

# African customs and traditions and the indigenization of international humanitarian law in armed conflict

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## Abstract

*Many ancient African societies had advanced and sophisticated humanitarian protection mechanisms and war codes to regulate the conduct of armed hostilities. A careful examination of both historical and contemporary African customs and traditions provides unique avenues through which to interpret and apply international humanitarian protection in armed conflict. As a sub-branch of international law, international humanitarian law (IHL) seeks to limit the excesses of warfare and regulate the conduct of armed hostilities. However, international conventions such as those of IHL remain severely constrained if they are not framed and reconciled with indigenous understandings and meanings of humanitarian protection. In non-international armed conflicts specifically, this enduring challenge demands that IHL conventions and other international conventions be framed and understood within indigenous frameworks that support local ownership of this internationalized body of law. Encouraging dialogue*

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*between international norms and indigenous practices can enhance the relevance, authority and legitimacy of IHL in Africa.*

**Keywords:** armed conflict, international humanitarian law, non-international armed conflicts, African customs and traditions.

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## Introduction

Africa is a vibrant mix of diverse cultures with a rich and complex history, including tribal and ethnic wars, struggles against colonialism and apartheid, and post-independence civil wars and genocides. While many aspects of international humanitarian law (IHL) are now accepted as international customary law, violations of IHL in armed hostilities and the rapidly changing nature of contemporary wars continue to be its most critical challenge. In many armed hostilities, it is common to read about grave breaches of international law. Often, these include the deliberate targeting of civilians and civilian homes and installations belonging to relief and humanitarian organizations, the kidnapping and murder of humanitarian staff, or blocking crucial aid from reaching those in desperate need. Possible violations of international law are precisely why IHL exists – that is, to mitigate the excesses of warfare and regulate the conduct of armed hostilities. Grave breaches and constant violations of IHL could suggest that well-intentioned international conventions such as those of IHL remain severely constrained in their efforts to tackle war crimes and IHL infractions if not framed and reconciled with indigenous understandings and meanings of humanitarian protection.

In non-international armed conflicts specifically, an increase in civilian fatalities and blatant violations of IHL is indicative of growing concerns about deficiencies in understanding the limitations and responsibilities exerted on warring parties by international law. It also highlights the need to frame IHL conventions and other international conventions within indigenous frameworks that support local ownership of this important body of law. Reframing and indigenization of IHL is particularly important for the following reasons. First, the international legal system as it exists today is mistrusted by many on the African continent, including non-State armed groups (NSAGs) who perceive it as an unwelcome intrusion and an extension of neo-colonialism.<sup>1</sup> Second, a scrutiny of past and contemporary African customs and traditions will not only enable the revival of indigenous humanitarian protection mechanisms that support IHL but will also help existing laws to respond sufficiently to future challenges. Diallo correctly observes that a law violated only in part will become contested and threatened with erosion, which will lead to its eventual demise.<sup>2</sup> For IHL to

- 1 Res Schuerch, *The International Criminal Court at the Mercy of Powerful States*, Springer, The Hague, 2017.
- 2 Yolande Diallo, “Humanitarian Law and Traditional African Law”, *International Review of the Red Cross*, Vol. 16, No. 179, 1976.

remain relevant, effective and authoritative, it is important that scholars and practitioners rethink and reorient IHL's hierarchical and binary view of the world, in which the West leads and the rest follow.

This article extends from a continuing project in which the author actively participated, aimed at assisting the International Committee of the Red Cross (ICRC) in updating its Tool on African Traditions and the Preservation of Humanity during War. The project aims to strengthen the relevance and authority of IHL by scrutinizing historical connections and relationships between African traditions and customs and IHL principles.<sup>3</sup> Using ethnographic case studies from southern Africa, this article underlines the growing importance of integrating indigenous practices into the application of IHL in armed hostilities. This is crucial to ensuring that IHL remains fit for purpose in a rapidly changing environment characterized by improvements and advances in military technology. The article argues that embracing the relevance of African customs and traditions to IHL and encouraging dialogue between international standards and indigenous norms and practices can reinforce the relevance and authority of IHL in armed conflict.

## Examining African customs and traditions to reinforce IHL in armed conflict

African IHL practitioners and historians have long argued that despite a paucity of literature on the topic, many African customs and traditions had advanced and in-built humanitarian protection mechanisms to limit the excesses of warfare and to regulate the conduct of armed hostilities.<sup>4</sup> However, Africa as a collective continues to maintain a low profile as far as the global debate and scholarship on IHL is concerned.<sup>5</sup> Scholars like Bello and Waschefort attribute this to the process of colonialization, which excluded “uncivilized” societies from participating in the early formation and development of IHL but also saw the deliberate violation of IHL principles by European colonial powers.<sup>6</sup> European colonial powers capitalized on the non-applicability of international criminal law to non-Western societies in order to commit genocides and war crimes without

3 ICRC, “Tool on African Traditions and the Preservation of Humanity during War”, 24 May 2021, available at: [www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl](http://www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl) (all internet references were accessed in September 2024).

4 See, for example, Sarah Jean Mabeza and Tamalin Bolus, “Changing the Narrative: A Tool on African Traditions and the Preservation of Humanity during War”, *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022; Mutoy Mubiala, “African States and the Promotion of Humanitarian Principles”, *International Review of the Red Cross*, Vol. 29, No. 269, 1989; Emmanuel G. Bello, “Shared Legal Concepts between African Customary Norms and International Conventions on Humanitarian Law”, *Military Law and the Law of War Review*, Vol. 23, No. 1–4, 1984.

5 Kenneth Wyne Mutuma, “The Silence of Africa in the International Humanitarian Law Debate”, *African Yearbook on International Humanitarian Law*, 2021.

6 See for example, E. G. Bello, above note 4, pp. 288–289; K. W. Mutuma, above note 5, pp. 135–136; Gus Waschefort, “Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same”, *International Review of the Red Cross*, Vol. 98, No. 902, 2016.

consequence.<sup>7</sup> Against growing mistrust of the international legal system, examining historical and contemporary relationships between IHL and African traditions and customs is necessary to strengthen respect for, application of and legitimacy of IHL in armed conflicts on the continent. This is especially crucial because the way in which individuals and societies perceive the law, and its social and political implications, influence its effectiveness or lack thereof. As argued by Mutuma, a major deficiency of IHL is its State-focused character; this weakens its ability to regulate the conduct and behaviour of NSAGs, which by operation of international law cannot become parties to IHL's treaties and law-making processes.<sup>8</sup> It is therefore unsurprising that NSAGs do not comply with IHL rules and to this day remain distrustful of the international legal system as a whole.

