



Supporting Engagement with Armed Groups and *De Facto* Authorities for the Protection and Promotion of Humanitarian Space:

An Analysis on Compliance with International Humanitarian Law and International Human Rights Law



Acknowledgments

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1. Introduction

This research paper analyzes how armed groups and *de facto* authorities (AGDAs) behave and under what circumstances they may comply with international humanitarian law (IHL) and international human rights law (IHRL).^[2]

In doing so, it sheds light on the root causes of norms' violations and on the factors that may be conducive to respect for such legal frameworks or restraint in conflict settings. It posits that understanding these phenomena serves two main reasons: (i) predicting future behaviours of AGDAs; and (ii) designing and implementing context-specific strategies aimed at improving respect for the law, and thus protecting and promoting the humanitarian space. The study concludes by proposing a series of practical recommendations for humanitarian actors to support engagement with AGDAs.

2. Methodology

This research paper is based on the findings of a two-year research project on the practice and interpretation of AGDAs with respect to ten key rules in armed conflicts^[3]. The methodology employed for this research project consisted of two complementary steps. The first step entailed the analysis of different policy documents reflecting AGDAs' positions on various humanitarian issues^[4]. These sources include oaths of allegiance, codes of conduct, unilateral declarations, command orders, military manuals, decrees, legislation, penal or disciplinary codes, public communiqués and different agreements concluded with States, other AGDAs and international and humanitarian organizations. More than 500 of such documents were reviewed^[5]. In both steps, a gender perspective was integrated by aiming to involve women and men equally throughout the project and by analysing AGDA practices through a gender lens^[6]. The two-year project has also included the development of the following case studies^[7]: Al Qaeda (AQ), the Islamic State group (ISg), the Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo (FARC-EP), Hezbollah, the Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces (MILF/BIAF), the Mouvement National de Libération de l'Azawad (MNL), and the Taliban^[8]. These were conducted by leading scholars and practitioners based on desk and field research, which comprised semi-structured interviews with members (or former members) of the AGDAs' leadership and key external stakeholders^[9]. Interviews were also conducted with members of the Alliance des Patriotes pour un Congo Libre et Souverain (APCLS), the Karen National Union/Karen National Liberation Army (KNU/KNLA), and the Syrian Democratic Forces/Autonomous Administration of North-East Syria (SDF/AANES). Policy documents and other documentary sources were also collected from these three AGDAs.

[2] The present document considers that certain rules of IHRL are binding upon AGDAs, such as the prohibition of using and recruiting children below 18 years old, which is enshrined in the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

[3] These rules include the following: (i) protection of civilians from attacks; (ii) the prohibition of sexual violence and gender discrimination; (iii) the prohibition of using and recruiting children in hostilities; (iv) the protection of education; (v) humanitarian access (and denial thereof); (vi) the protection of healthcare; (vii) the prohibition of forced displacement; (viii) the use of landmines and other explosive devices; (ix) detention, fair trial and the administration of justice; (x) the special protection of certain objects, such as cultural property and the environment.

[4] The focus of this study is on AGDAs as 'groups', which entails an analysis of their group-level decisions rather than those adopted at the individual level. Accordingly, these entities are examined as if they operated as a single and cohesive entity. This does not deny the importance of assessing the activities of individual members, who may commit violations or decide to respect international law; yet explaining such individual behaviours falls outside the scope of this paper and is therefore not covered in the analysis.

[5] These documents are available at www.theirwords.org, accessed 2 February 2023.

[6] Annyssa Bellal, Pascal Bongard and Ezequiel Heffes, 'From Words to Deeds. A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms. Research and Policy Conclusions' (2022) 14 https://words2deeds.org/wp-content/uploads/2022/09/Words2Deeds_comparative-study.pdf, accessed 06 June 2023.

[7] On the reasons for selecting these case studies, see Bellal, Bongard and Heffes (n 6) 14.

[8] The case studies are publicly available and can be found at <https://words2deeds.org/publications/>, accessed 2 February 2023. Although no case studies were published for the SDF/AANES, APCLS and KNU/KNLA, the collected information was used for the aforementioned comparative study and the present research paper.

[9] For security reasons, the case studies on AQ and the ISg only contain desk research and no in-person interviews were conducted. For further information, see Bellal, Bongard and Heffes (n 6) 14.

3. Armed Groups and *De Facto* Authorities in Armed Conflict

The study was conceived from the fact that AGDAs have an impact on the lives of millions of individuals around the world, and that the vast majority of such conflicts include one or multiple AGDAs fighting either State forces or other armed groups, or both. In 2022, the International Committee of the Red Cross (ICRC) reported that the number of 'armed groups that are of humanitarian concern has remained consistently between 500-600 over the last three years'[10]. The ICRC also noted that, as of July 2022, about 175 million people were estimated 'to live in areas controlled by armed groups,' that 64 million lived in areas fully controlled by such actors and 111 million lived 'in areas that are contested or fluidly' under the control of AGDAs[11].

In addition to their presence and control over territory and populations, AGDAs vary in their nature, objectives, and capacities (military or non-military ones). Some AGDAs are highly organized, constituting themselves as '*de facto*' authorities and operating State-like institutions, while others have a lower degree of organization and territorial control, not providing services (or at least to a very limited extent) and focusing exclusively on military activities. In this broad spectrum, AGDAs use violence to achieve their goals and some also establish institutions and adopt laws that regulate the everyday life of individuals, thus shaping the societies of which they are a part. AGDAs' impact on the civilian population and other protected individuals creates an imperative to examine how they behave and position themselves with respect to IHL and IHRL.

