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Africa and international humanitarian law: The more things change, the more they stay the same

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Abstract
Africa, both on the inter-State level and the academic level, maintains a very low profile in the global debate on international humanitarian law (IHL). IHL issues do not feature prominently in the armed conflict debate within Africa, and African States and people do not significantly participate in the global IHL debate. This contribution is aimed at both identifying the reasons for this lack of regional engagement with IHL and identifying entry points for such engagement. It also ambitiously calls for ongoing and engaged focus on IHL in Africa, and to this end, a number of issues for future consideration can be extrapolated from the issues discussed.

Keywords: law of armed conflict in Africa, historical development of the law of armed conflict in Africa, colonialism and the law of armed conflict, African perspective on the law of armed conflict.

Introduction

The human cost of armed conflict on the African continent has been devastating. While what follows is not an exhaustive list, during the past two decades alone there has been armed conflict in Angola, Burundi, Cameroon, the Central African Republic, Chad, Côte d'Ivoire, Djibouti, the Democratic Republic of the Congo (DRC), Egypt, Eritrea, Ethiopia, Liberia, Libya, Mali, Niger, Nigeria, Sierra Leone, Somalia, South Sudan, Sudan and Uganda. Some of these States, notably the DRC and Somalia, continue to suffer from armed conflict and have done so for multiple decades. The death toll of the Second Congo War alone has been estimated, at the most liberal end of the spectrum, at 5.4 million people, and at the most conservative end of the spectrum at 860,000 people.[1] Hawkins has concluded on the basis of calculating the land area of continents or regions in proportion to conflict that between 1990 and 2007, 88% of conflict deaths internationally were in Africa, 8% in Asia, 2% in Europe, and 1% each in the Americas and the Middle East.[2] The statistics post-2007 will in all likelihood show a variance with the escalation of fatalities in the Middle East.

Notwithstanding the prevalence of armed conflict continentally, and the massive violations that have been documented during African armed conflicts in recent history – which include the Rwandan Genocide and systematic campaigns of targeting civilians by a range of non-State armed actors in different countries, such as the Revolutionary United Front in Sierra Leone and the Lord's Resistance Army in the north-eastern DRC – we find that today, Africa, both on the inter-State level and the academic level, maintains a very low profile in the global debate on international humanitarian law (IHL) or the law of armed conflict (LOAC).[3] This raises the question of whether the most acute contemporary challenges to IHL in Africa are elevated to the global debate. The challenges surrounding the Boko Haram insurgency serve well as an example in this regard. This lack of engagement with IHL is very likely symptomatic of the exclusion, due to colonialism, of African States in the formative years of modern conventional IHL. As such, this contribution is moulded around two related questions: why is the IHL debate marginalized within Africa? And are IHL issues

1 The International Rescue Committee (IRC) has estimated that 5.4 million excess deaths occurred between August 1998 and April 2007. Benjamin Coghlan, Pascal Ngoy, Flavien Mulumba, *et al.*, *Mortality in the Democratic Republic of the Congo: An Ongoing Crisis*, IRC, 1 May 2017, p. ii. On the other hand, the Human Security Report Project of Simon Fraser University disputes these findings, finding instead that the armed conflict-related fatalities for this period are closer to 860,000. Human Security Report Project, *Human Security Report 2009/2010: The Causes of Peace and the Shrinking Costs of War*, 2 December 2010, Part II, p. 131. For an academic discussion of methodology, see Michael Spagat, Andrew Mack, Tara Cooper *et al.*, "Estimating War Deaths: An Arena of Contestation", *Journal of Conflict Resolution*, Vol. 53, No. 6, 2009.

2 Virgil Hawkins, *Stealth Conflicts: How the World's Worst Violence is Ignored*, Ashgate, Aldershot, 2008, p. 25.

3 While some authors draw a distinction between IHL and the LOAC that corresponds largely with the distinction between the protection of victims of armed conflict on the one hand and the regulation of the conduct of hostilities on the other, this author uses these terms as synonyms.

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of African concern excluded from the global IHL debate? This article endeavours not only to address the "why" in these questions, but also to propose solutions.

The first part of this contribution, "Africa and the Development of the Law of Armed Conflict: From the 1864 Geneva Convention to the 1977 Protocols", consists of a discussion of the status of African States during the colonial period and, as such, their exclusion, for the most part, from international negotiations regarding IHL. One response to this part of the piece may well be that the issue is simple: African States could not participate because they were not independent. Such an approach undermines the African experience of the consequences of colonialism, which to many Africans remains a contemporary issue and not a historic one, and in so doing dismisses much of what lies at the heart of anti-Eurocentrism within Africa. The colonial experience hugely contributes to such anti-Eurocentrism in contemporary Africa. As such, this first part of the contribution serves to provide context to the second part, "Africa in the Global IHL Debate, and the IHL Debate in Africa". It is in this part that the questions underlying this article are interrogated. In particular, the actors that determine the agenda of the global debate are identified, and the extreme focus on pan-Africanism in regional integration within Africa and increasing anti-Eurocentrism is discussed as a stumbling block to the mainstreaming of more global regimes of law such as IHL. Finally, the last part of the contribution touches on "The Future of IHL in Africa". In this part, the role of the International Committee of the Red Cross (ICRC) is highlighted in the mainstreaming process of IHL within Africa.

The works of Diallo,[4] Bello,[5] Wodie[6] and Mubiala[7] are significant in locating IHL in the African context, but unfortunately have not resulted in a more sustained focus. The present contribution identifies a range of entry points and approaches to the enhancement of IHL in Africa. However, considering the depth and breadth of the problem that is armed conflict in Africa, and the lack of Africa-specific IHL scholarship, one has to be realistic about the range of issues that can be addressed in a single contribution. That said, ambitious as it may be, this contribution is aimed at framing the debate and fostering an engaged and ongoing scholarly discourse on IHL with a specific African regional focus. In an attempt to do so, this author identifies a number of issues and entry points for future research and discussion. Key examples include the contribution of African civil society, militaries from African countries, and sub-regional actors.

4 Yollande Diallo, "Humanitarian Law and Traditional African Law", *International Review of the Red Cross*, Vol. 16, No. 179, 1976.

5 Emmanuel G. Bello, *African Customary Humanitarian Law*, Oyez Publishing, London, 1980; Emmanuel G. Bello, "A Proposal for the Dissemination of International Humanitarian Law in Africa Pursuant to the 1977 Protocols Additional to the Geneva Conventions of 1949", *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 23, Nos 1–4, 1984.

6 Vangah Francis Wodie, "Africa and Humanitarian Law", *International Review of the Red Cross*, Vol. 26, No. 254, 1986.

7 Mutoy Mubiala, "International Humanitarian Law in the African Context", in Monica Kathina Juma and Astri Suhrke (eds), *Eroding Local Capacity: International Humanitarian Action in Africa*, Nordiska Afrikainstitutet, Upsala, 2002.

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In speaking of "African" approaches, perspectives or challenges, one must guard against the pitfalls of generalization. It is not feasible to engage with such approaches, perspectives or challenges in respect of each of the fifty-four States that make up the African continent. As such, due consideration must be given by the reader to the fact that the regional approach espoused for in this contribution is informed by the interests and experiences of individual States. That is to say that the experiences of individual States were drawn upon in instances where they are particularly relevant to the point at hand. Similarly, speaking of a global IHL debate is in many respects not satisfactory, as there are many ongoing debates on IHL issues at any given time, some global and some more local. These debates are dynamic and take on new dimensions as they progress. Nevertheless, it is useful to be able to refer to those issues that feature prominently and consistently in the contemporary IHL discourse collectively. For present purposes, the term "the global debate" will be used.

Many of the arguments put forward in this contribution also hold true for other parts of the developing world, notably South America and much of Asia. This is due to a range of factors, including the fact that many States within South America and Asia share comparable colonial histories to States in Africa, and that the socio-economic status of individuals within parts of these regions is somewhat comparable to that prevailing in much of Africa. While the examples and experiences I draw on in developing my various arguments bring forward an African perspective, I do anticipate that many of these points can find relevance to other parts of the world.

Africa and the development of the law of armed conflict: From the 1864 Geneva Convention to the 1977 Protocols

Today much attention is placed on the rapid expansion and diversification of international law, which has led to different subsets of international law competing for dominance with one another. International lawyers generally have a grasp of the historical development of modern international law during the era of empire – which was characterized by Western hegemony, exclusionism and exceptionalism. In contrast to this narrative of the development of general international law, the parallel development of the law of armed conflict, as a sub-regime of international law, is generally portrayed as an all-inclusive, universal regime of law. For instance, in the introductory chapter of *The Handbook of International Humanitarian Law*, Greenwood paints a picture of such an all-inclusive regime that reflects practices from across the globe, and concludes that "the theory that humanitarian law is essentially 'Eurocentric' is in reality more a criticism of most literature on the subject than a reflection of historical fact".[8] The situation is much more nuanced than this approach suggests.

8 Christopher J. Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 16.

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There is much merit in humanitarian actors relying on local custom and traditional institutions in their efforts to enhance compliance with IHL. Diallo acknowledges that "the misunderstanding or lack of knowledge of the African traditional background, by making it necessary to resort to entirely foreign ideas, will then make it more difficult to obtain African acceptance of certain principles".[9] The ICRC's *Spared from the Spear* study serves as an excellent example of this approach.[10] One of the stated objectives of this study was to "demonstrate to all those interested that the long-standing Somali conventions of warfare, whose provisions are generally consistent with those of the Geneva Conventions, existed long before the latter were formulated and adopted".[11] Nevertheless, we know through the *travaux préparatoires* of the Geneva Conventions that such Somali conventions of warfare played no role in formulating the norms of the Geneva Conventions. The same is true of the Peul customs that underlie Diallo's study. As is the case with traditional Somali conventions of warfare and Peul customs as illustrated by Diallo, the traditional practices of various tribes across Africa, and outside of Africa, share features with the principles contained in the Geneva Conventions.[12] However, there is no direct causal relationship between the Geneva Conventions and these various traditional customs, beyond the fact that, like IHL norms, such traditions are generally steeped in humanity and pragmatism.[13] Wodie acknowledges as much in stating that, notwithstanding the fact that various African customs reflect sentiment similar to modern rules of IHL, "traditional Africa was not aware of humanitarian law".[14] Moreover, over-reliance on this approach will prove problematic when confronted with a culture where such traditional practices do not support the prevailing foundational conceptions of IHL. There thus seems to be a disconnect between "our" understanding of the antecedent state of international law during the nineteenth and early twentieth centuries, and "our" understanding of the development of modern conventional IHL, which occurred during the same period.