Similar to the philosophy of *ubuntu*,<sup>9</sup> the foundational principle of humanity that underlies IHL posits that individuals possess the capability and potential to demonstrate respect and compassion for all, including their adversaries. *Ubuntu* is a set of institutionalized ideals and values that guide and direct the patterns of life of Africans. It embodies a concept reflective of a shared set of aspirational objectives embraced by a substantial majority of Africans which directs and informs their interactions and engagement with others. As a moral philosophy applicable in the context of armed hostilities, *ubuntu* advocates for humane treatment of adversaries and opposes inhumane practices such as torture and the commission of mass atrocities.<sup>10</sup> The Ndebele proverb “Inkosi yinkosi ngabantu”, loosely translated as “A chief is to the people what people are to the chief”, illustrates the argument put forward by decolonial scholars like Mubiala,<sup>11</sup> Ndlovu-Gatsheni<sup>12</sup> and Bello<sup>13</sup> who argue that like other “civilized societies”, many African societies had and have in-built measures of security and protection for the people, including society's most vulnerable. In particular, the

7 See, for example, Henning Melber, “Germany and Namibia: Negotiating Genocide”, *Journal of Genocide Research*, Vol. 22, No. 4, 2020; Berber Bevernage, “The Making of the Congo Question: Truth-Telling, Denial and ‘Colonial Science’ in King Leopold’s Commission of Inquiry on the Rubber Atrocities in the Congo Free State (1904–1905)”, in William Gallois (ed.), *Rethinking the History of Empire*, Routledge, London, 2020.

8 K. W. Mutuma, above note 5, p. 134.

9 Godwin Sogolo defines *ubuntu* as a set of institutionalized ideals which guide and direct the patterns of life of Africans. It becomes a notion descriptive of a convergent set of desired goals which all, or at least most, Africans entertain and towards which their activities are directed. It encourages humane treatment of one’s opponents and rivals, and abhors torture, discrimination, dehumanization etc. See, for example, Godwin Sogolo, *Foundations of African philosophy: A Definitive Analysis of Conceptual Issues in African Thought*, Ibadan University Press, Ibadan, 1993; Mluleki Mnyaka and Mokgethi Motlhabi, “The African Concept of Ubuntu/Botho and Its Socio-Moral Significance”, *Black Theology*, Vol. 3, No. 2, 2005.

10 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 15 December 2022 (on file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2022 (on file with author).

11 M. Mubiala, above note 4, p. 35.

12 Sabelo J. Ndlovu-Gatsheni, “Who Ruled by the Spear? Rethinking the Form of Governance in the Ndebele State”, *African Studies Quarterly*, Vol. 10, No. 2–3, 2008.

13 E. G. Bello, above note 4, pp. 288–289.

proverb demonstrates that while a chief possessed important powers over his subjects, he could only exercise them for the good of his subjects and guests.<sup>14</sup>

Humanitarian protection and human rights protection systems in some African societies meant that initiation of armed hostilities and warfare was considered a measure of last resort, aligning with principles outlined in the *jus ad bellum* framework, a legal construct offering justifications for the transition from a state of peace to one of armed force.<sup>15</sup> However, even in the pursuit of armed hostilities, some traditional African societies adhered to extensive regulations embodied in a myriad of rules and codes of conduct, exemplified by the tenets of *jus in bello*. As a legal framework, *jus in bello* delineates guidelines that guide the conduct and obligations of belligerent nations, neutral nations and individuals engaged in armed conflict in their interactions with each other and with persons afforded protected status.<sup>16</sup>

Admittedly, while disruptive historical events such as the turbulent Mfecane period<sup>17</sup> may have sought to systematically undermine African humanitarianism and the concept of *ubuntu* in general, some African leaders of the time, like King Moshoeshoe of the Basotho nation, held steadfast to these enduring African values of *ubuntu* and humanitarianism. For instance, King Moshoeshoe extended a helping hand and accommodated scores of refugees fleeing the social and political upheaval of the Mfecane period.<sup>18</sup> He also treated prisoners of war (PoWs) and war captives in humane ways consistent with the Basotho philosophy of “Batho pele”,<sup>19</sup> which derives from a Sesotho phrase and loosely translates to “Humanity first”. King Moshoeshoe embodied the values of “Batho pele” by treating even his adversaries with respect and dignity and opposing inhumane practices like torture, looting, and dehumanizing war captives.<sup>20</sup> Against this background, one can conclude that no human civilization or race can lay claim to or monopoly over the origination of humanitarianism, since these concepts were intrinsically embedded in Africans’ traditional ways of

14 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 15 December 2022 (on file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2022 (on file with author).

15 Online interview with Thafeng Mokoena, Basotho Cultural Custodian and Historian, 8 January 2023 (on file with author).

16 Carsten Stahn, “‘*Jus ad Bellum*’, ‘*Jus in Bello*’ ... ‘*Jus post Bellum*’? – Rethinking the Conception of the Law of Armed Force”, *European Journal of International Law*, Vol. 17, No. 5, 2006.

17 *Mfecane* is a Nguni word for “crushing”. The Mfecane period was a period of sustained upheavals among the Bantu-speaking people of southern Africa. The Mfecane wars were inspired by a complexity of factors, including prolonged droughts, political and social fragmentation, which led to widespread deaths, displacement and human suffering. Socio-political turmoil at the time culminated in the disbandment of many tribes and the formation of powerful new ones.

18 Online interview with Thafeng Mokoena, Basotho Cultural Custodian and Historian, 8 January 2023 (on file with author); online interview with Thabang Mofana, Historian and Academic, 20 January 2023 (on file with author); online interview with Moletsi Moshate, Media Practitioner and Community Leader, 22 January 2023 (on file with author).

19 See, for example, Ngosa L. Mahao, “‘*O se re ho Morwa 'Morwa Towel'*’: African Jurisprudence Exhumed”, *Comparative and International Law Journal of Southern Africa*, Vol. 43, No. 3, 2010.

20 Online interview with Thabang Mofana, Historian and Academic, 20 January 2023 (on file with author).

life. Similarly, as will be demonstrated here, rules regulating the conduct of armed hostilities have existed in various shapes and forms in almost all societies.