4. AGDAs' Compliance with IHL and IHRL

AGDAs have behaved in different ways with respect to the applicable international legal framework. It has been widely documented that they have been responsible for attacks against health care providers, using and recruiting children in hostilities, taking hostages, and for denying humanitarian relief to those in need[12]. At the same time, AGDAs have also shown a certain degree of compliance with IHL and IHRL. On occasions, they have attempted to evacuate and treat wounded enemy fighters and civilians, adopted measures to prevent and punish cases of sexual violence, created policies against gender-based discrimination, and provided safeguards to detainees[13]. Examining the reasons why these variations take place across multiple conflicts and groups, and how such understanding can help the humanitarian community are essential aspects of this research paper.

For the purposes of the analysis, compliance is understood as 'behavioral conformity with existing norms and regulations'[14]. This translates into a match between the behaviour of AGDAs in armed conflict and their legal obligations, notably those of IHL and IHRL. When examining how these entities operate, it can be observed that they do not violate or respect the rules without exception. Instead, AGDAs may follow some of them while disregarding others.

[10] Matthew Bamber-Zryd, 'ICRC Engagement with Armed Groups in 2022' (ICRC Humanitarian Law & Policy Blog, 12 January 2023) <https://blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/>, accessed 12 January 2023. Back in 2021, the ICRC had noted that more than 100 were considered parties to non-international armed conflicts. Bruno Demeyere, 'Editorial' (2021) 102 *International Review of the Red Cross* 979, 979.

[11] Bamber-Zryd (n 10).

[12] Examples of some of these violations can be found in the UN Secretary General's annual reports on children and armed conflict, where AGDAs (and States) are included in a list of parties that have committed one or more of the following violations against children: recruitment and use; killing and maiming; abductions; rape and other forms of sexual violence; and attacks on schools and hospitals. Denial of humanitarian access is also reported, but it does not trigger the listing process. For the 2022 report, see UN General Assembly/UN Security Council, 'Children and Armed Conflict. Report of the Secretary-General' (2022) A/76/871-S/2022/493 <https://childrenandarmedconflict.un.org/document/secretary-general-annual-report-on-children-and-armed-conflict/>, accessed 2 February 2023.

[13] Pascal Bongard, 'From Words to Deeds: A Research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms. The National Movement for the Liberation of Azawad (Mouvement National de Libération de l'Azawad, MNLA), Mali' (2021) 24-25 <https://words2deeds.org/wp-content/uploads/2021/07/Case-Study-MNLA.pdf>, accessed 6 June 2023.

[14] Hyeran Jo, 'Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?' in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law* Volume 19, 2016, vol 19 (TMC Asser Press 2018) 65.

To illustrate this, a group may decide to explicitly prohibit hostage-taking in its code of conduct[15], in line with IHL[16], but recruit and use children in violation of international law[17]. Analogous observations can be made with respect to other legal provisions. At the same time, some rules may not be relevant to some AGDAs' operations if they do not engage in certain activities[18].

Compliance with IHL and IHRL, or lack thereof, leads us to acknowledge the existence of two preliminary conclusions. The first is that AGDAs may have different attitudes with respect to different thematic areas. This is particularly important as the root causes of violations and compliance will vary depending on the rule(s) in question. In other words, the motives behind an AGDA's attitudes, for instance, on the use and recruitment of children will differ from those related to the prohibition of forced displacement or sexual violence, and the way in which the humanitarian community addresses possible violations and situations of restraint should be reflective of these variations. Secondly, AGDAs should be conceived of as dynamic entities that modify their positions with respect to IHL and IHRL norms throughout the hostilities, often resulting (i) in an increase or decrease in their level of legal compliance; and (ii) in the application or not of specific rules (i.e., from non-relevance to including them in internal rules). Box n°1 identifies these dynamics from the practice of the FARC-EP in Colombia (see below).

BOX 1

The FARC-EP was active between 1964 and 2017 – although some sources date its 'official' origin to 1966, a period in which it managed to constitute itself as a military and political organization throughout the entire Colombian territory. The group modified its responses with respect to IHL and IHRL during its more than fifty years of existence. First, in a document produced in the context of the negotiations that led to the 2016 peace agreement, and related to the prohibition of using and recruiting children in hostilities, the group declared the following:

'Coinciding with the IHL, the FARC-EP rules of recruitment don't allow enlistment of children under 15 years and those rules are clear regarding the age, stating: "The entrance to the FARC-EP is personal, voluntary and conscious between 15 and 30 years". In this regard, the Seventh National Guerrilla Conference (1982), confirmed this rule, stating that: "4. Recruitment: The Fronts will create recruitment commissions, which must be prepared for their duty to recruit men and women who, without any exception, should be between 15 and 30 years old [...] The recruited must be physically fit and mentally mature, i.e. clear about why he or she joins [...]. [...]

Therefore, the FARC-EP, besides considering the need to provide clear measures of de-escalation of the conflict to accelerate progress towards peace, announce[s] to the country and to the world, taking into account the Optional Protocol of 2000, today an Appendix of the Convention on the Rights of the Child, decide not to incorporate, from now on, minors under the age of 17 in the guerrilla ranks'[19].

These paragraphs reflect that only at the Seventh National Guerrilla Conference (1982), the FARC-EP confirmed the prohibition of using and recruiting children below the age of 15, despite the fact that the group had existed for several years. The paragraphs also demonstrate that its policy towards this rule changed throughout the conflict. The case study on this AGDA concluded that international law was a tool to be used for political purposes when going through different negotiations, including those in the context of peace agreements. In other words, the FARC-EP was open to engaging on specific international rules when participating in such discussions.

The second dynamic (from non-relevance to adopting certain measures) can be identified in the FARC-EP's norms regulating its detention activities.

[15] Of course, there will be variations in the way the different AGDAs incorporate these norms into their internal regulations, and this will depend on different factors, such as their level of organization, knowledge of the law, support by external actors in developing the code of conduct and the moment in which such internalization takes place.

[16] Common Article 3 to the 1949 Geneva Conventions, which applies to AGDAs, explicitly prohibits the 'taking of hostages'. The ICRC has recognized that this provision is customary in nature. See ICRC Customary IHL Study, Rule 96.

