have condemned violations of IHL by belligerents, which implies that they considered themselves competent to monitor the respect of that law by such groups¹³.
 - ❖ Treaty-based human rights mechanisms: the experience of Inter-American Commission on human rights can be cited in this respect. It considers itself competent to apply IHL¹⁴.

4.3. New Mechanism to Strengthening IHL Compliance System

Although there might be a fear that the general international atmosphere at present is not conducive to the establishment of new mechanisms, I view for gradual adoption of them. As discussed earlier, the insufficiency of respect for IHL, among others, is attributable to the defects of existing system. And therefore, to effectively rectify such gaps any new mechanism should have, to the minimum, the following features:

First, there should be a forum where states can meet and discuss to evaluate when their obligation to ensure respect under common Article 1 is triggered, and to coordinate their response in case of insufficient respect (*International Institute of Humanitarian Law*, 2013: p. 116). Because the determination of whether violations are being committed, and whether such violations are sufficiently serious to require action on their part is difficult.

Second, there should be an independent body with the capacity to trigger itself and to provide States with the necessary information to assess whether the law was respected or violated (*International Institute of Humanitarian Law*, 2013: p. 16). It is necessary to create a distinct expert body to draft a periodic and public report on the compliance of IHL throughout the world, including by armed groups. Such a body should, however, be organized in the way to avoid an automatic State-centric bias of such a body. Because of its normally confidential,

¹³See e.g. SC Res. 1193 (1998) concerning Afghanistan, 764 (1992), 771 (1992), 780 (1992), 787 (1992), 941 (1994), and 1010 (1995) concerning the former Yugoslavia.

¹⁴See the cases *Abella v. Argentina (Tablada)*, Case 11.137, Inter-American Commission of Human Right, 18 November 1997.

field-work-oriented approach, the ICRC might not be the ideal body to undertake this task (Zegveld, 2002: p. 162).

Third, such mechanism must have the authorization to deal with armed groups—which necessarily means giving them the possibility to voice their positions, problems and aspirations with someone in such a mechanism. This will be the greatest challenge, but a necessary step towards greater respect for international humanitarian law (International Institute of Humanitarian Law, 2013: p. 116).

Fourth, the mechanism in questions should take costs and administrative burdens into account.

Fifth, legal recourses that the international community can take to sanction transgressions should be re-considered to effectively address violation by armed groups.

To illustrate, the new IHL compliance system will have the following functions:

- ❖ Regular meetings of States: This will serve as a core for the new IHL compliance system.
- ❖ Fact-finding: a method of ascertaining controversial facts, based on information gathered, compiled and analyzed from a range of sources.
- ❖ Periodic reporting can serve to create political will because state wants to avoid the embarrassment either to be obliged to report violations or to be subject to questions by the monitoring body (International Institute of Humanitarian Law, 2004: p. 57).
- ❖ Needless to say, the new mechanism should have multifaceted functions. This may include: dispute settlement, early warning, urgent appeals, country visit, non-binding legal opinion and regular thematic discussions on IHL issues.

There might be many that should be incorporated but the above list is mere attempt to list a few of important.

5. Conclusion

IHL is ceaselessly challenged by the evolution of contemporary armed conflict. This results enormous human suffering. Badly, this repercussion being caught amid hostilities would be far lesser if IHL were properly implemented by the parties to conflicts. These question the adequacy of the existing compliance system of IHL. Even though the regime has its own independent compliance systems, they are found defective and insufficient because they are of limited scope, crafted for international armed conflict only, and rarely, if ever, been used, and, therefore, the agenda of minimizing human suffering and protecting person affected by violence calls for strengthening compliance system of IHL.

6. Limitations

The chief approach employed in this manuscript is desktop research. It investigated only some of the general key problems regarding IHL compliance system

and even without giving chapter and verse of each issue. However, despite its limitation this doctrinal research serves as a bridge for further study. It will also be used as secondary source for students and teachers.

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