In his article “Shared Legal Concepts between African Customary Norms and International Conventions on Humanitarian Law”, Bello argues that many pre-colonial African societies developed sophisticated laws, social rules, regulations and taboos to regulate the conduct of armed hostilities and prevent mass atrocities. Some societies even went to great lengths to enforce them.<sup>21</sup> For example, among the Shona<sup>22</sup> of Zimbabwe, *zviera* (taboos) were used as a protection mechanism for civilians, particularly women and children, during armed hostilities and conflict. One such example is the proverb “Usauraya mai vako, unotanda botso”, loosely translated as “Do not harm your mother, you will go mad”.<sup>23</sup> Although this proverb applied to both peacetime and times of war, in the context of armed hostilities, it was used to shield vulnerable groups from the effects of war and conflict. In Shona culture, it is considered taboo to murder a woman, let alone one’s own mother, as this will invoke avenging spirits that can attack not only the murderer but also his or her entire family. In traditional Shona society, the term “mother” refers to both one’s biological mother and women in general.<sup>24</sup>

However, as correctly pointed out by Bello, no consistent laws of war were ever developed across the African nations because communication would inevitably have been necessary to compare values, discover common principles and interests, initiate cooperation towards common goals, and create institutions, organizations and laws to maintain relations with other groups.<sup>25</sup> Consequently, although many African societies share many humanitarian protection principles (as will be demonstrated in this article), the majority of which find resemblance in IHL, their application differed greatly from one society to another. Ndlovu-Gatsheni builds on this argument and notes that pre-colonial African societies were very diverse and complex.<sup>26</sup> This diversity and complexity allowed both good and bad forms of governance to coexist, sometimes uneasily, across space and time.

The political landscape in pre-colonial Africa was characterized by a multitude of forms of governance, ranging from smaller, community-based systems to larger entities with a more centralized authority. These governance structures were not uniform, and their nature often depended on factors such as size, cultural practices and historical developments. In some cases, smaller communities formed

21 E. G. Bello, above note 4, pp. 285–291.

22 The term “Shona” is used here to refer to different sub-ethnic and cultural groups who share a similar cultural-linguistic background. These sub-ethnic groups include the Manyika, Karanga, Zezuru, Nda, Hera, Korekore, Rozvi etc. For a detailed analysis, see Terence Ranger, *Missionaries, Migrants, and the Manyika: The Invention of Ethnicity in Zimbabwe*, Africa Studies Institute, Johannesburg, 1984; Finex Ndhlovu, “The Role of Discourse in Identity Formation and the Manufacture of Ethnic Minorities in Zimbabwe”, *Journal of Multicultural Discourses*, Vol. 2, No. 2, 2007.

23 Interviews with Josephat Kangausaru and Jeremiah Kufakurinani, Traditional Leaders, Harare, December 2022 (on file with author)

24 Online interview with Eunice Chivuru, Cultural Custodian and Historian, 8 January 2023 (on file with author).

25 E. G. Bello, above note 4, p. 289.

26 Sabelo J. Ndlovu-Gatsheni, “*Inkosi Yinkosi Ngabantu: An Interrogation of Governance in Precolonial Africa – the Case of the Ndebele of Zimbabwe*”, *Southern African Humanities*, Vol. 20, No. 2, 2008.

cohesive units, contributing to a more federated-like structure where each entity retained its own distinct rules and laws. This created dynamic governance systems within a broader identity, allowing for a higher degree of autonomy among various communities.<sup>27</sup> On the other hand, there were instances of larger, more centralized governance structures that encompassed multiple communities, exhibiting characteristics of a State-like mechanism. For instance, larger and more centralized political systems like the Zulu and Ndebele kingdoms, under their founders Shaka and Mzilikazi respectively, were built and ruled through conquest and violence, whereas smaller political systems like the Basotho Kingdom under King Moshoeshoe were built and governed through voluntary devotion.<sup>28</sup>

The dynamism of the Ndebele system of governance across different historical periods is also worth noting. Historians such as Ndlovu-Gatsheni have argued that Ndebele governance systems during the migratory phase (1841–40) were vastly different from governance systems in the settled period (1841–93).<sup>29</sup> As a result, governance systems that emerged during these two distinct historical periods had implications for human rights and humanitarian protection which sometimes dictated flexibility, openness and adaptability.<sup>30</sup> The intention here is not to make sweeping generalizations about African societies, as doing so runs the risk of ignoring complexities and obfuscating nuances that necessitated the constant shifting governance architecture of many of these societies. Rather, the intention is to highlight convergences between African traditions and customs, on the one hand, and IHL, on the other. It is hoped that this may help to strengthen the authority and relevance of IHL in Africa by demonstrating the varied and complex ways in which these societies sought and continue to grapple with humanitarian protection principles.

## Folklore and humanitarian protection in Southern Africa

Folklore refers to a body of cultural practices and beliefs shared by a distinct community and transmitted mainly by word of mouth from one generation to the other. Folklore is an old cultural practice in many African communities and includes tales, songs, poems, drama, dance, riddles, proverbs and sayings. Folklore also refers to a set of practices through which expressive cultural practices and traditions are shared.<sup>31</sup> While many of these have been lost due to social disintegration and the break-up of traditional ties, many societies still rely on the

27 Peter Lloyd, “The Political Structure of African Kingdoms: An Exploratory Model”, in Michael Banton (ed.), *Political Systems and the Distribution of Power*, Routledge, London, 2012.

28 See, for example, Ian Knight, *The Anatomy of the Zulu Army: From Shaka to Cetshwayo, 1818–1879*, Frontline Books, Barnsley, 2015; Max du Preez, “The Socrates of Africa and His Student: A Case Study of Pre-Colonial African Leadership”, *Leadership*, Vol. 8, No. 1, 2012.

29 S. J. Ndlovu-Gatsheni, above note 26, p. 378.

30 *Ibid.*, pp. 378–379.

31 Norman Chivasa and Phillipa Mutswanga, “An Examination of the Role of Shona Folktales in Promoting Peacebuilding among Modern Communities in Zimbabwe”, *International Journal of Humanities, Social Sciences and Education*, Vol. 1, No. 11, 2014.

experiences of their older generations as a foundation and source of guidance for life. Although the basic format is the same for each, folk tales, proverbs and riddles vary depending on dialectal differences, idiolect (storyteller) and changing times. Folk tales, proverbs and riddles, as forms of didactic prose, were used by the indigenous communities of southern Africa to promote humanitarian protection principles and prevent mass atrocities during armed hostilities. They were intelligently deployed to offer advice, warn, reprimand and inculcate positive values. Embedded in these practices are moral values, such as humanness, respect, hospitality and dignity, which are the foundation of IHL. For instance, Ndebele proverbs such as “Isisu somhambi asingakanani singanophonjwana lwembuzi”, loosely translated as “The stomach of a traveller is the size of a goat’s horn”, were used largely to appeal to the African philosophy of *ubuntu*, particularly during crisis times. This proverb implores host communities to provide humanitarian relief – i.e., food and shelter – to those fleeing conflict and persecution.<sup>32</sup> The underlying message is that providing for a visitor/stranger will not deplete one’s food banks, and a visitor ought to be accorded all the conveniences of a homestead. Another example is “Emuva kuphambili”, loosely translated as “Past acts have a way of catching up with a person, and one ought to take heed in how they treat others”. Although this proverb can be applied broadly to everyday life, in the context of armed hostilities it was used to encourage humane treatment of PoWs and to prevent the commission of mass crimes.<sup>33</sup>

Among the predominantly Nguni tribes of southern Africa, folklore played a crucial role in the socialization process and in inculcating humanitarian protection principles during and outside battle.<sup>34</sup> At the height of the liberation struggle in the region, music, songs and dance played a pivotal role in reflecting and engaging with political, economic and social transformations, and in some instances facilitated and enabled these transformations. Writing about African societies, Ndlovu-Gatsheni notes that the use of *izibongo* (praise poems), *izingoma* (music) and proverbs played a crucial role in upholding African customs and traditions in the face of colonial onslaught.<sup>35</sup> Music was not only a tool for mass mobilizations against colonialism but was also used to inculcate in guerrillas the ethos of discipline and how to conduct themselves during armed hostilities.<sup>36</sup> War songs such as “Bafundiseni” (“Teach Them”) popularized by the Zimbabwe People’s Revolutionary Army (ZIPRA) – the armed wing of the Zimbabwe African People’s Union (ZAPU) during the struggle for independence in Rhodesia – were

32 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 15 December 2022 (on file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2022 (on file with author).