Modern conventional IHL largely found its genesis in the first Geneva Convention of 1864 and the Hague Regulations of 1899 and 1907. In their elaboration, prevailing considerations that moulded general international law at the time surely also influenced them – that is to say that the era of empire impacted upon the development of IHL, as it did in every other area of

Upon taking over authorship of this chapter for the third edition of the publication, O'Connell retained this sentence: see Mary Ellen O'Connell, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 16.

9 Y. Diallo, above note 4, p. 63.

10 Musa Yusuf Hussein, Mohammed Abdilaahi Riraash and Ibrahim Jaji M. Wa'ais (eds), *Spared from the Spear: Traditional Somali Behaviour in Warfare*, Somali Delegation of the International Committee of the Red Cross and Somali Red Crescent Society, February 1998.

11 *Ibid.*, p. 5.

12 See, generally, Y. Diallo, above note 4; E. G. Bello, *African Customary Humanitarian Law*, above note 5.

13 *Ibid.*

14 V. F. Wodie, above note 6, p. 249.

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international law.[15] In order to appreciate the context of the development of IHL in Africa, it is imperative to address the status of African States within the international legal order during the period contemporary with key developments of conventional IHL.

The background of the development of IHL in Africa

The status of African States in the international legal order: The impact of colonization

During the nineteenth and early twentieth centuries, European empires managed to absorb into their domain of power virtually the entire territory of Africa. The only States on the continent that arguably escaped Western colonialism are Ethiopia and Liberia, and they are tenuous examples at best.[16] While significant administrative colonial rule was never established in Liberia and Ethiopia, these States certainly did not escape the wrath of colonialism or alien domination altogether. The practice of claiming territory in Africa predated the development of specific legal doctrine to justify such claims to territory.[17] Most of the early modern informal colonial claims in Africa were based on colonial treaties.[18] These treaties were essentially written documents signed and entered into by illiterate (in the Western sense) village chiefs, in a language they did not understand, transferring all people within their village and their ancestor's claims to the territory and its resources to the colonizing entity. It was on this basis that King Leopold II of Belgium infamously claimed the territory of the modern-day DRC as his own.[19]

15 Simma has warned that the effects of such expansion and diversification should not be overstated, and notes that different sub-regimes of international law, which would include modern IHL, developed and continue to exist very much within the structural confines of international law more generally. Bruno Simma, "Fragmentation in a Positive Light", *Michigan Journal of International Law*, Vol. 25, No. 4, 2004, pp. 846–847.

16 Between 1821 and 1947, the American Colonization Society formed a settlement of freed American slaves of African descent in Liberia (although in reality more of the settlers' roots could be traced to Central America than to Africa). This settlement was conceived within the rhetoric of colonialism. In 1947, Liberia declared independence as Africa's first republic. However, for the period 1947–80, the so-called Americo-Liberians, who represented a significant minority in Liberia, absolutely dominated political power in that country. Robin Dunn-Marcos, Konia T. Kollehlon, Bernard Ngovo and Emily Russ, "Liberians: An Introduction to their History and Culture", Culture Profile No. 19, Center for Applied Linguistics, Washington, DC, April 2005, pp. 3–16. For its part, Ethiopia lost the Second Italo-Ethiopian War, culminating in Italy's military occupation of Ethiopia under the flag of Italian East Africa. Italian East Africa was short-lived, as in 1940 Italy aligned itself with the Axis powers and by the end of 1941 the Allied powers had liberated Ethiopia during the East Africa Campaign. While Ethiopia remained an independent State throughout this period, Italy's occupation of Ethiopia was an attempt at claiming a colonial territory. See, generally, Eric Rosenthal, *The Fall of Italian East Africa*, Hutchinson & Co., London, 1941.

17 The Berlin Conference (1884–85) regulated European colonization and trade in Africa, and introduced the principle of "effective occupation". See, generally, Stig Förster, Wolfgang Justin Mommsen and Ronald Edward Robinson, *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition*, Oxford University Press, Oxford, 1988.

18 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, pp. 136–137.

19 *Ibid.*, pp. 155–166.

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The legendary explorer Stanley was the primary agent through which Leopold secured these treaties in the context of the Congo Free State. Sir Richard Francis Burton's claim that "Stanley shoots negroes as if they were monkeys" goes some way in indicating that Belgian forces in the DRC considered themselves to be operating in a legal and moral vacuum.[20]

The concept of empire as it manifested in Africa was much more nuanced than the term "colonialism" suggests. Koskenniemi argues that there were various methods and mechanisms through which Western powers could extend their exclusive influence in African States, which did not amount to formal administration and thus the establishment of a colony.[21] Lord Lindley provides the example of British Bechuanaland:

> an interesting example of a protectorate in which the internal as well as the external sovereignty has passed to the protecting Power, but the territory has not been formally annexed, so that, in the eyes of British law, it is not British territory.[22]

One effect hereof was that British law did not apply within the relevant territory. As a result, Britain was able to maintain a *de facto* colony without being hampered by British law, which for example outlawed slavery.

Over time, doctrine developed to justify legally the colonization of non-Western peoples. Essentially, the justification for establishing colonial administrations and acquiring territory through the means of occupation was founded on the notion that the relevant territory was *terra nullius* – that is to say, the territory was occupied by "savages" who were not politically organized.[23] The inherent hegemony of this construct is well illustrated by Lord Lindley's writings on "backward territory" in international law of 1926, wherein he stated that "territory which is *territorium nullius* may pass under the dominion of a Sovereign" by occupation and accretion. He went on to state that on the other hand, "transference of territory under a Sovereign to the *territorium nullius* may take place" by abandonment, forfeiture and destruction.[24] It is interesting to note that the transacting parties are the sovereign and the *territorium nullius* – no mention is made of the people indigenous to the *territorium nullius*.

In Africa the impact of colonialism is still felt today, and in the context of IHL Mubiala has noted that "the specific problems of the acceptance of

20 See, generally, Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Pan Books, London, 2006. See also, generally, John Bierman, *Dark Safari: The Life Behind the Legend of Henry Morton Stanley*, Hodder and Stoughton, London, 1991.

21 M. Koskenniemi, above note 18, pp. 124–125.

22 Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice relating to Colonial Expansion*, Longmans, Green & Co,, London, 1926, p. 187.

23 During the nineteenth and early twentieth centuries, there was a nuanced debate regarding the regulation by international law of European engagement with the non-European world. The particularities of this debate go above and beyond the scope of this contribution. For more on this debate, see M. Koskenniemi, above note 18, pp. 98–178.

24 M. F. Lindley, above note 22, p. 187.

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contemporary IHL … [are] largely due to its European origins. Africans strongly distrust any European-inspired legal system, let alone a humanitarian law that proved ineffective during the colonial wars."[25]

Africa and the "logic of exclusion-inclusion" in the development and application of international law

Koskenniemi speaks of "the myth of civilization: a logic of exclusion-inclusion" when addressing the development of international law in the period contemporary with the first Geneva Convention of 1864 and the Hague Regulations.[26] He argues that European States were struggling to "minimize their colonial liabilities" while maximizing their influence. In a similar fashion, European States were the driving force behind the development of IHL conventions to protect their interests in spaces where such protections would be useful, such as inter-State armed conflicts within Europe, but exclude the constraints inherent in these conventions in spaces where they would restrict the relevant State's activities, such as colonial wars. The concepts of statehood and sovereignty, and the concomitant international legal personality that attaches to States proper, were to undergo a dramatic metamorphosis leading up to and following the Geneva Convention of 1864. However, this metamorphosis was gradual. It was only in 1856, with the adoption of the Peace Treaty of Paris, that a non-Christian State, the Ottoman Empire (Turkey), was regarded as a member of the international community of civilized States.[27] This accounts for the fact that only twelve Western European States negotiated the Geneva Convention of 1864. Only three African States subsequently ratified this Convention.[28]

25 M. Mubiala, above note 7, p. 47.

26 M. Koskenniemi, above note 18, p. 127.

27 The notion of civilized peoples and States in international law thinking came to the fore during the later parts of the nineteenth century. "For purposes of the application of European international law, Lorimer, in 1883–1884, divided the human race into three categories: 'civilized', 'barbarian' and 'savage'; Von Liszt, in 1898, classified it, in his turn, as 'civilized', 'semi-civilized' and 'uncivilized'." Mohammed Bedjaoui, "General Introduction", in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, Martinus Nijhoff, Dordrecht, 1991, p. 8. The full extent of international law was to apply only among civilized States, meaning Christian States, whereas semi-civilized States, such as Siam and China, had a limited international law status, allowing them to be party to treaties, for example. Uncivilized States existed outside of the confines of international law. *Ibid.*

The remnants of this approach remain visible today in some of the most important international law instruments – for example, Article 38(1) of the Statute of the International Court of Justice (ICJ), which provides the traditional expression of the sources of international law, defines the general principles of international law as "the general principles of law recognized by civilized nations". Statute of the International Court of Justice, Annex, Charter of the United Nations, 26 June 1945 (entered into force 24 October 1945). Similarly, Common Article 3 of the Geneva Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

28 These were the Congo (27 December 1888), the Orange Free State (28 September 1897) and the South African Republic (30 September 1896). For a list of States Parties, see ICRC Database on Treaties, States Parties and Commentaries, available at: https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument (all internet references were accessed in January 2017).