[17] It shall be noted that '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' is a war crime under the Rome Statute of the International Criminal Court. See Article 8(2)(e)(vii).

[18] For instance, the ICRC has identified as a customary norm applicable in non-international armed conflicts (NIACs) that '[p]ersons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention', yet certain AGDAs may not deprive individuals of their liberty – or at least may choose not to do so at a given moment of the conflict, as detainees may be considered to be a burden. It would hardly make sense to examine those groups' activities in light of said customary IHL rule.

[19] FARC-EP, Announcement on Minors in the Conflict, 15 February 2015, http://theirwords.org/media/transfer/doc/farc_ep_announcement_on_minors_in_the_conflict_e6c1d31649e5c1560d3487a1740e48c0.pdf, accessed 3 December 2022. This is also relevant when considered that the prohibition contained in IHL was only applicable in Colombia in 1995, when the state ratified AP II.

During an interview, a former commander and member of the Secretariat noted:

'[w]hen we started to have prisoners of war [...] when we captured people during combat, which was rare at the beginning of the war, and when that was the case, the time of captivity was short. I remember some were detained only for two days. Thirteen soldiers – we had them for three days and then we released them. But we were facing this situation, and then the need to regulate it begins, and this is why a standard of respect for the physical and moral integrity of prisoners of war was established'[20].

When asked about the AGDA's practices regarding detention, a former member affirmed, similarly, that

at the beginning they would detain individuals only in the context of the conduct of hostilities – they would be deprived of their liberty because 'they were in an armed confrontation, and in a confrontation one fighter captures the other who has surrendered'[21].

As can be observed, the interviewees describe how at the early stages of the conflict, the FARC-EP barely detained individuals or had rules regulating this activity, a scenario that would later change as a result of the fact that they had to deal with individuals deprived of their liberty[22].

The research has found that AGDAs are actors that modify, adapt and re-assess their perspectives on whether or not to respect the different IHL and IHRL rules throughout the armed conflicts in which they operate. This is particularly evident during ceasefire or peace processes, when parties may seek political recognition by local constituencies or international audiences, when their political reputation is at risk, or when AGDAs look for international support.

The fact that AGDAs are dynamic and evolving actors and that political considerations, concern for their reputation, and interest in obtaining external support are important factors that can be identified with some clarity at specific moments in time. The FARC-EP fighting in the 60s and 70s was not the same AGDA that negotiated and signed the 2016 peace agreement with the Colombian government, as the group had modified its structure and adapted its position with respect to international law in its more than fifty years of existence. Similar examples can be found in other armed conflicts (although with different temporal scopes). In Mali, the MNLA reportedly took measures to address abuses in 2012, when it was facing increasing negative publicity that was damaging its reputation in the eyes of various stakeholders[23]. Attacks on civilians by the Lord's Resistance Army (LRA) declined during peace negotiations with the Ugandan government, only to increase immediately after the latter refused to make concessions[24].

In addition to these reputational factors being of relevance for these AGDAs, these examples also serve to shed some light into their organizational structure. More specifically, they show that during some specific moments in time and for those AGDAs, an effective command-and-control structure existed, and that decisions adopted by their leadership on whether to comply or not with a particular rule would (a priori) be carried out by their members. Furthermore, these dynamics also allow us to conclude that compliance depends on the rules in question, the objectives of the respective AGDA when its leadership decides to respect or not, and its command-and-control structure. In the end, AGDAs' behaviors should be examined along a spectrum, being better conceptualized as 'a matter of degree varying with the circumstances of the case'[25].

[20] Ezequiel Heffes, 'Case Study: Fuerzas Armadas Revolucionarias de Colombia–Ejército Del Pueblo (Revolutionary Armed Forces of Colombia – People's Army, FARC-EP)' (Geneva Academy of IHL and Human Rights & Geneva Call 2021) 39 <https://words2deeds.org/wp-content/uploads/2021/03/Case-Study-Revolutionary-Armed-Forces-of-Colombia-%E2%80%93-Peoples-Army-1.pdf>, accessed 7 January 2023.

[21] *ibid* 40.

[22] Statute of the FARC-EP, Art. 7(k).

[23] Bongard (n 13) 45.

[24] Jessica A Stanton, *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law* (Cambridge University Press 2016) 265.

[25] Richard Falk, 'On Identifying and Solving the Problem of Compliance with International Law' (1964) 58 *Proceedings of the American Society of International Law and Its Annual Meeting* 1, 5.



5. A Focus on AGDAs' Restraint and Violations of IHL and IHRL

While important, identifying the aforementioned scenarios remains at the surface of the analysis of AGDAs' compliance with IHL and IHRL. This is evidenced in the examined documentary sources and the case studies conducted in the context of the two-year research project, which demonstrate that violations and respect of certain rules can be explained by a combination of reasons. Power relations, as well as historical, political, and social conditions serve to determine these reactions, making compliance with the applicable legal framework a context-dependent issue[26]. The following pages will first examine some of the most commonly found explanations as to why AGDAs violate and respect their legal obligations.

A. WHY DO AGADS VIOLATE IHL AND IHRL?

Four explanations are often found in the AGDAs under examination: (1) their lack of knowledge and understanding of (some) IHL and IHRL provisions; (2) AGDAs' lack of capacity and problems related to their structure that would prevent them from complying with certain rules; (3) their lack of willingness to respect the applicable legal framework; and (4) AGDAs' different interpretations of selected rules[27].

[26] Heike Krieger, 'Introduction' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (Cambridge University Press 2015) 4–5.