33 Online interview with Khanyisile Mlotshwa, Academic and Historian, 10 January 2023 (on file with author).

34 S. J. Ndlovu-Gatsheni, above note 12, pp. 72–74.

35 S. J. Ndlovu-Gatsheni, above note 26, pp. 380–390.

36 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 15 December 2022 (on file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2022 (on file with author); online interview with Khanyisile Mlotshwa, Academic and Historian, 10 January 2023 (on file with author); S. J. Ndlovu-Gatsheni, above note 26.



used to invoke a fighting spirit in young men and women but also to inculcate the ethos of self-control consistent with the conduct of a well-groomed liberation fighter.<sup>37</sup> Parts of the song warn fighters against looting civilian property (war booty) and inflicting unnecessary harm on their opponents. One verse in the song, “Bafundiseni abasakhulayo libalaye imilayo emitsha”, loosely translated as “Groom the new generation to be responsible and ethical so they know how to conduct themselves in battle”,<sup>38</sup> is consistent with the law of armed conflict contained in international law – for instance, limiting the use of violence to what is necessary to achieve military objectives.

Pongweni notes that during Zimbabwe’s armed struggle, folklore was used for multiple purposes, including to conscientize, inform, educate and mobilize, but also to inculcate humanitarian protection principles.<sup>39</sup> “Ndzira Dzemasoja” (loosely translated as “The Rules of Armed Combat”), a song popularized by the Zimbabwe African National Liberation Army, the armed wing of the Zimbabwe African National Union, impressed on guerrillas how to conduct themselves during armed conflict. It also admonished guerrillas from committing war crimes, mistreating PoWs and captives, and looting, while encouraging them to promptly deliver directly to their commanders all items confiscated from the enemy.<sup>40</sup>

## Civilian protection and treatment of protected persons in armed conflict among the Basotho, Ndebele and Shona

The protection of civilians during war under IHL is provided for in Geneva Convention IV (GC IV),<sup>41</sup> Article 13 of which states that this protection is applicable to all populations of parties to the conflict without distinction. Article 14 of GC IV states that safety zones and localities may be organized to protect wounded people, the sick, the aged, children and expectant mothers from the effects of war. Many pre-colonial societies in southern Africa had well-defined and sophisticated humanitarian protection systems designed to shield vulnerable groups from the effects of armed conflict, and these humanitarian protection mechanisms resemble modern IHL protection regimes that prohibit attacks on civilians and ill-treatment of protected persons. For instance, the Nguni developed sophisticated social taboos that relate to the treatment of children, women and expectant mothers and to the protection of sacred forests, cultural property and religious shrines, and in some instances such protections extended to civilians and war captives. It is important to note that the majority of these

37 Interview with Cde Ginyamabhunu (nom de guerre), ZIPRA Commander and Liberation Struggle Fighter, Bulawayo, 12 December 2022 (on file with author).

38 Interview with Dungeni Ndlovu, ZAPU Stalwart and Liberation Struggle Fighter, Bulawayo, 10 December 2022 (on file with author).

39 Alec J. C. Pongweni, *Songs that Won the Liberation War*, College Press, Harare, 1982.

40 Interview with Josephat Kangausaru, Traditional Leader, Harare, 10 December 2022 (on file with author); interview with Jeremiah Kufakurinani, Traditional Leader, Seke, 12 December 2022 (on file with author).

41 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

commonly shared humanitarian protection principles were unwritten war codes and social taboos; therefore, care must be taken in recognizing that “Nguni” is a collective term used to describe diverse groups with multiple and sometimes conflicting and contradicting traditions and customs.

Article 13 of GC IV and Article 9 of Additional Protocol II<sup>42</sup> speak broadly about the general protection of populations, including the protection of medical and religious personnel, against certain consequences of war. Similarly, sophisticated humanitarian protection mechanisms are embedded within many African traditions and customs to protect vulnerable groups from harm during armed hostilities. Unsanctioned deviations from these unwritten war rules typically warranted strong retribution from the opponent. For example, writing about Ndebele–Shona wars of the nineteenth century, Historian David Beach documented how Shona raiding groups under Chief Changamire penetrated Matabele hinterlands and, in the process, committed atrocities on Ndebele women that provoked a strong and retaliatory response from Ndebele regiments, who overpowered and crushed the Shona.<sup>43</sup> This case illustrates a sense of deep recognition and enforcement of the rules of war that forbade attacks on vulnerable groups. By operation, this rule meant that vulnerable groups such as women and children were rarely killed, and transgressions were considered reckless and disgraceful and could invite severe punishments. There were also economic reasons for not killing women and children; for instance, in largely agricultural societies, women tilled the land and bore children whose labour would be needed once war ended as well as for future conscription into the military.<sup>44</sup>

Under King Moshoeshoe, Basotho had very advanced and sophisticated humanitarian principles designed to protect and safeguard society’s most vulnerable, including women and children, war captives, the elderly, and disabled persons. In the Basotho tradition, women, children, travellers and the aged were considered inviolable and were to be treated with care even during war.<sup>45</sup> This meant that women, children and travellers (civilians) were accorded extra protection among the Basotho. Among the Ndebele, ill-treatment of protected persons, among them *izangoma* (traditional healers) and *izanuse* (diviners), was strictly prohibited, and deviation from this unwritten war rule invited strong retaliation from the Ndebele.<sup>46</sup> Among the Shona, social taboos were employed to protect vulnerable groups from harm during armed hostilities. As noted

42 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

43 David Norman Beach, “Ndebele Raiders and Shona Power”, *Journal of African History*, Vol. 15, No. 4, 1974.

44 Interview with Josephat Kangausaru, Traditional Leader, Harare, 10 December 2022 (on file author); interview with Jeremiah Kufakurinani, Traditional Leader, Seke, 12 December 2022 (on file with author).