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As convener of the first Hague Conference in 1899, Russia invited twenty-six States to participate. In addition to the European States, Persia, China, Japan, Siam, the Ottoman Empire and the United States were invited. By 1907, when the United States took the initiative to organize the second Hague Conference, forty-seven States were invited, of which only Abyssinia (Ethiopia), Costa Rica and Honduras did not attend. On this occasion, those invited included nineteen Latin American States;[29] Asia was represented by China, Japan, Persia, and Siam, while Abyssinia was the only African invitee. These events were significant, but at the time, they were still met with considerable scepticism. For his part, Westlake concluded that even though China, Siam and Persia participated in the Hague Conferences, their admission into the "system" nevertheless fell short of "recognizing the voices as of equal importance with those of the European and American Powers".[30] To date, from the African continent, only Ethiopia (during 1935), Liberia (during 1914) and South Africa (during 1978) have ratified any of the Hague Conventions/Declarations emanating from the Hague Conferences of 1899 and 1907.

By the time the Geneva Conventions of 1949 were negotiated, fifty-nine States participated. Thus, during the period between the recognition of the Ottoman Empire as a sovereign State during 1856 and the negotiation of the 1949 Geneva Conventions, membership of the international community of "civilized States" expanded significantly. As a corollary, so too did the number of States which actively engaged in the development of conventional IHL. Nevertheless, from an African perspective not much had changed. Only Egypt and Ethiopia represented the African continent at the negotiations of the 1949 Geneva Conventions.[31] This was largely due to the fact that most African States remained subject to colonial control. However, States such as Liberia and South Africa were free to participate, but did not do so.

A wave of decolonization followed the adoption of the Geneva Conventions of 1949, and by the time the conference was convened to elaborate the 1977 Additional Protocols, 135 States were participating, with thirty-nine States representing the African continent.[32] Moreover, of the twelve national liberation movements from eight countries who attended as delegates, eight groups from six countries were African.[33]

This was a watershed moment for African involvement in the development of IHL. Much of the agenda during the negotiations of the Additional Protocols was determined precisely by the increase in non-international armed conflicts (NIACs)

29 These States were the Argentine Republic, Bolivia, the United States of Brazil, Chile, Colombia, Costa Rica (invited but did not attend), Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras (invited but did not attend), Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and the United States of Venezuela.

30 John Westlake, "The Native State of India", 1910, in L. Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, Cambridge, 2014, p. 623.

31 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 1, 1949, pp. 158–170.

32 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, Vol. 2 (1974–1977), 1977, pp. 25–408.

33 *Ibid.*

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in the developing world, particularly Africa. However, for African States, independence, and the concomitant equal sovereignty that came with it, had been a hard-fought ideal for decades. Many of these States viewed the regulation of NIAC as the internationalization of domestic affairs.[34] This sentiment was well expressed by the representative of Zaire in relation to Additional Protocol II (AP II) relevant to NIAC:

> Several provisions of this Protocol encroach upon the internal laws of states and thus dangerously compromise the sovereignty and territorial authority of these states on matters which … are within their domestic jurisdiction. The mistake was to place on an equal footing a sovereign state and a group of its insurgent nationals, a legal government and a group of outlaws, a subject of international law and a subject of domestic law.[35]

This line of argumentation is consistent with the views expressed by Western States in the early development of conventional IHL. The *travaux préparatoires* indicate that African States "gave priority to humanitarian issues affecting Africa as a result of external factors".[36] These States placed much emphasis on the internationalization of wars of national liberation, and the issue of mercenaries, while largely neglecting AP II. Moreover, in many newly independent African States the withdrawal of the colonial administration had left a massive power vacuum, which came to be occupied by often fragile governments. This led to civil wars by various factions vying for power, frontier disputes and secessionist movements. Key examples in this regard include the Congo Crisis (1960–65),[37] the Biafran War (1967–70),[38] and the situation regarding Morocco and Western Sahara which continues to this day.[39] The experience for many African actors was that these newly independent African States fought for independence without the benefit of IHL, yet as soon as they gained independence, AP II was negotiated and all of a sudden they had to afford to insurgents the legal recognition that they themselves had never benefited from. Indeed, as suggested above, the *travaux préparatoires* do not support the dominant narrative that the development of the law of NIAC was responsive to the needs of Africa – certainly not from the perspective of African States generally. The notion of NIAC was not new; Western empires had engaged consistently in NIACs during the preceding century. Instead, following the end of empires, Western States thought they were unlikely to be affected by NIACs, and as such, the regulation of NIAC was deemed by many to be an issue of developing States with weak governance.

34 V. F. Wodie, above note 6, p. 251.
35 Michael Bothe, "Conflits armés internes et droit international humanitaire", *Revue Générale de Droit International Public*, No. 1, 1978, pp. 82.
36 M. Mubiala, above note 7, p. 39.
37 David N. Gibbs, *The Political Economy of Third World Intervention: Mines, Money and U.S. Policy in the Congo Crisis*, University of Chicago Press, Chicago and London, 1991, pp. 77–164.
38 See, generally, Suzanne Cronjé, *The World and Nigeria: The Diplomatic History of the Biafran War, 1967–1970*, Sidgwick and Jackson, London, 1972.
39 Stephen Zunes and Jacob Mundy, *Western Sahara: War, Nationalism, and Conflict Irresolution*, 3rd ed., Syracuse University Press, Syracuse, NY, 2010, pp. 3–90.

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While a great majority of African States are party to AP II today, their resistance to stringent regulation of NIAC during the negotiating conference should not be underestimated, and is well evidenced by the *travaux préparatoires*.

The arbitrary nature of colonial borders in Africa was a key contributor to the emergence of frontier disputes. International law dealt with this issue through a norm known as *uti possidetis*. According to Ratner, "stated simply, *uti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence".[40] While, as the International Court of Justice has pointed out, the *uti possidetis* norm is necessitated by pragmatic considerations,[41] from an African perspective this norm may serve to further entrench scepticism of international law as being Eurocentric.

The application of IHL in colonial wars

The important point to understand from the above, for the purposes of this contribution, is the implication that African States played no meaningful role in the negotiation and development of early IHL instruments. Even more importantly, neither did they benefit from the application of such instruments during the colonial era. We thus find that foundational notions of IHL, such as equality of belligerents, were forged along the lines of who "civilized" States deemed to be their equals. The colonial conflicts predated the 1949 Geneva Conventions, and as such Common Article 3 was not relevant, and because colonial wars were fought against non-State entities, conventional IHL did not apply. The point of departure of the Western powers in the colonial wars was generally that the communities indigenous to the territory in question never had any form of sovereignty to begin with. Sovereignty, as it were, was a concept reserved exclusively for European powers. Westlake argued:

> International law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded.[42]

Anghie has commented:

> The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the

40 Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States", *American Journal of International Law*, Vol. 90, No. 4, 1996.

41 ICJ, *The Case Concerning the Frontier Dispute* (*Burkina Faso v. The Republic of Mali*), Judgment, 22 December 1986, *ICJ Reports 1986*, paras 20–32.

42 John Westlake, *Chapters on the Principles of International Law*, as quoted in M. Koskenniemi, above note 18, p. 127.

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> most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man's burden.[43]

This point of departure was challenged for the first time during the Second Boer War, as the Boers too were of European decent.[44] Yet, there was a voice that maintained the general premise regarding colonial territories and their peoples in the context of the Second Boer War. Field Marshal Lord Wolseley, commander-in-chief of the British War Office, expressed the following view:

> I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races … To attempt to tie our hands in any way, no matter how small, by the "Laws and Customs of War" proposed for *civilized* nations at the peace Conference, would be in my opinion suicidal, for the Boers would not be bound by any such amenities.[45]

The only IHL convention to which all forces involved in the Boer War were party was the 1864 Geneva Convention. Major-General Sir John Ardagh, director of British military intelligence, was of the view that the substantive content of the Hague Conventions embodied the Laws and Customs of War, and as such found general application.[46] Ardagh further commented:

> The peculiar conditions of the war in South Africa may justify a departure in certain instances from the Laws and Customs of War on the ground of military necessity, but as reciprocity is the foundation of the observance of international rules, it should be most carefully weighed how such departures would affect us if their exercise was appealed to as precedent created by ourselves when we found ourselves engaged in other wars.[47]

The question arises as to why this same reasoning, being the basis on which the Laws and Customs of War were applicable to relevant military engagement, was not employed in other wars between colonizing powers and local populations. Many factors certainly impacted on this, the most important of which seems to be that what lay at the heart of the distinction was conceptions of being civilized and

43 Anthony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal*, Vol. 40, No. 1, 1999, p. 7.

44 The Boer Wars were two separate armed conflicts. The First Boer War was fought between the United Kingdom and the South African Republic from 20 December 1880 to 23 March 1881. The Second Boer War, which was a much more significant armed conflict, both in intensity and duration, was fought between the British Empire on one side and the Zuid-Afrikaansche Republiek (Transvaal, known as the South African Republic) and Oranje-Vrijstaat (Orange Free State) on the other, and lasted from 11 October 1899 to 31 May 1902. See Herold E. Raugh, *The Victorians at War, 1815–1914: An Encyclopedia of British Military History*, ABC-CLIO, Santa Barbara, CA, 2004, pp. 49–54.

45 Lord Wolseley to Parliamentary Under-Secretary, War Office 32/850, 14 February 1900, as quoted in Andries W. G. Raath and Hennie A. Strydom, "The Hague Conventions and the Anglo-Boer War", *South African Yearbook of International Law*, Vol. 24, 1999, p. 156.