[27] Other explanations include the following: (i) the lack of AGDAs' participation in international law-making processes; (ii) lack of respect of IHL and IHRL by the opposing party as a reason not to respect this body of law; (iii) to cause 'terror' to control the civilian population; and (iv) the commission of IHL and IHRL violations as propaganda or a political message. Albeit important, these are not examined in the present research paper as they are not found across the documentary sources and case studies, but only in specific AGDAs and at specific moments in time. For further information, see in any case Olivier Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 *International Review of the Red Cross* 353.

1. Lack of knowledge of humanitarian rules

All AGDAs interviewed have admitted to lacking detailed knowledge and understanding of certain IHL and IHRL norms, having at best a basic awareness of the general rules, such as the prohibition of deliberately attacking civilians. Bangerter has noted, in this regard, that 'only a relatively small circle of persons are aware of legal concepts in any given society, and it is unlikely that leaders of armed groups will be recruited in this particular circle'[28]. It should not be seen with surprise that, in certain contexts, AGDAs recruit their members from the civilian population living in the territories they control, and that these individuals have little or no military and legal training before being deployed to the battlefield. Concepts familiar to military lawyers and IHL experts, such as the principle of proportionality, 'may not be well understood by members of [AGDAs], both at senior and at lower operational levels'[29].

To illustrate this point, when MILF/BIAF leaders and members were asked about the rules dealing with humanitarian access, although they showed a good understanding of the neutrality and impartiality of humanitarian actors[30], their knowledge of the legal framework governing this thematic area was rather limited[31]. Similarly, regarding the prohibition of using and recruiting children in hostilities, one explanation put forward by the KNU/KNLA was that a lack of ground-level awareness of international rules was a significant obstacle to achieving full compliance[32]. Another example can be found regarding the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Although this treaty is applicable to AGDAs, most groups interviewed in the context of the research project were not aware of its existence or the rules contained therein[33].

2. Lack of capacity and problems related to AGDAs' structures

AGDAs may also lack appropriate organizational structures and resources, which prevent them from implementing some of their humanitarian obligations[34]. Those with a low level of organization or with a fragmented or decentralized nature may have less potential to implement certain rules. This can be observed in two examples. First, from a general standpoint, AGDAs' changing structures can make the enforcement of operational policies in the field very difficult. During a meeting with AGDAs hosted by Geneva Call in 2016, some groups shared the practical difficulties they faced when trying to disseminate information about new humanitarian commitments or changes in their policies to all the commanders across the regions under their control. At the time, several groups admitted internal communication breakdowns in their chains of command[35].

Second, with respect to the prohibition of using and recruiting children in hostilities, the research project found that AGDAs willing to comply with this prohibition faced difficulties in verifying the age of new recruits in the absence of identity cards or other documentary sources[36]. AGDAs have also shared their capacity problems with respect to the rules dealing with their detention activities. Although some of them have indeed adopted codes and internal legal frameworks, AGDAs have noted that it was difficult to hold individuals in detention facilities where minimum safeguards would be respected. This was notably the case of the FARC-EP, the Sudan People's Liberation Movement-North, and the KNU/KNLA. A particular difficulty was shared in relation to the separation between women and men in these facilities, which was not followed by some of the AGDAs interviewed.

[28] Olivier Bangerter, 'Comment – Persuading Armed Groups to Better Respect International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (1st edn, Cambridge University Press 2015) 113.

[29] Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors' (2011) 6 <https://www.geneva-academy.ch/joomla-tools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf>, accessed 7 January 2023.

[30] Chris Rush, 'From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms. Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces. The Philippines.' (2022) 48 https://words2deeds.org/wp-content/uploads/2022/09/MILF_Case-Study.pdf, accessed 7 January 2023.

[31] *ibid.* AGDAs' lack of knowledge of the rules pertaining to humanitarian access has been already highlighted in a previous Geneva Call's report. Back in 2016, Geneva Call found that AGDAs' comprehension was limited and significantly influenced 'by whether humanitarian agencies [had] directly engaged with them on these issues. Consequently, there [was] greater expressed acceptance of IHL were there ha[d] been long-term humanitarian engagement'. Geneva Call, 'In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action' (2016) 6, https://www.genevacall.org/wp-content/uploads/2023/06/WHIS_Report_2016_web.pdf, accessed 27 July 2023.

[32] This information was shared by the KNU/KNLA to Geneva Call on various occasions. See, for instance, Geneva Call, 'Armed Non-State Actors Speak about Child Protection in Armed Conflict' (2017) 20-21 https://www.genevacall.org/wp-content/uploads/2023/06/CansaReport_web.pdf, accessed 27 July 2023. See also Pascal Bongard and Ezequiel Heffes, 'Engaging Armed Non-State Actors on the Prohibition of Recruiting and Using Children in Hostilities: Some Reflections from Geneva Call's Experience' (2019) 101 *International Review of the Red Cross* 603, 609-612.

[33] Bellal, Bongard and Heffes (n 6) 14.

[34] The two-year research project, as a result of this specific dynamic, proposed to examine AGDAs according to certain ideal types: (i) non-recognized or partially internationally recognized States or so-called 'de facto' authorities; (ii) armed opposition movements; (iii) paramilitary groups or militias; and (iv) vigilante groups or self-defence militias. The reason for such a proposal was that this way of categorizing the examined AGDAs may facilitate the comprehension of the reasons and incentives leading to situations of respect and violations of IHL and IHRL. Bellal, Bongard and Heffes (n 6) 15-16.

[35] Geneva Call (n 31) 21.

[36] Bellal, Bongard and Heffes (n 6) 21.

Finally, although certain groups have attempted to minimize the indiscriminate effects and civilian harm caused by using anti-personnel mines and improvised explosive devices, the research project has found that precautionary measures were not implemented systematically as a result of coordination problems, which included warning the local population, recording their placement, and removal after hostilities[37].



3. Lack of willingness to respect the international legal framework and specific IHL and IHRL rules

AGDAs may also lack willingness to abide by IHL and IHRL, as some of the rules belonging to such regimes are perceived by such actors as prohibiting actions that could serve their strategic interests, and ‘give them a competitive advantage over government forces’[38].