45 M. du Preez, above note 28.

46 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 15 December 2022 (on file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2022 (on file with author).

previously, it is widely believed among the Shona that indiscriminate killing inside and outside armed conflict can invoke avenging spirits that can harm not just the murderer but his or her entire family too. Social taboos like these were intelligently used to mitigate commission of mass crimes and atrocities during battle.<sup>47</sup>

In some African societies, warriors underwent cleansing ceremonies to cleanse themselves of the blood of civilians killed and harmed during war. This cultural practice served as acknowledgment that while civilians ought to be spared during armed hostilities, in some instances collateral damage is unavoidable. This example illustrates that some African customs and traditions went over and above the Geneva Conventions to ensure post-war harmony. For example, when Mozambique's protracted civil war ended in 1992, the Manyika in Gorongosa district activated the *magamba* spirit – an important post-war indigenous practice used to overcome strong feelings of revenge and retribution among combatants.<sup>48</sup>

## Use of weapons and regulation of armed conflict among the Ndebele, Zulu and Basotho

In many African societies, humanitarian protection principles were deployed to ensure moderation in armed conflict situations and to regulate the conduct of armed hostilities. Concepts of moderation and clemency shown to enemies, as well as the prohibition of certain weapons, constituted ancient laws that regulated the conduct of armed hostilities. In some societies, wars would cease during agricultural seasons to allow for sowing and harvesting. This was essential to boost the grain and food banks needed to sustain future wars. Under international law, IHL imposes on parties to a conflict various restrictions on the means of warfare, in particular the choice of weapons and the methods of warfare. These are contained in instruments such as the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and its five protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention on anti-personnel mines.

Many African societies developed sophisticated means of regulating warfare, including choice of weapons and military tactics. To minimize inflicting bodily harm on opponents, some societies even went to the extent of banning the use of certain weapons during armed battle. For instance, during his reign as the Zulu ruler, King Cetshwayo passed a law prohibiting the use of sharpened sticks used to jab the eye of an opponent during a fight. Use of such weapons was considered cowardly and unfair, and harsh penalties – including death – could be

47 Online interview with Eunice Chivuru, Cultural Custodian and Historian, 8 January 2023 (on file with author).

48 Leonard M. Thompson, *Survival in Two Worlds: Moshoeshoe of Lesotho 1786–1870*, Oxford University Press, Oxford, 1975.

imposed on offenders. Heavy fines could also be levied on transgressors depending on the severity of the injury and harm caused. Subsequent Zulu kings later outlawed and banned the use of excessively harmful weapons like poisoned spears during armed battle.<sup>49</sup>

Among the Zulu, young warriors were trained in the laws of war prior to joining battle. The rules included prohibition of killing an enemy that has surrendered or has clearly expressed an intention to surrender, a provision that is also contained in Article 3 common to the four Geneva Conventions prohibiting attacks on persons *hors de combat*. For instance, writing about the Zulu nation, Carton and Morrell<sup>50</sup> argue that while stick fighting could sometimes be characterized by unforgiving outcomes, ruthless retribution and painful ostracism, it inculcated in young Zulu warriors a sense of restraint – a critical component of the socialization of young Zulu men.<sup>51</sup> The ability to exercise physical restraint during stick fighting taught young boys the ethos of self-control that they were expected to emulate in combat. For instance, during stick fighting, young men were trained to first protect themselves and to pull back if an opponent lay defenceless or if an opponent could no longer compete and therefore resorted to his primary identity as a non-combatant. During stick fighting, it was also considered unnecessary to cause prolonged pain and suffering to defeated opponents, who were, after all, no longer enemies but defenceless non-combatants. The above examples demonstrate that some African customs and traditions respected provisions contained in the Hague Law that prohibit unlimited use of weapons or arms in battle and the infliction of unnecessary suffering. While certain aspects of international law bring some conditions to the use of violence (for instance, the principle of necessity versus proportionality), as a general rule, IHL prohibits infliction of unnecessary suffering or causing superfluous injury. As has been demonstrated in the above cases, the Zulu nation developed sophisticated humanitarian protection mechanisms to strike a balance between military necessity (ability to subdue the enemy) and the need for humanitarian protection (not inflicting unnecessary harm or injury on opponents).

Many ancient African laws of armed conflict contained specific unwritten rules and provisions regarding the regulation of war, including declaration and cessation of war. Consequently, attacks without warning were a rare occurrence and, in most instances, were considered acts of cowardice. The work of anthropologist and historian Karl Mauch<sup>52</sup> shows just how rare surprise attacks on opponents were in pre-colonial Zimbabwe. According to Cobbing, the Ndebele formulated rules concerning the protection of non-belligerents and the safe evacuation of civilians, mostly women, children and the elderly, prior to the commencement of battle. In the Ndebele–Shona battle that occurred at the Mtilikwe–Pokoteke river confluence, the Shona were given three days’ advance

49 Benedict Carton and Robert Morrell, “Zulu Masculinities, Warrior Culture and Stick Fighting: Reassessing Male Violence and Virtue in South Africa”, *Journal of Southern African Studies*, Vol. 38, No. 1, 2012.

50 *Ibid.*, p. 34.

51 *Ibid.*, p. 31.

52 Cited in D. N. Beach, above note 43, p. 41.

warning of commencement of battle.<sup>53</sup> This served as a warning for civilians to leave or self-evacuate to safe zones. In some cultures, protected persons, including emissaries, were used to warn adversaries of the commencement of war. Among the Basotho, the person of an ambassador, messenger or delegate was inviolable and could not be attacked.<sup>54</sup> These provisions correspond to Part III and several articles of Part IV of Additional Protocol I (AP I),<sup>55</sup> specifically Article 37, which ensures that individuals who are sent to negotiate or communicate with the enemy under a flag of truce are not harmed.

Within IHL, the principle of distinction permits direct attacks only against combatants, while peaceful civilian populations must be spared and protected against the effects of the hostilities. Ndebele regiments under King Mzilikazi carried shields made of cattle hides of distinctive colour and patterns, and bore markings and facial scars to make them stand out and be recognizable. This enabled the Ndebele to distinguish between armed combatants and non-combatants, civilians and peace envoys, and thus to apply the principle of distinction. War signals that included beating drums, smoke and sounding alarms were used to relay important messages, including the commencement of war; opponents and civilian populations took such warnings seriously. In the majority of cases, armed confrontations were a last resort if negotiations failed. For instance, King Lobhengula sent his trusted *indunas* (council of elders) to meet the British Crown in England in order to seek peaceful resolution with Cecil John Rhodes' men, who were determined to militarily crush the Ndebele and take over their land and livestock.<sup>56</sup> When peace overtures between Lobhengula and the British Crown faltered, war broke out, and unfortunately Lobhengula and his men lost the war to Rhodes and the British South African Company, who had superior weaponry. Prior to the declaration of war, it is rumoured that Lobhengula's emissaries had carried an object to the British signalling the Ndebele king's intention to declare war, and evidence of this occurring elsewhere suggests it was a common practice among the Nguni of southern Africa.<sup>57</sup>