46 John Charles Ardagh, "Ardagh Papers", Microfilm A422, Transvaal Archives, Pretoria.

47 John Charles Ardagh, "Major-General Sir John Ardagh: Papers", National Archives of the United Kingdom, PRO 30/40/17.

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being "barbarian".[48] The forces of both the Zuid-Afrikaansche Republiek (Transvaal) and the Oranje-Vrijstaat (Free State), the two Boer Republics who fought the Second Boer War, were of Western European descent; they spoke a European language (Dutch); they dressed like Europeans; they were Christian; and they organized themselves politically in a European manner. It was thus more difficult to employ the rhetoric of civilized versus savage in interactions with the Boer forces. No legal criteria were ever developed to determine which peoples were savages and which were civilized – these determinations were based on social constructs and perceptions.[49]

Even more recently, the peoples indigenous to colonial territories were, for the most part, excluded from the benefits of IHL. This point is illustrated by the reservation made to the Geneva Conventions by Portugal on 14 March 1961:

> As there is no actual definition of what is meant by a conflict not of an international character … Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.[50]

At the time of this reservation, Portugal maintained the following colonies in Africa: Angola, Cabinda, Cape Verde, Portuguese Guinea and Mozambique, all of which gained independence only between 1973 and 1975. Indeed, the Portuguese Colonial War in Angola commenced five weeks before this reservation was made, and lasted until 1974. This reservation served to exclude the application of Common Article 3 to conflicts fought by Portugal within its colonies.

African troops in World War I: The genesis of the applicability of IHL in Africa

World War I (WWI) was particularly significant in the context of IHL in Africa. It marked the first occasion on which African States, most of which were at the time subject to colonial domination, engaged in armed conflict legally bound by conventional IHL.[51] The African theatres of WWI were much larger territorially than the African theatres of World War II (WWII). Africans participated in WWI in three contexts: (1) colonial wars fought between local tribes and colonialist forces, such as the Zaian War in Morocco;[52] (2) wars between

48 M. Koskenniemi, above note 18, pp. 76–88.
49 See above note 26 for more detail.
50 Reservation to the Geneva Conventions (1949) by Portugal, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=663716D11E477ECFC1256402003F977C.
51 The application of IHL during the Second Boer War arguably provides a limited exception to the general statement that conventional IHL first found application to African armed forces during WWI.
52 See Robin Leonard Bidwell, *Morocco under Colonial Rule: French Administration of Tribal Areas 1912–1956*, Frank Cass, Abingdon, 1973, pp. 48–62. This armed conflict was fought from 1914 to 1921 between France and the French Protectorate of Morocco on one side, and the Zaian Confederation (together with various Berber tribes) on the other. During WWI, the Zaian Confederation received support from the Central Powers.

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opposing colonial powers within Africa, such as the East Africa Campaign in WWI, fought primarily between the British and German Empires in East Africa, both of which utilized African forces extensively;[53] and (3) African soldiers deployed in the European theatres of WWI subject to the command and control of officers from their colonial masters.[54] It is impossible to know exactly how many Africans fought in the European theatres of WWI. It has been estimated that the Allies mobilized 650,000 colonial troops in Europe, but this figure includes not only Africans.[55] Britain did not mobilize any African troops in European theatres of war, but did do so in the Middle East. Yet according to Koller, "unlike Britain, the French deployed large numbers of African troops in Europe, including 172,800 soldiers from Algeria, 134,300 from West Africa, 60,000 from Tunisia, 37,300 from Morocco, 34,400 from Madagascar and 2,100 from the Somali Coast".[56] The East Africa Campaign serves well to illustrate the level of African involvement and African suffering during WWI. As Paice has stated:

> The death toll among the 126,972 British troops who served in the East Africa campaign was officially recorded as 11,189 – a mortality rate of nine per cent – and total casualties, including the wounded and missing, were a little over 22,000. The loss of life among armed combatants was, however, only the tip of the iceberg. … By the end of the war more than one million [African] carriers had been recruited by the British in their colonies and in German East Africa, of whom no fewer than 95,000 had died.[57]

The African armed forces that fought under colonial masters were bound to conventional IHL not by virtue of the status of the "States" to which they belonged being fully sovereign, as indeed most of them were not. Instead, they were bound by virtue of the fact that they acted as functionaries of their "colonial masters" – most of which were parties to antecedent IHL conventions. More than a century has now passed since the beginning of WWI. While there is increased formal recognition for the contribution made by African troops to the war, unfortunately a lack of public awareness remains. For instance, on 5 November 2013, French president François Hollande commemorated the 430,000 African soldiers from French colonies who fought for France in WWI, and acknowledged that they "took part in a war that was not necessarily theirs".[58] President

53 See A. Adu Boahen, *General History of Africa*, Vol. 7: *Africa under Colonial Domination 1880–1935*, UNESCO, 1990, pp. 132–142; Hew Strachan, *The First World War in Africa*, Oxford University Press, Oxford, 2004, pp. 93–184. The East Africa Campaign lasted from August 1914 to November 1918. African forces from across the British Empire were mobilized; German forces also relied heavily on local conscripts.

54 Christian Koller, "The Recruitment of Colonial Troops in Africa and Asia and their Deployment in Europe during the First World War", *Immigrants & Minorities*, Vol. 26, Nos 1–2, 2008.

55 *Ibid.*, p. 113.

56 *Ibid.*, p. 114.

57 Edward Paice, *Tip and Run: The Untold Tragedy of the Great War in Africa*, Weidenfeld & Nicolson, London, 2007, pp. 392–393.

58 Guillaume Gueguen, "Hollande Honours Africa Role in France's WWI Fight", *France 24*, 8 November 2013, available at: www.france24.com/en/20131108-african-troops-soldiers-world-war-french-hollande-senegal-algeria-tunisia.

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Hollande said that no soldier who fought for France and shed blood in battle should be forgotten, and emphasized that "the ultimate recognition is awareness" – he thus acknowledged a lack of public awareness and, by extension, public recognition.

Africa in the global IHL debate, and the IHL debate in Africa

In as far as the elaboration of treaty norms is concerned, IHL is a rather stagnant branch of international law. As such, even though African States now form a part of the international community of sovereign equal States, the era of the development of foundational, conventional IHL has largely passed. It should hardly be surprising that there is an apathy among many quarters within Africa of legal concepts, intended to be of a universal nature, the development of which occurred without any significant African participation.[59] This apathy is given theoretical expression by the Third World Approaches to International Law (TWAIL) movement. Mutua identifies the first objective of TWAIL as understanding, deconstructing and unpacking "the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans".[60] This anti-Western attitude is also very prevalent in the political space.[61] The degree of such apathy differs in different States and contexts, as noted elsewhere, and the individual contexts of States is an area where these issues should be further researched. This historical context is indispensable in understanding the current status of IHL in the African context.

Whether it be technological innovation that creates new means of armed conflict, or whether it be challenges to fundamental notions of the law of armed conflict, the global discourse on the law of armed conflict is strongly influenced by the "cutting edge" as determined by the needs of a select few Western States. Along these contours, we see massive bodies of work developing on topics such as cyber-warfare and terrorism. Indeed, the technology that drives new means of armed conflict is so dynamic that, in a consumerist style, the debate keeps shifting from one technology to the next. This is not to say that the global debate does not engage with more traditional or foundational issues within the IHL discourse, as indeed it does. However, these issues are often only elevated to the global debate once they become relevant to Western States. For example, the dynamics of the "war on terror" elevated questions surrounding the locality and geographic scope of hostilities in transnational NIACs for the purposes of

59 M. Mubiala, above note 7, p. 47.

60 Makau Mutua, "What is TWAIL?", *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 5–8 April 2000, p. 31.

61 Abdulai argues that "African leaders also tend to resent the paternalistic attitude of Western Countries toward them. This warped idea in the West that it is their responsibility to 'change' a 'backward Africa' to be like them is much resented in modern-day Africa." David N. Abdulai, *Chinese Investment in Africa: How African Countries can Position Themselves to Benefit from China's foray into Africa*, Routledge, Abingdon, 2017, section 9.4.

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determining the applicability of IHL to the global debate.[62] However, the tactics of the Lord's Resistance Army had posed these same questions since 1986.

As was alluded to in the introduction to this article, IHL maintains a very low profile on the African continent. There are two sides to this coin – on the one side, IHL issues do not feature prominently in the armed conflict debate within Africa (certainly not when compared to the developed/Western world). On the other, African States and African people do not participate, in a significant manner, in the global debate. These two facets of the problem cannot be divorced from one another. The only way in which African States and actors can influence the agenda of the global debate is by including IHL issues in the armed conflict debate within Africa, and so progressively infiltrating the global debate.

While IHL as a regime of law is marginalized in the formal African armed conflict debate, it is very encouraging that the humanitarian objectives of IHL echo with people across Africa. The ICRC's *People on War Report* was a study published during 1999 which included twelve countries globally, with Nigeria, Somalia and South Africa representing the African continent.[63] The methodology of the study included in-depth, face-to-face interviews, group discussions and national public opinion surveys. An additional group of five States was studied by way of a questionnaire only.[64] A range of questions that focused on IHL issues were put to participants, and the study includes the statistical data on responses. In general terms, the African States sampled did not show a marked departure from the general trends identified in the study. Having said that, there are clear examples where particular States depart from the general trend. For example, in respect of the question "Are there any laws that say you can't attack the enemy in populated villages or towns knowing many civilians/women and children will be killed, even if it would help weaken the enemy?", the average response across all States was 36% "yes". Some 50% of Somali respondents said yes, while the figure was 30% for South African respondents and only 21% for Nigerian respondents.[65] In some instances, the results are rather perplexing. Considering the response received from Nigerian participants in regard to a basic application of the principle of distinction, it is surprising that in response to the question "Do you think the existence of the Geneva Conventions prevent[s] wars from getting worse or does it make no real difference?", 71% of Nigerian respondents felt that the Geneva Conventions prevent wars from getting worse.[66] For this question the

62 For instance, the International Law Association's (ILA) study group on "The Conduct of Hostilities under International Humanitarian Law: Challenges of 21st Century Warfare" specifically included the issue of the geographic scope of the battlefield in its study. See ILA Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", Interim Report, 2014.