On this issue, AGDAs’ behaviors can be divided into two groups. The first group has rejected the application of certain norms of international law, and not of the international legal system as a whole. This is evidenced, for instance, in the aforementioned example of the FARC-EP, a group that would be openly against the prohibition of using and recruiting children under the age of 18, as established in IHRL. This position would only be modified when peace negotiations began with the government, despite the fact that such prohibition was already applicable in the territory of Colombia.

A second group of AGDAs has rejected the application of international law to their activities, thus making their engagement with this legal regime highly improbable. Examples can be found in the ISg and AQ. These AGDAs have claimed that their activities are regulated by religious sources and interpretations. While the ISg has openly dismissed the application of ‘secular laws’ and adopted expansive interpretations of Islamic law that are openly in contradiction with IHL and IHRL[39], AQ has pointed out that Muslim States’ acceptance of international law is evidence of infidelity to Islam[40].

[37] Bellal, Bongard and Heffes (n 6) 28.

[38] Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 6.

[39] American University in Cairo Research Team, ‘From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms. The Islamic State Group’ (2022) 6 https://words2deeds.org/wp-content/uploads/2022/09/ISG_Case-Study.pdf, accessed 7 January 2023.

[40] American University in Cairo Research Team, ‘From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms. Al-Qaeda.’ (2022) 7 https://words2deeds.org/wp-content/uploads/2022/09/Al-Qaeda_Case-Study.pdf, accessed 7 January 2023.

4. Different interpretations of IHL and IHRL rules

Finally, AGDAs may not follow certain humanitarian norms if they have a different interpretation of the content of such rules when compared to those that have been presented by the ICRC, international organizations, and legal experts.

For instance, certain AGDAs disagree with those interpretations of IHL regarding who ‘takes a direct part in hostilities’[41]. As a result, certain categories of individuals may end up being considered as targetable military objectives, even if they should be protected under IHL. In the case of the Taliban, there are clear differences between the *Layha*[42], the AGDA’s code of conduct, and what IHL stipulates regarding people and objects entitled to protection[43]. Although the Taliban’s definition of who was ‘protected’ widened over time[44], the research project has found that those working ‘in local government, the state justice system, and the security forces remained targets (unless they surrendered, which then theoretically entitled them to protection)’[45].

The FARC-EP affirmed in the 1990s that ‘paramilitary informants and collaborators, traders who sell goods to hire gunmen, or farmworkers on farms which are paramilitary bases’ could also be targeted[46], thus making a differentiation that was against the rules of IHL. A representative of the APCLS, an AGDA that has been engaged on international law by humanitarian organizations, also explained that ‘sometimes civilians are targeted on the basis of their ethnicity but we try to discipline this’[47]. As with the FARC-EP example, IHL prohibits deliberate attacks against civilians, and belonging to an ethnic group does not make an individual targetable.

Similarly, the study also found differing views on what amounts to violations of the prohibition of sexual violence, as some AGDAs tend to avoid explicitly mentioning or defining it in their internal rules or regulations. Where sexual violence is included, it is usually limited to the prohibition of rape as opposed to prohibiting sexual violence more broadly. Consequently, other forms of sexual violence, such as sexual exploitation or forced abortion, also prohibited under IHL, are omitted. This may contribute to such forms of violence being considered as acceptable, leaving victims/survivors without recourse[48].

Certain AGDAs have also expressed support for women’s rights while holding different conceptions of what they entail. An example can be found in the Taliban’s policies in favor of their own understanding of Islamic women’s rights and their rejection of women’s rights as understood in international law. Furthermore, policies proclaimed to be in the interest of protecting women, such as requiring them to be accompanied by a male relative, are upheld despite having discriminatory effects[49]. More generally, it should be added that compliance with IHL or IHRL norms other than those on sexual violence or explicitly mentioning women tends to be construed as a gender-neutral matter[50]. Assessing whether gender is sufficiently mainstreamed in AGDAs’ compliance, ensuring that the protection needs of women, men, girls, and boys, as well as non-binary individuals, are equally met deserves further exploration. Another relevant example is how some AGDAs have interpreted the notion of ‘children.’ The 2006 version of the Taliban’s *Layha*, in this regard, prohibited the recruitment and use of underage boys in hostilities (i.e., those who have not yet grown beards), without specifying the age[51]. It stated indeed that ‘mujahedin [were] not allowed to take underage boys with no facial hair onto the battlefield or into their military bases’[52], thus providing a different definition to when boys become adults and leaving the involvement of girls in its operations or military bases unaddressed.

[41] For further information on this point, see Bellal, Bongard and Heffes (n 6) 17-19.

[42] The ‘layha’ was the Taliban’s code of conduct – although researchers have noted that the word might be more accurately translated as ‘policy’. Its first version was adopted in 2006, and it was expanded in 2009 and 2010. Ashley Jackson and Rahmatullah Amiri, ‘From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms. The Taliban-Afghanistan’ (2022) 14–15 https://words2deeds.org/wp-content/uploads/2022/09/Taliban_Case-Study.pdf, accessed 7 January 2023.

[43] *ibid* 23.

[44] *ibid*.

[45] *ibid* 25.

[46] Heffes (n 20) 18.

[47] Geneva Call, ‘Conduct of hostilities by armed non-state actors. Report from the 2020 Garance Talks’ 15, available at <https://www.genevacall.org/wp-content/uploads/2023/06/Garance-Series-Issue-3.pdf>, accessed 27 July 2023.

[48] Bellal, Bongard and Heffes (n 6) 20.

[49] This particular example of requiring women to be accompanied by a mahram (a male relative) results, for instance, to restrictions of women’s freedom of movement and access to services. Jackson and Amiri (n 42) 35 & 43-44.