During King Moshoeshoe's rulership of the Basotho, sophisticated communication signals were deployed in times of war. For example, upon the sounding of an alarm, a foreigner was supposed to join the citizens in the defence of the realm, even if the attackers were his fellow countrymen.<sup>58</sup> Still, despite his military prowess, King Moshoeshoe preferred not to wage war but instead forge

53 Julian Cobbing, "The Evolution of Ndebele Amabutho", *Journal of African History*, Vol. 15, No. 4, 1974.

54 Online interview with Thafeng Mokoena, Basotho Cultural Custodian and Historian, 8 January 2023 (on file with author); online interview with Thabang Mofana, Historian and Academic, 20 January 2023 (on file with author); online interview with Moletsi Moshate, Media Practitioner and Community Leader, 22 January 2023 (on file with author).

55 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

56 J. Cobbing, above note 53.

57 Interview with Themba Ndlovu, Historian and Academic, Bulawayo, 15 December 2022 (on file with author).

58 Online interview with Thafeng Mokoena, Basotho Cultural Custodian and Historian, 8 January 2023 (on file with author); online interview with Thabang Mofana, Historian and Academic, 22 January 2023 (on file with author).

alliances with powerful kings such as Shaka and Dingiswayo.<sup>59</sup> There is a popular story among the Basotho that is used to illustrate King Moshoeshoe's military diplomacy. It is rumoured that after he defeated Mzilikazi's mighty army, Moshoeshoe famously sent Mzilikazi a herd of fat oxen with a note indicating that Mzilikazi had clearly attacked out of hunger and that the cattle were for him to feed his hungry regiments. It is also rumoured that when British forces withdrew from Thaba-Bosiu following an embarrassing defeat at the battle of Viervoet in 1851, King Moshoeshoe sent the army commander a note congratulating the British for their bravery and sent his regards to the British Crown.<sup>60</sup>

## Treatment of war captives and protection of PoWs

Articles 49 and 50 of Geneva Convention III (GC III)<sup>61</sup> deal with various matters relating to the utilization of the labour of PoWs. The provisions cover working conditions, occupational health safety standards, duration of labour of PoWs etc. African societies like the Ndebele and Basotho developed humane systems for integrating war captives and PoWs into host communities. According to Ndlovu-Gatsheni,<sup>62</sup> the anthropologist Thomas Morgan Thomas described the social conditions of captives and PoWs within Ndebele society as very humane. Within Ndebele society, PoWs and war captives were given good food and permitted to marry like all other young men. Captured young men were drafted into Amabutho regiments and underwent the same stages of military training as any Ndebele young men would. Thomas<sup>63</sup> noted that for a captive or PoW to be received as a member of the family was the highest honour that any stranger could be given in an African family unit, and that by extension, captives and PoWs received the full benefits of membership. Young men also enjoyed full rights to marriage after being fully initiated into any institution, while exceptional young men who had demonstrated military prowess were appointed into high military command positions in the Ndebele military structure.<sup>64</sup>

In August 1836, a Boer family led by Barend Liebenberg trekking from the Cape entered King Mzilikazi's territory in the present-day Free State (South Africa), despite a warning by Stephabus Erasmus, whose family had fallen victim to Mzilikazi's warriors. The Liebenbergs too were attacked, and Barend and his wife were killed. Hidden under a sail, Mzilikazi's warriors found three Liebenberg children and took them, along with three others, to Mzilikazi, who became

file with author); online interview with Moletsi Moshate, Media Practitioner and Community Leader, 22 January 2023 (on file with author).

59 See, for example, N. L. Mahao, above note 19; M. du Preez, above note 28.

60 L. M. Thompson, above note 48.

61 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

62 S. J. Ndlovu-Gatsheni, above note 26.

63 Thomas Morgan Thomas, *Eleven Years in Central South Africa*, Books of Bulawayo, Bulawayo, 1970.

64 S. J. Ndlovu-Gatsheni, above note 26.

furious that his warriors had captured little children. The king ordered their return, but this was impossible due to the circumstances at the time.<sup>65</sup> In a similar case, in 1834, Mzilikazi's warriors captured Peter David's (leader of the Griquas) 17-year-old daughter Truey and another "coloured" child known as Wilhelm. Unlike their father, the children were all spared and brought to the king at eGabeni, the royal *kraal* (village).<sup>66</sup> According to Ndebele tradition and custom, Truey and Wilhelm became *abantwana besihlangu* (children of the shield). The Liebenberg children were integrated into Ndebele society, and Christian Liebenberg assumed an indigenous name, Velaphi (meaning "Where do you come from?"). He grew to become a Matabele warrior and his fighting exploits attracted the attention of the king, who made him chief of the Nungu regiment. Christian's sister Sara Liebenberg became Lobhengula's carer and was fully integrated into Ndebele society.<sup>67</sup> Tribal custom among the Ndebele dictated that orphaned children with no family to care for them be adopted by the king, as happened with the Liebenbergs and Peter David's daughter.

Because of the humane treatment extended to war captives, some voluntarily assimilated into Ndebele society and even went to the extent of translating their totems to isiNdebele equivalents. Historians Ndlovu-Gatsheni and Msindo<sup>68</sup> have documented how some Shona captives translated their totems to isiNdebele: Shiri to Nyoni, Shumba to Sibanda etc. Articles 13 and 14 of GC III oblige host States to treat war captives and PoWs with respect and dignity, but Ndlovu-Gatsheni<sup>69</sup> further argues that the Ndebele treatment of war captives and PoWs demonstrated a deeper human feeling that went far beyond the superficial observance of the type of treatment provided for in the Geneva Conventions, primarily because the Conventions accord basic minimal care. Part III, Section III of GC III deals with the labour of PoWs; under Article 49, provision is made for the Detaining Power to utilize the labour of prisoners who are physically fit to work, and Article 50 lists the classes of authorized work that PoWs are permitted to perform. Under King Moshoeshoe, PoWs and captives were treated humanely and with respect for their dignity. For example, the king sent working parties to work on the chiefs' land (*letsema*) and enemy fields (*ts'imoea lira*) because their produce was consumed not only by his family and his dependents (refugees) but by all men of the chieftdom at the *pitso* (assembly) and in time of war.<sup>70</sup> Humanitarian protection regimes like these find resonance in Part III, Section II

65 William F. Lye, "The Ndebele Kingdom South of the Limpopo River", *Journal of African History*, Vol. 10, No. 1, 1969.

66 *Ibid.*

67 Jessie Lloyd, *Rhodesia's Pioneer Women (1859–1896)*, Rhodesia Pioneers' and Early Settlers' Society, Bulawayo, 1974.

68 Sabelo J. Ndlovu-Gatsheni, "Mapping Cultural and Colonial Encounters, 1880s–1930s", in Brian Raftopoulos and Alois Mlambo (eds), *Becoming Zimbabwe: A History from the Pre-Colonial Period to 2008*, Weaver Press, Harare, 2009; Enocent Msindo, *Ethnicity in Zimbabwe: Transformations in Kalanga and Ndebele Societies, 1860–1990*, Rochester Studies in African History and the Diaspora, Vol. 55, University of Rochester Press, Rochester, NY, 2012.