63 ICRC, *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, 1999, available at: www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf. The States where in-depth, face-to-face interviews were carried out were Afghanistan, Bosnia-Herzegovina, Cambodia, Colombia, El Salvador, Georgia/Abkhazia, Israel, the occupied territories and the autonomous territories, Lebanon, Nigeria, the Philippines, Somalia and South Africa.

64 The States that were surveyed on a questionnaire-only basis were France, the Russian Federation, Switzerland, the United Kingdom and the United States. See "About the People on War Project", in *ibid.*

65 ICRC, above note 63, p. 19.

66 *Ibid.*, p. 20.

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average response across all States was 56% in favour of this opinion; for Somalia is was 51% and for South Africa 40%. Nevertheless, the overall conclusion that there is not a large variance between Africa and other regions more holistically is very important.

Determining the agenda of the contemporary global IHL debate

Before determining which issues feature in the global IHL debate – and equally importantly, which issues do not feature – it is relevant to consider who the parties are who set the agenda for this debate. There are essentially five groups of actors who have the potential, in any given case, to influence the agenda of the global debate (this is not to imply the making of international law, but instead the proactive and deliberate influencing of the debate): academics, governments, armed forces, civil society, and international organizations (including regional organizations). The media, non-State armed groups and jurisprudential developments may also influence the debate. However, while the media certainly play a significant role in creating awareness of issues, they do not directly contribute to the IHL dimensions of the debate.[67] While the relevance of non-State actors within the IHL discourse has become increasingly prominent, such groups do not yet play a proactive role in engaging in the normative IHL debate. Lastly, formal jurisprudence certainly does contribute significantly to this debate, though tribunals hear matters brought before them and do not proactively engage with a specific issue. There is no readily available scholarship on the question of who influences and determines the global debate on IHL. A study into this question could be very useful for the better understanding of IHL and associated issues. However, this is a complex question, one which will likely involve a research design incorporating both qualitative and quantitative components, and is certainly beyond the scope of the present contribution. The framework put forward here is very basic and serves only to provide a systematic approach to dealing with the core question of the current contribution, which is the enhancement of IHL in the African context.

States remain the primary agents through which international law, including IHL, is developed. Among the five groups listed above, States are represented both by governments and by armed forces. This is so because in the context of IHL, armed forces often play a very central role in determining a State's policy. Each of the five groups pursues unique goals and agendas. While in a strong democracy there should be significant synergy between the goals and agendas of a government and those of its armed forces, not all States are strong democracies, and in many States there is a noticeable gap between the government's goals and agendas and those of the armed forces. Moreover, even

67 The media do not influence the agenda of the global debate directly. They may take up a relevant issue, such as unmanned aerial vehicles (UAVs) or child soldiering, but they typically do not couch the issue as an IHL issue as opposed to an IHRL issue. Having said that, the media play a massive role in drawing attention to IHL issues such as UAVs and child soldiering.

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in stronger democracies, the civilian legal corps of a department of foreign affairs will likely approach an issue differently than a military lawyer. However, the goals and agendas of governments, armed forces and international organizations (as State-based organizations) will often be loosely aligned. Engagement with specific IHL issues by these actors is determined by what is relevant to them and their agendas at any given point in time. They all engage with one another, and they also engage with their networks beyond their States. The agendas of many of these actors take on an added layer of political complexity in the context of peace support and multinational operations. Of these groups of actors, it is only academics who have the freedom to pursue research agendas that are not related to current events or developments. However, academically there is generally less value in pursuing a research agenda divorced from the pertinent legal questions of the time. This author is not suggesting that actors belonging to each of these five categories absolutely have to engage with an issue for that issue to make it onto the agenda – indeed, this is usually not the case. Often, military and government lawyers will be very tight-lipped about specific IHL issues. For instance, when it became public knowledge that the United States is using unmanned aerial vehicles (UAVs) in the context of its targeted killing programmes, the issue of the use of weaponized UAVs skyrocketed to the top of the agenda of the global IHL debate. Those responsible for this were for the most part academics, civil society and functionaries within international organizations. Nevertheless, it is supremely important to note that while the US government and US armed forces, for obvious reasons, often avoid pertinent issues, when they do engage with matters such as UAVs, they do so within the language and structural parameters of IHL (which is not to say that their positions are necessarily in conformity with IHL).[68]

The number of armed conflicts that are taking place at any given time will probably surprise most people. The DRC, for example, has seen the parallel existence of multiple ongoing armed conflicts, of an international and non-international character, at the same time. It is, however, not surprising that from among this vast array of armed conflicts internationally, it is only a handful that set the trends as far as the global debate on IHL is concerned. This is not due to any specific agenda of exclusion, or to exceptionalism. Instead, when countries within which IHL is prioritized (that is to say, where there is a critical mass of IHL expertise and focus from among a combination of actors belonging to the five categories mentioned above) engage in armed conflict, debate on issues that affect the specific armed conflict intensifies dramatically. Many of the issues that have become relevant in the context of Western military engagement in Iraq and Afghanistan, such as detention during NIACs,[69] have long existed in the context of many armed conflicts in States across Africa. However, because of a lack of engagement with IHL within these States, these issues were not elevated in any

68 See, for example, Harold H. Koh, "The Obama Administration and International Law", Annual Meeting of the American Society of International Law, 25 March 2010.

69 See for example, *Hassan v. United Kingdom*, [2014] ECHR 29750/09, 2014, p. 31.

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significant way, to the global level of discourse and debate. There are a range of factors that contribute to this lack of engagement within Africa. There is undoubtedly a lack of IHL capacity across all five actor groups identified above, and particularly in academia. However, this lack of capacity may well be symptomatic of a broader scepticism toward IHL within Africa, which I argue is indeed the case.

"African solutions for African problems" and the marginalization of IHL in Africa[70]

"African solutions for African problems" makes for an appealing sentiment – one of self-reliance, responsibility and autonomy – and is thus often invoked by African leaders. However, this sentiment can also serve to exclude global solutions to African problems – such as IHL. To borrow from Koskenniemi again, there is frequently "a logic of exclusion-inclusion" in the operationalization of "African solutions for African problems". It is a convenient way to exclude external scrutiny. A key example in this regard is the position taken by many African States on the occasion of an extraordinary session of the Assembly of Heads of State and Government of the African Union (AU) during October 2013 which was set up specifically to discuss the International Criminal Court's (ICC) prosecution of President Uhuru Kenyatta and Deputy President William Samoei Ruto, both of Kenya. In this regard, Dersso has commented:

> Sadly, the heads of state and government who attended the summit defended their position to insulate themselves from ICC prosecution based on the political ideal of "African solutions to African problems". Hiding behind this to serve their self-interest is both a misuse and a perversion of the ideal. Such instrumentalisation of this ideal erodes its moral force as well as its political and institutional significance for enabling the continent to take the lead in dealing with the challenges it faces.[71]

A common refrain from those within Africa who oppose the ICC is that it is a Western, Eurocentric institution that exerts its power only over Africans, and is thus a continuation of Western domination. Jean Ping, former president of the AU, has said that "the ICC seems to exist solely for judging Africans".[72] While the ICC has a close relationship with IHL, the rejection of legal norms and institutions which are deemed "Western" or "Eurocentric" by African States is not isolated to this institution.

70 The phrase "African solutions for African problems" was coined by the economist George Ayittey in 1993. See George Ayittey, "An African Solution for Somalia", *Wall Street Journal*, 7 October 1993, p. A12.

71 Solomon A. Dersso, "The AU's ICC Summit: A Case of Elite Solidarity for Self Preservation?", *Institute for Security Studies*, 15 October 2013, available at: www.issafrica.org/iss-today/the-aus-icc-summit-a-case-of-elite-solidarity-for-self-preservation.

72 Rowland J. V. Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal", *Melbourne Journal of International Law*, Vol. 14, No. 2, 2014, p. 679.

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There is certainly a large measure of truth to the critique that much of the international architecture is dominated by Western thought. The solution, however, lies not in withdrawing into the regional shell under the banner of "African solutions for African problems". A further implication of this is that African States are not bringing to the table African solutions to global problems. As Sen has opined:

> I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states – never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned nearly two and a half centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorization of justice to the artificially imposed limits of nation states. This is not only because [quoting Martin Luther King] "injustice anywhere is a threat to justice everywhere" (though that is hugely important as well). But in addition we have to be aware how our interest in other people across the world has been growing, along with our growing contacts and increasing communication.[73]

Much attention has been placed of late on creating buy-in among armed non-State actors into IHL principles, with the underlying idea being that voluntary compliance will be enhanced should there be such buy-in by the armed actor in question.[74] This approach has been operationalized specifically in Africa and other parts of the developing world.[75] At the same time, it is overlooked that in the African context, there is often little buy-in into IHL even from State actors.[76] The historical discussion with which this article commenced serves to contextualize the present-day lack of engagement with IHL in Africa.

As armed conflict issues are not discussed within the parameters of IHL in Africa, the question arises: in which areas other than IHL are these issues absorbed? The rhetoric within Africa is largely one of pan-Africanism and regional integration. The preamble to the Constitutive Act of the AU commences with these words: "Inspired by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the

73 Amartya Sen, "Global Justice", in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law*, Routledge, Oxon, 2010, pp. 69–70.

74 See, for example, Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

75 The organization Geneva Call is a leader in the field in such direct engagement with armed non-State actors. This organization has been active in twenty-seven States, including eight African States (Burundi, the DRC, Mali, Niger, Senegal, Somalia, Sudan and Western Sahara). See the organization's website, available at: http://genevacall.org/.