[50] Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the ‘Principle of Distinction’* (Routledge 2019) 89.

[51] Jackson and Amiri (n 42) 37.

[52] Kate Clark, ‘The Layha. Calling the Taleban to Account. Appendix 1. The Taleban Codes of Conduct in English’ 26 https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf, accessed 7 January 2023.



B. WHY DO AGDAS COMPLY WITH IHL AND IHRL?

Three explanations can be identified in the case studies and documentary sources when trying to understand why AGDAs comply with IHL and IHRL: (1) to increase their reputation in front of, and gain support from international stakeholders; (2) to increase their reputation in front of, and gain support from local constituencies; and (3) when local norms have a similar content to AGDAs' IHL and IHRL obligations. These are explained below.[53]

1. To increase their reputation in front of, and gain support from international stakeholders

When reflecting on the reasons why AGDAs comply with IHL and IHRL, empirical studies have suggested that legitimacy-seeking groups are more likely to comply with international law than legitimacy-indifferent ones[54]. The international community, formed by States, international, and humanitarian organizations, is one from which this legitimacy is often sought. Several AGDAs have indeed committed to respect IHL and IHRL by signing Action Plans with the United Nations, Geneva Call's *Deeds of Commitment*, and concluding agreements with States, other AGDAs, and humanitarian organizations. They have also adopted internal regulations in an attempt to demonstrate their willingness to respect this legal framework[55].

For example, the MILF/BIAF changed its child protection policy in order to be removed from the UN 'list of shame' of grave violators against children; the KNU/KNLA adopted policies which were influenced by humanitarian and human rights organizations; the SDF/AANE has signed several *Deeds of Commitment* with Geneva Call and an Action Plan with the UN on child protection issues (for further information on this AGDA, see below Box 2); and the FARC-EP modified its policies on certain thematic areas during the peace negotiations with the government of Colombia.

[53] Other reasons have been put forward by scholars in a similar way as to the reasons why AGDAs violate IHL and IHRL, but those included in this document were the ones found across the AGDAs examined in the research project. On IHL in particular, see Bangerter (n 27).

[54] Jo (n 38).

[55] Of course, this does not mean that compliance problems are not present, but that the general policy of the group is to look for international support by committing to respect IHL and IHRL.

BOX 2: The Case of the Syrian Democratic Forces/Autonomous Administration of North-East Syria

A relevant example of a legitimacy-seeking AGDA is the SDF/AANES, which has been particularly active in publicly engaging with international law and relevant international stakeholders. In 2014, this group signed three of Geneva Call's *Deeds of Commitment* on issues related to the protection of children, the prohibition of sexual violence and gender discrimination, and the prohibition of using anti-personnel mines. In parallel, it adopted internal rules which included IHL and IHRL provisions. In 2014, for instance, it adopted a 'Charter of the Social Contract,' which affirms that '[t]he Covenants and international conventions for human rights are an essential part and complement this contract,'[56] also including an entire section dedicated to 'Rights

and freedoms.' There, it claims to adopt 'the International Bill of Human Rights, the International Covenant on Civil and Political Rights and cultural, social, economic and other relevant instruments as an integral part of this Charter'[57]. In 2016, this AGDA also enacted a 'Social Contract of the Democratic Federation of Northern Syria,' where it guarantees 'the equality of all peoples in rights and duties,' respecting 'the charters of human rights' and aiming to preserve 'national and international peace'[58]. Since then, the SDF/AANES has adopted military orders on children and armed conflict (2018), on the protection of education (2020), cultural heritage (2020), and health care (2021). Furthermore, in 2019, it signed an Action Plan with the UN to End and Prevent the Recruitment and Use of Children[59]. This AGDA has also actively sought international support to deal with former members of the ISg who are (and were) held in detention.

2. To increase their reputation in front of, and gain support from local constituencies

In addition to looking for international recognition, AGDAs may also seek support from local constituencies, which is why they may avoid deliberately attacking civilians living in the territories they control or imposing taxes on local non-governmental organizations. They may also try to regulate local disputes and establish some 'governance' activities, occasionally in line with international law. Adopting these measures can constitute efforts to win support from these same domestic constituencies.

To illustrate this, the Taliban have on occasions referred to the situation of the local population in relation to specific IHL and IHRL rules. For instance, Taliban leaders granted the World Health Organization and UNICEF and their implementing partners access to conduct polio vaccinations at the beginning of August 2007. The research project has found statements in which the leadership of the AGDA claimed:

The only preventive treatment for polio according to the world's advanced medicine is to vaccinate children against the disease and give them polio drops. The Islamic State of Afghanistan supports any program which is for the health of the people of our poor country and for the benefit of the population[60].

Furthermore, they have mentioned 'humanitarian grounds' and 'humanitarian sympathies' when calling for assistance to the local population in response to flooding. In 2013, they stated:

The Islamic Emirate calls on its Mujahideen to cooperate and help with the people of the flood-hit areas as much as they can, the Islamic Emirate also calls on the charitable and wealthy people of the country to provide emergency medical and food aid to the flood victims in this great calamity, provide shelter to them and help them rebuild their destroyed homes in accordance with Islamic and national obligations and humanitarian sympathies[61].

[56] 'Charter of the Social Contract in Rojava (Syria)' para 20.

[57] *ibid* 22. In 2014, Human Rights Watch affirmed nonetheless that while the Social Contract 'upholds some important human rights standards', it neglected 'to stipulate a number of core principles, such as the prohibition on arbitrary detention, the right to prompt judicial review, and the right to a lawyer in criminal proceedings'. As a positive development, Human Rights Watch identified that it banned the use of the death penalty. Human Rights Watch, 'Under Kurdish Rule Abuses in PYD-Run Enclaves of Syria' (2014) <<https://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria>> accessed 22 May 2020.