69 S. J. Ndlovu-Gatsheni, above note 26.

70 L. M. Thompson, above note 48.

of GC IV relating to aliens in the territory of a party to the conflict, which contains provisions prohibiting military attacks on civilian centres, including asylum and refugee centres.<sup>71</sup>

Despite being a highly centralized and militarized State, the Ndebele State developed sophisticated systems for humanitarian protection and war codes to regulate conduct of warfare. Through storytelling and folklore, the Ndebele deployed “codes of warfare” that encouraged humane treatment of war captives and PoWs. Stories often emphasized the changing nature of one’s fortunes in life, which minimized commission of war crimes and mass atrocities during hostilities. Everyday language was encoded with idioms and proverbs that encouraged moderation and clemency. One such example is “Inxeba lendoda kalihlekwa”, loosely translated as “You don’t make fun of another man’s misfortune”, which was intended to discourage triumphalist tendencies by the winning side in battle and to serve as a reminder not to treat captives and PoWs with disdain because the tables could easily turn in the next battle.<sup>72</sup> If, for instance, the winning side treated the enemy in battle without respect for their dignity, the same fate might await them in future combat. Military codes like these discouraged Ndebele warriors from perpetrating war crimes and significantly reduced brazen acts of brutality.<sup>73</sup>

Article 4 of GC III describes which persons are to be categorized as PoWs, and the general protection extended to such persons is contained in Part II of the Convention. Provisions of GC III also cover responsibility for the treatment of the sick and wounded, humane treatment of PoWs, respect for the person of PoWs, maintenance and medical attention for PoWs, and equality of treatment of PoWs without any adverse distinction. Some of Basotho’s humanitarian principles went far beyond the humanitarian protection principles contained in IHL, however. For instance, the protection of a “stranger” was deemed to be the full responsibility of his host, and a traveller’s goods could not be seized from him.<sup>74</sup> According to IHL provisions, the principle of distinction between combatants and civilians holds that only a fighter may be targeted. This principle is designed to protect civilians in armed conflict and is set out in Articles 48 and 52 of AP I. Under Moshoeshoe’s leadership of the Basotho, those who surrendered in war were to be spared, and while captives’ offensive weapons were taken from them, they were allowed to retain within their possession their

71 See, for example, GC IV, Art. 44; AP I, Art. 17.

72 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 22 December 2022 (file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2023 (on file with author); online interview with Khanyisile Mlothswa, Academic and Historian, 18 January 2023 (on file with author).

73 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 22 December 2022 (file with author); interview with Chief S. Masuku, Traditional Leader and Chief, Matopos, 27 December 2023 (on file with author); online interview with Khanyisile Mlothswa, Academic and Historian, 18 January 2023 (on file with author).

74 See, for example, Khali Mofuoa, “The Exemplary Ethical Leadership of King Moshoeshoe of Basotho of Lesotho in the [sic] Nineteenth Century Southern Africa”, *Journal of Public Administration and Governance*, Vol. 5, No. 3, 2015; N. L. Mahao, above note 19.



shields.<sup>75</sup> This corresponds with Article 18 of GC III relating to the property of PoWs, which states that “[a]ll effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection”.

## Treatment of the sick and wounded in battle

Article 12 of Geneva Convention II (GC II)<sup>76</sup> speaks broadly to the protection and care of the wounded and sick in battle. IHL prohibits attacks against those *hors de combat* (those who are sick, wounded and/or PoWs); for instance, while soldiers can be targeted under normal circumstances, it is prohibited to target them if they surrender or are wounded and no longer pose a threat. Under IHL, such persons are entitled to more protection if they meet the criteria of PoWs. Chapter II of GC II lays out procedures to be followed when dealing with the sick and wounded. Specifically, Article 12 provides that members of the armed forces and other persons mentioned therein who are wounded or fall sick should be respected and treated in all circumstances. They are to be treated and cared for in a humane manner, and this responsibility is placed on the party to the conflict in whose power they find themselves. Among the Basotho, it was the custom for the sick and wounded of the enemy to be cared for at the end of each battle.<sup>77</sup>

Among the Shona groups, who were generally less militaristic than the Ndebele, prior intergroup contact shaped each side’s attitude, leading to a reduction in reckless killing, wounding, and attempts to cause maximum harm during conflicts. The wounded and sick of the enemy would be treated, and the dead buried in accordance with local customs and traditions, which emphasized the importance of honouring the dead with dignity and respect in the burial process.<sup>78</sup>

King Moshoeshoe, the founder of Basotho nation, successfully defended his people from attacks by the Ndebele under King Mzilikazi, the Griquas, the Boers and later the British on several occasions. Despite defeating his enemies in battle, King Moshoeshoe earned a reputation for acting wisely and treating his enemies with dignity and compassion. His military prowess displayed in defence of his people and his compassionate character attracted to his kingdom many people seeking protection. He provided sanctuary, food and protection to refugees

75 K. Mofuoa, above note 74; N. L. Mahao, above note 19.

76 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II).

77 Online interview with Thafeng Mokoena, Basotho Cultural Custodian and Historian, 8 January 2023 (on file with author); online interview with Thabang Mofana, Historian and Academic, 22 January 2023 (on file with author); online interview with Moletsli Moshate, Media Practitioner and Community Leader, 22 January 2023 (on file with author).