76 The TWAIL movement engages with these issues; see, generally, M. Mutua, above note 60, pp. 31–40.

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peoples of Africa and African States". Additionally, the stated goals of the African Union, as provided for in the Constitutive Act, include:

> (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; …
>
> (c) accelerate the political and socio-economic integration of the continent;
>
> (d) promote and defend African common positions on issues of interest to the continent and its peoples; …
>
> (j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; …
>
> (l) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.[77]

There is little doubt that this embrace of pan-Africanism and regional integration in Africa is a response to historical Western domination and subjugation.[78] As a result, collectively, African States have selectively embraced regimes of law that fit into the goals of pan-Africanism and regional integration. International human rights law (IHRL), for example, is very well suited to these goals. Through the application of developed IHRL concepts, such as the principle of subsidiarity, the operationalization of legal norms can occur mostly in a more local space – the African continent. Despite being the least developed of the three regional human rights systems, the African system has received a great deal of attention. Africa has produced leading human rights law scholars whose voices are heard, and taken seriously, on the international stage.[79] Many African universities play host to academic centres and research focus groups on IHRL.[80] Across Africa there are innumerable African grass-roots human rights NGOs that act as a check on State power.[81] For the most part, debate regarding IHL issues is either absorbed or

77 Constitutive Act of the African Union, 2158 UNTS 3, 1 July 2000 (entered into force 26 May 2001), Art. 3.

78 Indeed, the Organization of African Unity (OAU), the predecessor to the AU, was set up with the express purpose of promoting "the unity and solidarity of the African States" and "eradicat[ing] all forms of colonialism from Africa". As provided for in Charter of the Organization of African Unity, 479 UNTS 39, 25 May 1963 (entered into force 13 September 1963), Art. 2.

79 The nationality of holders of United Nations (UN) human rights special procedures mandates is indicative in this regard. All six working groups include a member from Africa (however, this is a formal requirement); of the six independent experts, one is from Africa; and six of the thirty Special Rapporteurs are from Africa. The fact that the UN aspires to geographic representation may account for this to some extent, but it is worth noting that a strong African voice has emerged during the past decades in the human rights discourse. The work of Mahmood Mamdani, Makau wa Mutua, Christof Heyns and Frans Viljoen, among many others, serves well as an example in this regard.

80 A key example in this regard is the Centre for Human Rights at the University of Pretoria, which won the 2006 UNESCO Prize for Human Rights Education as well as the 2012 African Union Human Rights Prize.

81 There are literally thousands of such NGOs – the following list serves merely for illustrative purposes: Zimbabwe Lawyers for Human Rights (Zimbabwe); Uganda Conflict Action Network (Uganda); Mubende Human Rights (Uganda); Sudan Organisation Against Torture (the Sudan); Youths for

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muffled by the vibrant IHRL debate, and within the architecture of human rights law, on the continent. There thus seems to be an attempt to fit a square peg in a round hole.

Viljoen has argued that Africa has indeed played a major role in developing IHL.[82] The title of one of Viljoen's essays is "Africa's Contribution to the Development of International Human Rights and Humanitarian Law" – he thus addresses both IHRL and IHL together. The examples Viljoen cites of Africa's contribution to the development of human rights are plentiful, and include: unique facets of the African Charter on Human and Peoples' Rights;[83] developments regarding children's rights initiated by the African Charter on the Rights and Welfare of the Child;[84] developments regarding refugee protection initiated by the Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa;[85] and environmental protection with specific reference to developments brought on by the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention.[86] In addition to these developments, which emanated from within Africa, Viljoen also indicates that African States played a meaningful role in the development of the United Nations (UN) human rights architecture.[87] The argument that Africa engages actively with the development of human rights, both regionally and internationally, is very compelling. In contrast hereto, the examples drawn upon to indicate Africa's contribution to IHL are limited to the establishment of the International Criminal Tribunal for Rwanda (ICTR) and its jurisprudence; the adoption of the Rome Statute and the establishment of the ICC;[88] and the regulation of mercenaries.[89] These examples are not nearly as

Human Rights Protection and Transparency Initiative (Nigeria); Association Malienne des Droits de l'Homme (Mali); Association Mauritanienne des Droits de l'Homme (Mauritania); Association Marocaine des Droits Humaine (Morocco); Centre for Human Rights and Rehabilitation (Malawi); Centre for Minority Rights Development (Kenya); Chadian Association for the Promotion and Defense of Human Rights; and the Legal Resources Centre (South Africa).

82 Frans Viljoen, "Africa's Contribution to the Development of International Human Rights and Humanitarian Law", *African Human Rights Law Journal*, Vol. 1, No. 1, 2001.

83 *Ibid.*, pp. 19–22. Group or peoples' rights serve as a very good example.

84 *Ibid.*, pp. 22–23. Viljoen illustrates that in many respects the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990 (entered into force 29 November 1999), provides better protection than the UN Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990).

85 F. Viljoen, above note 82, pp. 23–28. The expansion of the concept of "persecution" for purposes of refugee status determination by the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974), is emphasized.

86 F. Viljoen, above note 82, pp. 23–28. African Convention on the Conservation of Nature and Natural Resources, 1001 UNTS 3, 15 September 1968 (entered into force 16 June 1969); Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 2101 UNTS 177, 30 January 1991 (entered into force 22 April 1998).

87 F. Viljoen, above note 82, p. 31.

88 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).

89 The first ever convention regulating mercenary activities was elaborated in Africa: OAU Convention for the Elimination of Mercenarism in Africa, OAU Doc. CM/433/Rev. L. Annex 1, 3 July 1977 (entered into force 22 April 1985).

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compelling as those cited in respect of human rights.[90] Firstly, the ICTR was created through a UN Security Council resolution,[91] and only three African States voted on the resolution, one of which cast the only vote against; and secondly, both the ICTR and ICC belong more properly to international criminal law and not to IHL.[92] The regulation of mercenaries is indeed an area of IHL in which Africa played a leading role; however, citing Taulbee,[93] Viljoen acknowledges:

> The African response can be explained primarily with reference to the fact that the mercenary has become "the symbol of racism and neo-colonialism within the Afro-Asian bloc", because the recurring scenario was one of "white soldiers of fortune fighting black natives".[94]

Thus it seems that African States' motivation for engaging with this issue is directly linked to their lack of motivation for engaging with IHL more generally, which is due to their colonial history. There is a much greater sense of ownership of IHRL within Africa, and IHRL gives considerable deference to regional development and action when compared to IHL. Viljoen's contribution further serves as a good example of the point made above, that in the African context the IHL debate is, for the most part, absorbed into IHRL. This is not a criticism of Viljoen, who specifically acknowledges that "international humanitarian law is distinct from international human rights law".[95] Indeed there are many virtues in the co-application of IHRL and IHL, and in multi-, inter- and transdisciplinary scholarship more generally. However, in an environment where IHL issues are dealt with mostly by human rights lawyers, often these issues are subjugated to human rights thinking and ideals, which are not always consistent with the logic of IHL, and there is the further implication that these issues are not dealt with by subject-matter experts.

The African Union and IHL

Considering the general pleas for "African solutions to African problems", and increasing anti-Eurocentrism, within Africa, which are often perceived to exist

90 It should be acknowledged that in period since Viljoen's article (above note 82), a number of instruments have been adopted in Africa that contribute to IHL in respect of specific issues. These include the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention, 2009), and on the sub-regional level, the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006).

91 UNSC Res. 955, 8 November 1994.

92 IHL certainly plays a very meaningful role in the development of international criminal law (ICL), and vice versa. Klabbers has noted that it is useful and justifiable to treat IHL and ICL separately, as IHL covers more than war crimes, crimes against humanity, genocide and aggression, and similarly, ICL covers more than IHL. Moreover, ICL "assigns responsibility to individuals, and thereby breaks through the classic structure of international law". See Jan Klabbers, *International Law*, Cambridge University Press, Cambridge, 2013, p. 219.

93 James L. Taulbee, "Myths, Mercenaries and Contemporary International Law", *California Western International Law Journal*, Vol. 15, 1985, p. 342.

94 F. Viljoen, above note 82, p. 37.

95 *Ibid.*, pp. 31–32.

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within those areas of international law with universalist aspirations, it makes sense to look towards the AU as the central actor in enhancing IHL on all levels within African States. During 2013, the AU launched its Agenda 2063, which, as the name suggests, is a fifty-year plan aimed at a "shared strategic framework for inclusive growth and sustainable Development & a global strategy to optimize the use of Africa's Resources for the benefit of all Africans" [*sic*].[96] The Agenda consists of twelve "flagship programmes", including "Silencing the Guns by 2020", which is framed in the following terms:

> Silencing the Guns by 2020: aims to fulfil the pledge of the AU Heads of State and Government meeting on the occasion of the Golden Jubilee Anniversary of the founding of the OAU, "not to bequeath the burden of conflicts to the next generation of Africans, "to end all wars in Africa by 2020" and "make peace a reality for all African people and rid the continent free of wars, end inter- and intra-community conflicts, violations of human rights, humanitarian disasters and violent conflicts, and prevent genocide [*sic*]".[97]

Agenda 2063 is generally characterized by such an overly ambitious approach. The philosophy suggests that if mankind ends all wars, we need not be too concerned with ensuring the proper conduct of hostilities and protection of victims of war. The idea that all wars in Africa can be ended in a mere seven years is altogether unrealistic. Moreover, this rhetoric can be destructive to those who engage in it, as it poses the question: if it can be done in seven years, why are we only doing it now?