[58] 'Social Contract of the Democratic Federation of Northern Syria' <<https://internationalistcommune.com/social-contract/>> accessed 22 May 2020.

[59] UN Office of the Special Representative of the Secretary General for Children and Armed Conflict, 'Syrian Democratic Forces Sign Action Plan to End and Prevent the Recruitment and Use of Children' <https://childrenandarmedconflict.un.org/2019/07/syrian-democratic-forces-sign-action-plan-to-end-and-prevent-the-recruitment-and-use-of-children/>, accessed 7 January 2022.

[60] Jackson and Amiri (n 42) 22. Jackson and Amiri's study concluded nonetheless that obstacles 'were occasionally encountered with command and control, and Taliban fears that the campaigns served as cover for spies'. *ibid*.

[61] 'The Taliban Have Called for Help and Cooperation With the Flood Victims' (in Pashto), Nunn Asia, 13 August 2013, <https://www.nunn.asia/7530/>, accessed 7 January 2023.

After the winter in 2016, the Taliban made an appeal to ‘the country’s businessmen, international NGOs, countries and the United Nations to deliver urgent aid to affected areas of Afghanistan on Islamic and humanitarian grounds’[62].

Examples of AGDAs trying to respect certain minimum judicial guarantees when passing sentences for common law detainees in an attempt to gain support from local populations were also found in the case studies[63]. Although all AGDAs under analysis administered some form of justice, their level of sophistication depended on the level of organization and structure of the particular AGDA. Those highly organized groups established tribunals and adopted internal laws to prosecute different crimes, including those that they considered ‘terrorist acts.’ This is the case, most notably, of the SDF/AANEs[64]. Those with a lower level of organization, such as the FARC-EP, solved local disputes by relying on local commanders to set up a table in a public space and discuss issues with civilians. This entailed both informal mediations and dispute-settlement mechanisms.

At the same time, it must be kept in mind that attempts to garner local support and legitimacy can also undermine compliance with certain IHL and IHRL norms. This can happen when an AGDA chooses to cater to the interest of a dominant social group, to the detriment of marginalized groups. For example, it can lead to violence against LGBTI persons or ethnic minorities, precisely in order to gain social legitimacy and support from others[65].

3. Local norms with a similar content to AGDAs’ international obligations

Finally, AGDAs may also respect their IHL and IHRL obligations when the content of the respective rules corresponds with local norms or customs. For instance, the MNLA, of Mali, relied on their own ‘values, local norms and customs’ that largely coincide with commonly ‘agreed rules of behaviour’[66]. These were reflected in a Tuareg traditional code of warfare, called Achak, that specifically includes a prohibition to attack unarmed men, women, children, and the elderly[67].

Similarly, as aforementioned, the FARC-EP committed not to recruit children below the age of 15 in 1982 at the Seventh National Guerrilla Conference. This was not a result of an international rule prohibiting such behaviour, but because, in the words of a former commander, ‘boys and girls at that age may have already participated in social life, consumed alcohol, worked, and had sexual relations’[68]. When asked about other rules, such as the provision of health care, they explained that this was a priority for civilians, enemy forces, and their own members, which would be grounded on a ‘social duty’ of the AGDA. In his words, ‘[h]umanism was always really present among us’[69].

Islamist AGDAs rely on their interpretations of the Sharia[70], and some of them have publicly shared their commonalities with the international legal framework. An example of such process is the one undertaken by the MILF. This AGDA established a committee of Islamic scholars to study relevant IHL rules and compare them with the Sharia, and it has been reported that this body ‘found that it was straightforward to accept most of the core precepts of IHL’[71].

[62] IEA, ‘Statement of Islamic Emirate Concerning Security for Urgent Humanitarian Relief Work’, 4 March 2017, cited in Jackson and Amiri (n 42) 34.

[63] For a recent examination of AGDAs’ administration of justice, see also René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021).

[64] Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022) 192–204.

[65] CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’ (2013) CEDAW/C/GC/30 <<https://www.refworld.org/docid/5268d2064.html>> accessed 28 June 2023 para 36; Susan Aboueldahab, ‘Gender-based persecution as a crime against humanity: A milestone for LGBTI rights before the Colombian Special Jurisdiction for Peace’ (EJIL:Talk 2021) <<https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/>> accessed 28 June 2023.

[66] Bongard (n 13) 4.

[67] *ibid* 19.

[68] Heffes (n 20) 28.

[69] *ibid* 34.

[70] For a study on the role of religious leaders in influencing compliance in armed conflict, see Ioana Cismas and others, ‘Considerations and Guidance for the Humanitarian Engagement with Religious Leaders’ (University of York 2023) <<https://static1.squarespace.com/static/5e624fe7ac1bea36a0649292c/t/63c532089f167c409eb8649e/1673867787947/Religious+Leaders+%26+Humanitarian+Norms+Considerations+and+Guidance.pdf>> accessed 7 February 2023.

[71] Rush (n 30) 17–18.

6. Conclusions: Practical Recommendations for Humanitarian Actors to Engage AGDAs for the Protection and Promotion of Humanitarian Space

As this research paper has shown, there are different ways in which the issue of compliance with IHL and IHRL can be understood. Based on the findings and interactions with several AGDAs, it is expected that respect (or lack thereof) can be anticipated by considering certain factors:

- (i) **Knowledge and internalization of the law:** a higher degree of respect can be achieved when AGDAs know and understand their IHL and IHRL obligations, adopt internal rules to behave accordingly, and apply measures in the event of violations;
- (ii) **Alignment of IHL and IHRL with traditional norms and religious values:** identifying commonalities between these normative frameworks and disseminating these among weapon bearers on that basis may lead to an increase in adherence to IHL and IHRL as they will not observe this international legal regime as strange or foreign;
- (iii) **The capacity factor:** AGDAs may lack the capacity to fully implement some of their IHL and IHRL obligations, and thus enhancing such capacity may lead to an increased level of compliance with such rules;
- (iv) **The adoption of humanitarian commitments:** a better respect for IHL and IHRL can be obtained if AGDAs are actively encouraged to adopt thematic commitments that would be reflective of the reality on the ground. This can create a sense of ownership and make the obligations contained in such commitment realistic (or at least pragmatically attuned);
- (v) **The legitimacy-seeking element:** as identified, AGDAs may on certain occasions try to seek legitimacy from local and international stakeholders, which in turn could influence AGDAs' compliance with IHL and IHRL.