78 Online interview with Eunice Chivuru, Cultural Custodian and Historian, 8 January 2023 (on file with author); interview with Jeremiah Kufakurinani, Traditional Leader, Seke, 12 December 2022, (on file with author).

fleeing the turbulent Difaqane period characterized by serious upheavals among the Bantu-speaking groups of southern Africa during the 1820s.<sup>79</sup> During this period, many tribes were scattered and others were destroyed, while some, like the Basotho, fled for safety and settled in the famous Thaba-Bosiu in present-day Lesotho. By extending help and protection to the distressed and not keeping recaptured cattle belonging to other Basotho clans (as per custom) but returning them to their rightful owners, King Moshoeshoe gained the respect of the Basotho.<sup>80</sup>

## Protection of cultural property and sacred places during armed conflict

Article 20 of AP I and Article 53 of GC IV, designed to safeguard cultural objects and places of worship, explicitly prohibit attacks on institutions such as clinics, schools, public libraries and cultural sites during armed conflict. This prohibition finds reinforcement in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its supplementary protocols. Concurrently, Article 17 of Geneva Convention I<sup>81</sup> prohibits the mutilation and burning of deceased bodies in the context of armed conflict. Numerous African societies, recognizing the imperative of preserving cultural heritage and religious sanctuaries during armed hostilities, enacted rules and laws for such protection. These regulations extended beyond traditional cultural sites to encompass special groups of individuals, sacred forests, burial grounds and healing shrines. Within the Ndebele system, for instance, distinct groups like diviners, mediators and peace envoys were afforded protection against attacks during armed confrontations. Any form of ill-treatment directed at these protected persons invoked stringent retaliation within the Ndebele society.<sup>82</sup> Moreover, places of cultural significance, including ancestral sites, places of worship and religious shrines, were safeguarded against acts of aggression and vandalism.

An exemplary case is the Njelele shrine located in the Matobo district of southwestern Zimbabwe. Historically, this cultural and religious shrine served dual purposes, acting as a site for rainmaking rituals and consultations with ancestors on governance matters, including political affairs.<sup>83</sup> Bhebe highlights the shrine's historical role among the pre-colonial Kalanga, who invoked

79 N. L. Mahao, above note 19; M. du Preez, above note 28.

80 Ian Knight, *Warrior Chiefs of Southern Africa: Shaka of the Zulu, Moshoeshoe of the BaSotho, Mzilikazi of the Matabele, Maqoma of the Xhosa*, Riverside Press, Durban, 1994.

81 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

82 Interview with John Dube, Ndebele Cultural Custodian and Historian, Matopos, 22 December 2022 (on file with author).

83 See, for example, Simon Makuvaza, "Why Njelele, a Rainmaking Shrine in the Matobo World Heritage Area, Zimbabwe, Has Not Been Proclaimed a National Monument", *Heritage Management*, Vol. 1, No. 2, 2008; Sindiso Bhebe, "Understanding the Traditional and Contemporary Purpose of the Njelele Rainmaking Shrine through the Oral Testimonies of Local People in Matobo", *Oral History Journal of South Africa*, Vol. 7, No. 2, 2019.

supernatural powers at Njelele to ensure agricultural prosperity and sought guidance during times of catastrophes, succession disputes, tribal conflicts and war.<sup>84</sup> Successive Ndebele kings, including during the wars of the Red Axe under King Mzilikazi and the Anglo-Ndebele War of 1983 under King Lobhengula, relied on Njelele for political and military counsel.

During the liberation war against colonial Rhodesia, Njelele assumed the role of a “healing centre”, contributing significantly to the recovery of several guerrillas who fell ill between 1963 and 1978.<sup>85</sup> This multifaceted historical significance underscores the vital protective role that cultural and religious sites played in diverse African societies during times of armed conflict. Among the Basotho, it was deemed uncustomary to disturb the graves of one’s ancestors. For instance, when King Moshoeshoe’s grandfather Peete was killed by the cannibal chief Rokotsoane, Moshoeshoe restrained his men, who were clamouring for revenge for the death of Peete.<sup>86</sup> Moshoeshoe also took a public stand against the killing of suspected witches, and he is believed to have contended that since the cannibals had fed on his grandfather’s flesh, Peete had symbolically become a grave, and imposing a death sentence on the killers would amount to the desecration of the tombs of one’s forefathers.<sup>87</sup> He even presented his grandfather’s killers with cattle and land, decreeing that they should plough crops for survival and forsake cannibalism.<sup>88</sup> Among the Basotho, attacks on cultural property were considered an act of provocation and accordingly elicited a strong response. For instance, desecration of ancestral graves was heavily frowned upon. The Basotho considered an assault on cultural heritage to be an attack on the identity of the Basotho, the soul of the nation and its framework of reference. Such actions were deemed as attacks on the Basotho collective memory, strength and self-worth.

## Conclusion

In conclusion, the arguments contained in this article highlight the significance of fostering dialogue between indigenous norms and practices and international standards within the framework of IHL. Due to the rapidly changing nature of armed conflict on a global scale and increasingly on the African continent, incorporating international norms and standards with indigenous practices is imperative not only to enhance the relevance of IHL but also to strengthen IHL’s authority and reach. Emerging conflict trends, including the increasing urbanization and hybridization of armed conflict, underscore the necessity for such integration. This integration is posited to sustain IHL’s indispensable role as a tool for mitigating the excesses of warfare and regulating the conduct of armed

84 S. Bhebhe, above note 83, p. 4.

85 *Ibid.*, p. 8.

86 Peter Sanders, *Moshoeshoe: Chief of the Sotho*, Heinemann, London, 1975, cited in Sandra B. Burman, *Chiefdom Politics and Alien Law: Basutoland under Cape Rule 1871–1884*, Springer, London, 1981.

87 P. Sanders, above note 86, pp. 280–350.

88 See M. du Preez, above note 28, p. 11; N. L. Mahao, above note 19, pp. 330–332.

hostilities. However, addressing the imperative of extending the reach and authority of international law, particularly in non-Western regions of the world, necessitates a deliberate reconfiguration of international legal frameworks that acknowledge and accommodate tensions surrounding the hierarchization of norms and values within the international legal system.

Efforts to enhance the legitimacy, authority and global reach of IHL must concurrently involve initiatives aimed at harmonizing international law with indigenous frameworks pertaining to humanitarian protection and the regulation of armed hostilities. This alignment can be pursued through two principal avenues. Firstly, a foundational approach involves fostering humility in engaging with local communities, listening attentively to their perspectives, and acquiring insights into their customs and traditions. Such reciprocal learning processes can significantly contribute to informing the future development and application of IHL, particularly by communities historically excluded from participating in the initial formulation and evolution of this significant body of international law.

Secondly, sustained engagement with non-State actors, particularly those who question the legitimacy of international law, holds the potential to enhance both the credibility and enforcement of IHL. However, it is essential to acknowledge a substantial challenge associated with research endeavours of this magnitude, stemming from insufficient empirical and scientific evidence. This limitation inadvertently results in an over-reliance on oral sources, which, while invaluable, are susceptible to biases and exaggerations. Compounding this issue is the historical absence of written documentation of African history until relatively recently, as information was traditionally transmitted orally by elders to subsequent generations. This presents a critical challenge, as the passing of older generations diminishes a vital source of wisdom that could otherwise contribute to the nuanced development and application of IHL in dynamic and complex contexts.

## Further reading

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UN Security Council, “Ninety Per Cent of War-Time Casualties Are Civilians, Speakers Stress, Pressing Security Council to Fulfil Responsibility, Protect Innocent People in Conflicts”, May 2022, available at: <https://press.un.org/en/2022/sc14904.doc.htm>.