While "Silencing the Guns by 2020" occupies a considerable portion of Agenda 2063, IHL is noticeably absent. During 2015, the AU launched the "First Ten-Year Implementation Plan 2014–2023", in order to give concrete guidance for the progressive implementation of Agenda 2063.[98] The issue of armed conflict on the African continent again features strongly. The plan for the first ten years is characterized by seven aspirations, which are underpinned by twenty goals. The third aspiration is "[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law".[99] Although this aspiration is directly linked to IHL, IHL features only indirectly in Goal 11, which falls under this aspiration and provides for "[d]emocratic values [and] practices, [and] universal principles of human rights, justice and the rule of law", and specifically includes, as a continental goal for 2023, "[African Governance Architecture] Clusters on Democracy; Governance; Human Rights; Constitutionalism and Rule of Law and Humanitarian Assistance".[100] The fourth aspiration calls for "a peaceful and secure Africa",[101] and includes Goals 13 to 15, which are: "Goal 13: Peace,

96 AU, *Agenda 2063: The Africa We Want*, Framework Document, September 2015.
97 *Ibid.*, p. 108.
98 AU, *Agenda 2063: The Africa We Want – First Ten-Year Implementation Plan 2014–2023*, September 2015.
99 *Ibid.*, p. 73.
100 *Ibid.*, p. 74.
101 *Ibid.*, p. 78.

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Security and Stability are Preserved";[102] "Goal 14: A Stable and Peaceful Africa";[103] and "Goal 15: A Fully Functional and Operational African Peace and Security Architecture".[104] The manner in which these goals are fleshed out challenges the coherency of Agenda 2063 as it relates to armed conflict. For instance, Goal 13 includes as a national-level target for 2023: "Level of conflict emanating from ethnicity, all forms of exclusion, religious and political differences is at most 50% of 2013 levels."[105] Juxtaposed against this is the target for 2023 under Goal 14, "A Stable and Peaceful Africa" at both the national and continental levels – not to mention one of the flagship projects of the Agenda as a whole, that being to "Silence the Guns by 2020".[106]

As national level-targets for 2023, Goal 14 includes "[s]ufficiently capable security services by 2020" and "[r]espect for rules of engagement and human rights in conflict situations [being] entrenched in the security forces".[107] Certainly, these goals are linked directly to the professionalism of African armed forces, and IHL training and compliance forms a key component of such professionalism. Nevertheless, Agenda 2063 is preoccupied with ending all wars, and the relevance of IHL training, dissemination and compliance is never directly addressed.

Interestingly, Agenda 2063 is largely silent on assigning responsibility for targets to functionaries within the organization. The AU functionaries who deal with IHL issues most actively on a day-to-day basis are: (1) the Department of Political Affairs, (2) the Office of the Legal Counsel, (3) the AU Commission on International Law (AUCIL), and (4) the Peace and Security Department, which includes the Peace Support Operations Division, the Defense and Security Division, and the Conflict Prevention and Early Warning Division. However, the so-called African Peace and Security Architecture (APSA) is also very relevant to the broader discussion of IHL in Africa.[108] The APSA falls under the authority of the AU Peace and Security Council (PSC), and its ideals are informed most concretely by the Protocol relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol),[109] and the Common African Defence and Security Policy (CADSP).[110] Additionally, the AUCIL, the Panel of the Wise, the Continental Early Warning System, the African Standby Force and the Peace Fund all form part of the APSA.

102 *Ibid.*
103 *Ibid.*, p. 79.
104 *Ibid.*, p. 81.
105 *Ibid.*, p. 78.
106 *Ibid.*, p. 79.
107 *Ibid.*, p. 80.
108 For additional information on the APSA, see Kwesi Aning and Samuel Atuobi, "Responsibility to Protect in Africa: An Analysis of the African Union's Peace and Security Architecture", *Global Responsibility to Protect*, Vol. 1, No. 1, 2009; Ademola Jegede, "The African Union Peace and Security Architecture: Can the Panel of the Wise Make a Difference?", *African Human Rights Law Journal*, Vol. 9, No. 2, 2009.
109 Protocol relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002 (entered into force on 26 December 2003) (PSC Protocol).
110 Solemn Declaration on a Common African Defence and Security Policy, 28 February 2004.

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IHL features strongly in the working documents of these various entities. The PSC Protocol serves well as an example, where "respect for the sanctity of human life and international humanitarian law" is expressly included as both an objective and a guiding principle of the PSC.[111] Furthermore, the powers of the PSC extend to following up "within the framework of its conflict prevention responsibilities … respect for the sanctity of human life and international humanitarian law by Member States".[112] Finally, the African Standby Force is established in terms of Article 13 of the Protocol, which specifically provides:

> The [AUCIL] shall provide guidelines for the training of the civilian and military personnel of national standby contingents at both operational and tactical levels. Training on International Humanitarian Law and International Human Rights Law, with particular emphasis on the rights of women and children, shall be an integral part of the training of such personnel.[113]

There is an apparent conflation of IHL ideals with the PSC's broader objectives of conflict prevention and cessation. This can be seen in the PSC's express objective to "promote and encourage … respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts".[114] Respect for IHL cannot realistically be seen as an element of efforts to prevent conflicts. However, more problematic is the lack of IHL awareness and implementation on the operational level during armed conflicts in Africa. While the data are sporadic, and in some cases anecdotal, there is almost universal agreement that IHL implementation and compliance in African armed conflicts is very low.[115] While IHL is relatively well mainstreamed in the workings of the AU at the policy level, the question remains as to how to ensure that the objectives, mandates, guiding principles and general policies of the AU feature on the operational level. While armed conflict is prevalent in a significant number of AU member States, organizationally, the AU is responsible for three active peace support operations, with a total of more than 42,000 deployed uniformed personnel.[116]

The preceding discussion serves largely as an indictment of African actors for failing to come to the IHL table and make their voices heard. This is, however, not the entire picture. Firstly, as the initial part of this contribution suggests, Africa's colonial history has impacted heavily by creating a climate of scepticism among African States towards international, largely Western concepts such as IHL – much of the TWAIL movement in international law is premised on this

111 PSC Protocol, above note 109, Arts 3(f), 4(c).
112 *Ibid.*, Art. 7(1)(m).
113 *Ibid.*, Art. 13(13).
114 *Ibid.*, Art. 3(f).
115 See, for example, Office of the UN High Commissioner for Human Rights (OHCHR), *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010. Additionally, trial records and judgments of the ICTR, the Special Court for Sierra Leone and the ICC provide compelling evidence of broad non-compliance with IHL.
116 AU, *African Union Handbook*, 2016, pp. 60–63.

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scepticism.[117] There are various additional factors that contribute to such scepticism today – the rejection of the ICC as non-African, with an agenda of prosecuting Africans, serves well as a contemporary example in this regard. Incidentally, the AU has been used as a vehicle to advance anti-ICC rhetoric within Africa, and the most concrete expression of this rhetoric is the Malabo Protocol of the AU, which seeks to create an African regional criminal chamber parallel to the ICC.[118] Contextually, the establishment of this chamber appears to be motivated by an effort to exclude ICC jurisdiction on the basis of complementarity. However, while less visible, the lack of development of expertise and the lack of engagement with IHL issues from within Africa are even more to the point.

Secondly, a seat is generally not reserved for African actors at the IHL table on the international level. For example, it was reported by participants that only two experts from sub-Saharan Africa participated in the process that led to the adoption of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance).[119] It is worth mentioning here that with the prevalence of NIACs within Africa, the notion of direct participation in hostilities is of incredible significance to the African continent. Another example is the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual).[120] The Tallinn Manual process was an expert-driven process initiated by the NATO Cooperative Cyber Defence Centre of Excellence, an accredited NATO Centre of Excellence.[121] This may suggest that the process included only participants from NATO member States, but this is not the case; for instance, an Australian Defence Force officer participated as an expert. None of the experts, peer reviewers or editors involved in this process were African – and while it is true that at present cyber-warfare is not a threat in Africa compared to other parts of the world, it certainly is one of the major global future threats in which all States internationally have an interest. What is also interesting is the extent to which the experts involved in the ICRC Interpretive Guidance and the Tallinn Process overlap.[122] This may well entrench a sentiment that exists in some quarters: that a small clique of Western experts dominates these processes.

From the preceding discussion there seems to be a disconnect between the attitude from within Africa regarding engagement with IHL – that is to say, a

117 M. Mutua, above note 60.

118 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol), 24 June 2014 (not in force).

119 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009. This process was conducted under Chatham House rules, and a list of expert participants was never released. Thus, this information cannot be confirmed.

120 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

121 *Ibid.*, p. 16.

122 Unlike the Tallinn Manual, the ICRC Interpretive Guidance does not list the names of the experts that were involved in the process. Nevertheless, the *New York University Journal of International Law and Politics*, Vol. 42. No. 3, 2010, was dedicated to a forum in which the Interpretive Guidance was debated. Kenneth Watkin, Michael N. Schmitt, Bill Boothby, W. Hays Parks and Nils Melzer all contributed to this special edition, and they were all part of the expert group. Of these individuals, only W. Hays Parks was not included in the expert group for the Tallinn Manual process.

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conscious lack of engagement with the global debate – and the attitude of those international actors who are well established within the IHL debate regarding bringing Africa to the table. On the one hand, it appears that the colonial experience of Western domination and subjugation has entrenched a sentiment within African States of distrust towards more international and perhaps Western concepts such as IHL. At the same time, international actors certainly do not exclude African participants intentionally. Rather, their experience is such that there is no will from within African States to participate in these processes and to develop the subject-matter expertise necessary to engage with the IHL debate on the global level. Clearly, the solution to this problem requires active engagement from both sides of this divide.