As a result of these findings, this research paper encourages humanitarian actors and other entities and individuals interested in engaging AGDAs on humanitarian issues to consider the following questions or considerations to protect and promote the humanitarian space. Finally, if the respective entity lacks the operational capacity to undertake such an examination, or if undertaking such an examination presents security risks for the humanitarian actor, they are encouraged to seek support from specialized organizations and scholars working on AGDA-related issues.

To develop an understanding of the factors contributing to norms' violations and respect and restraint

When engaging the vast majority of AGDAs, it can be observed that they may adhere to some specific IHL and IHRL norms and not others; and that they may be open to discuss the reasons why they violate or respect such rules. In order to assess how AGDAs behave and position themselves with respect to IHL and IHRL, humanitarian actors are encouraged to undertake an assessment of certain specific issues, that are listed as follows:

- ① Understand AGDAs and how their organizational structure^[72], territorial control, political and religious motivations, and the relationship they have with the communities living under their control may influence their degree of compliance. This can be done by undertaking a mapping exercise of the respective group and addressing questions such as:
 - What are the ideologies and goals of the AGDA?
 - When and how was the AGDA created?
 - What type of organization does the group have?
 - How does its command-and-control take place? Does the AGDA have centralized or decentralized command-and-control structure?
 - Is the internal decision-making process led by the military wing or by a non-military one? Is it representative of the communities living under their control (e.g. does it include women or primarily men)?
 - Does the group have an internal code of conduct or other type of internal regulation dealing with IHL and IHRL, or exclusively with their own organization?
 - Does the AGDA have or try to have a vast territorial control?
 - Does the AGDA provide services to the civilian population and if yes, to everyone or specific groups?
 - What is the type of relationship between the AGDA and the civilians living under their control (e.g., a relationship of support, convenience, struggle, etc.)? Does the relationship vary across different ethnic or other groups?
 - What are the power dynamics, including gendered ones, influencing the AGDA's behavior and attitude towards vulnerable and marginalized groups? Identify ethnic tensions, local beliefs about gender norms, and the position of marginalized groups in the AGDA's agenda.
 - Does the AGDA show awareness of gendered dimensions of humanitarian norms in their application? Consider that a gender-neutral understanding of IHL and IHRL norms may lead to violations.
- ② Identify patterns of violation, respect, and restraint in relation to IHL and IHRL. In particular, humanitarian actors need to examine the following:
 - Have there been public reports documenting violations of specific IHL and IHRL rules?
 - Have the respective AGDAs responded to such reports in certain ways (e.g., by producing public documents responding to such allegations, modifying their internal laws in line with international law, punishing individuals)?
 - Have the AGDAs voluntarily committed to respect specific IHL and IHRL norms with the support of third parties (e.g., States, humanitarian organizations, international organizations) or by themselves?

A thorough understanding of AGDAs' views on the norms of IHL and IHRL that the humanitarian actor is trying to engage on would also be required.
- ③ Identify if there are external actors that influence AGDAs' respect for IHL and IHRL:
 - Have religious leaders, community leaders, States, humanitarian actors, or other AGDAs influenced the AGDA the humanitarian actor is trying to engage with?
 - Has that influence been on IHL or IHRL-related issues? Has it influenced positively or negatively with respect to AGDA's compliance with IHL and IHRL?

[72] For a thorough study on how AGDAs' organizational structure may influence their legal compliance, see ICRC, 'The Roots of Restraint in War' (2018).

- Has that influence changed over time, either increasing or decreasing the level of norms' compliance by the respective AGDA?

AGDAs do not operate in isolation and various stakeholders can influence situations of violation and respect and restraint. A mapping exercise of such actors would serve to clearly understand the factors contributing to AGDAs' behaviors.

To develop an understanding of potential opportunities to positively influence AGDAs' behaviors

In parallel to developing a thorough understanding of AGDAs' patterns of violation and respect and restraint with IHL and IHRL, humanitarian actors need to identify opportunities to positively influence these groups' behaviors. The following can serve for this purpose:

- ① The exercise to be undertaken will depend on the type of engagement sought:
 - It will not be the same process to engage AGDAs to access their territory in order to carry out a distribution of food, to obtain security guarantees, to try to influence them to commit to a rule of IHL and IHRL by including such provision in their code of conduct, or to encourage them to sign a public document in line with international law.
 - It is essential in this process to obtain information on previous experiences engaging with the respective AGDA, and on whether this has been successful or not, and the motives of such success (or lack thereof).
- ② Potential opportunities to influence AGDAs positively should be conceived in accordance with the overall goal of the actor and activity to be carried out. In any case, it is suggested that interested actors try to understand the following:
 - Whether the respective AGDA is looking for political recognition, either domestic or international one, which can be assessed by gathering their public statements (if they do exist).
 - If the group has already been involved in discussions with the government on political or humanitarian issues.
 - If the group has received dissemination sessions on IHL and IHRL by relevant stakeholders.
 - If the group has a specific interest on a humanitarian area (e.g., provision of health care, protection of individuals in detention).
 - If they have publicly committed to respect IHL and IHRL, either by signing a public document or including such rules in their own codes of conduct.
 - The manner in which the group has positioned itself with respect to the behaviors of other parties in conflict (e.g., does it publicly condemn alleged violations?).



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