The future of IHL in Africa

The means and methods of armed conflict in Africa have in no way remained stagnant during the century since the beginning of WWI, but developments in the African context are much less technologically driven. Some of the issues of specific concern in contemporary armed conflict in Africa include: the perpetuation of armed conflict for purposes of natural resource exploitation; the effects of porous borders and mobile non-State armed actors; issues regarding the application *rationi loci* of IHL; the escalation and de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of IHL; child soldiering; and linking violence to less organized armed groups. Some of these issues have featured in the global debate, while others have not. The criminalized character of contemporary armed conflicts in Africa and the associated exploitation of natural resources, as well as child recruitment, are issues that have received very broad attention. One key example in this regard is the Kimberley Process Certification Scheme;[123] another good example is the issue of sexual violence during armed conflict, particularly in the DRC.[124] At the same time, other issues, such as the escalation and de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of IHL, do not feature in any significant manner in the global debate. Yet still other issues, such as non-State armed actors, that have long existed in the African context do feature in the global debate, but this is largely due to these problems having occurred in much more recent history in the context of armed conflicts to which developed States are party. This raises the question of why some of these issues feature in the global debate, and others not.

There are many factors that influence whether an issue becomes part of the global debate, including the visibility of the issues (e.g., child soldiering), whether the

123 The Kimberley Process Certification Scheme is a process created by UNGA Res. 55/56, 29 January 2001, in order to "give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds". The Kimberley Process has also received the support of the Security Council: UNSC Res. 1459, 28 January 2003.

124 See, for example, OHCHR, above note 115.

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issues are of concern beyond the IHL debate (e.g., natural resource exploitation), and whether the issues have impact beyond Africa (e.g., the market for conflict diamonds and columbite-tantalite is largely Western). However, even those issues of particular African concern which are discussed within the global debate do not always feature much in the debate within Africa. Child recruitment, for example, is not exclusively an African problem, but it certainly has been a greater problem within Africa than elsewhere for many years. Yet the civil society organizations, governments and academics that engage with this issue most vigorously are generally not African. It thus appears that a lack of consistent engagement from within Africa contributes to the patchwork manner in which IHL issues of African concern reach or do not reach the global debate.

It is not possible to devise a concrete, predetermined action plan for the mainstreaming of IHL within Africa, and of Africa within the global IHL debate. Achieving this goal will require a flexible and comprehensive approach. As mentioned before, the focus should be on enhancing the IHL debate within Africa. Should this be achieved, the inclusion of African issues within the global debate will occur as a matter of course, as will the better development of expertise within Africa. As a start, it is most important to identify entry points around which momentum can be built. Much of the preceding discussion has focused on Africa as a regional entity, but this regional entity is made up of States, and States act in their own interest before acting in the regional interest. As I cautioned in the introduction, it was not feasible for me to focus this contribution on individual State considerations, as this would have involved separate discussion of each of the fifty-four States that make up the African continent. However, it would be unrealistic not to recognize the fact that the IHL debate within each State is unique. Of the five actor groups identified above (academics, governments, armed forces, civil society and international organizations), it is unlikely that the initiative will come from the governments or armed forces of any specific States. What is needed is an entity that has the potential to engage with each State in Africa, and specifically with those States affected by armed conflict. Two such entities exist: the ICRC and the AU. Ewumbue-Monono and von Flüe identified the transition from the OAU to the AU as a watershed moment for ICRC engagement in promoting IHL within Africa.[125] In reflecting on ICRC engagement with the OAU, these authors recognized that:

> Although on balance OAU-ICRC cooperation in promoting humanitarian law has had some positive effects, these could be increased in cooperation with the African Union, which has wider objectives and has created new opportunities for promoting and implementing international humanitarian law in Africa.[126]

125 Churchill Ewumbue-Monono and Carlo von Flüe, "Promotion of International Humanitarian Law through Cooperation between the ICRC and the African Union", *International Review of the Red Cross*, Vol. 85, No. 852, December 2003, p. 764.
126 *Ibid.*, p. 760.

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Unfortunately, after thirteen years, it appears that notwithstanding the formal inclusion of IHL in the working documents of the AU and specifically the APSA, the level of IHL capacity-building within the AU has not progressed much. It is thus unlikely that the AU would, of its own accord, intensify its engagement with IHL. As such, it still falls to the ICRC to not only engage with States individually, but also to work with the AU in placing IHL firmly on the agenda of the armed conflict debate within Africa.

The ICRC has a well-staffed delegation accredited to the AU, and has twenty-nine delegations across Africa in total.[127] Moreover, the ICRC delegation to the AU has had "observer status", first at the OAU and then at the AU, since 1992. The ICRC delegations in Africa are very active in IHL training and dissemination. This engagement occurs across the spectrum, and includes formal programmes of engagement with the armed forces, governments (including parliamentarians) and academia.[128] Indeed, when compared to other regions of the world the ICRC has invested disproportionate resources in such efforts in Africa, yet Africa remains underrepresented in the global IHL debate. The training in which the ICRC engages in Africa is generally aimed at a relatively low knowledge level, and does not build much on knowledge to the point of creating real subject-matter expertise. Unfortunately, this is a necessary consequence of the lack of existing expertise within Africa. Perhaps a valid course of action will be to develop a training programme that focuses more on depth of knowledge – this will, however, require significant additional resources. The reasons for this are surely manifold, but include the fact that there is no vibrant IHL community or discourse on the African continent, and as such, there is a lack of a knowledge base. Such training and dissemination is nevertheless of incredible importance, as we know that the benefits of IHL are unlocked not through enforcement, but through compliance. For compliance to occur within armed forces, two essential ingredients are required: proper training and discipline. What more could then be done?

While the ICRC is very involved in Africa, the organization does not involve Africa significantly in its affairs at headquarters level. This is well evidenced by the lack of involvement of African experts in substantive ICRC studies. This is certainly an area in which the ICRC can improve in respect of engagement with Africa. This shortcoming is surely also symptomatic of a general lack of high-level expertise on IHL in Africa. However, while there is no vibrant IHL community, there are a number of experts from Africa who have the knowledge, skills, experience and stature to contribute to such ICRC processes.

A further issue is that, as a Swiss organization, the ICRC also fits into the mould of "Eurocentrism" of which many African entities are particularly critical and sceptical. This problem can be mitigated in a number of ways. The ICRC can

127 ICRC, *Annual Report 2015*, Vol. 1, 2015, p. 104, available at: https://app.icrc.org/files/2015-annual-report/.
128 Mutsa Mangezi and Sarah Swart, "Back to Basics: Enhancing African Adherence to the Rules of War", *Humanitarian Law & Policy*, 4 October 2016, available at: http://blogs.icrc.org/law-and-policy/2016/10/04/africa-ihl-ratification-compliance/.

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decentralize its engagement strategy with the AU by engaging more extensively with African civil society – that is to say, not the global NGOs with a footprint in Africa, but instead the African-initiated NGOs. These civil society organizations may in turn engage with the AU and member States. Again, it would be unrealistic not to acknowledge the challenges that face this solution – corruption may well hamper greater reliance on local actors. The ICRC can also make much greater use of local expertise in training and other areas of engagement, letting Africans be the mouthpiece to advocate IHL ideals to Africans wherever feasible. These suggestions may appear to serve to manipulate States and actors in Africa, by "disguising" the work of the ICRC. However, this is not the case. Instead, the ICRC's understanding and manner of work will also develop through closer collaboration with African actors. It should be mentioned that responsibility for the mainstreaming of IHL in Africa cannot rest on the shoulders of the ICRC alone. ICRC initiatives in Africa make a disproportionately large contribution as it is.

The International Institute of Humanitarian Law (IIHL) in San Remo also contributes significantly to engagement with African armed forces. The IIHL draws on African experts as lecturers and facilitators, provides training to a significant number of African participants, and includes topics of African concern in its programme of work – a key example in this regard is the Africa Accountability Colloquium.[129]

A recurring theme when engaging with IHL in Africa is a lack of expertise. This creates a vicious cycle, as expertise is needed to create further expertise. The reasons for this lack of expertise are manifold, but include the fact that the IHL is marginalized in the armed conflict debate in Africa. The educational opportunities in Africa are limited when compared to other regions of the world, yet Africa produces leading scholars in separate but related fields, such as IHRL. Universities, civil society, individual States and armed forces, national IHL committees and National Red Cross and Red Crescent Societies in Africa must intensify their efforts. These entry points, specifically at the individual State level, form an intrinsic part of the future IHL debate in Africa, and should be the subject of further analysis.

Conclusion

The need for greater African involvement in the IHL debate was recognized by Bello when he proposed the establishment of an African Institute of International Humanitarian Law in 1984.[130] There are people in Africa within the five sectors that determine the global IHL debate who work tirelessly at elevating IHL within Africa, and Africa in the global IHL debate. It is unfortunately a rather lonely endeavour. African States and actors have participated very strongly in the

129 See: www.iihl.org/africa-accountability-colloquium/.

130 Emmanuel G. Bello, "A Proposal for the Dissemination of International Humanitarian Law in Africa", above note 5, p. 311. Bello's call was echoed in M. Mubiala, above note 7, p. 47.

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development of other areas of international law, with international criminal law being a key example due to its proximate existence with IHL. Unlike IHL, African States played a central role in developing international criminal law, not only in the context of treaty negotiations, but also jurisprudential development specifically in the context of the ICTR and the Special Court for Sierra Leone. The deterioration of the relationship between the ICC and African States is a very sad and unfortunate state of affairs. Nevertheless, African involvement in, and certainly initial buy-in into, the international criminal law project can serve as a beacon of hope, and perhaps a blueprint for the mainstreaming of IHL within Africa, and Africa within the global IHL debate.

There is a need for the development of academic expertise within Africa on IHL. African scholars can play a very meaningful role in bringing issues of African concern to the attention of international audiences through conference presentations and both scholarly and popular publications. Unfortunately, yet predictably, in "our" desire to be at the forefront of our field, African scholars tend to engage more with those issues that are on the global agenda than with the issues of African concern that are not on this agenda. As an anecdotal example, I can draw on my own experience as a South African academic: I know many more postgraduate students from the African continent pursuing research in IHL on issues such as UAVs and cyber-warfare than I know students who are engaging with issues of particular concern within Africa.

This article has emphasized the role of the ICRC in facilitating the mainstreaming of IHL in Africa, but there are other entry points too. Each of the five actor groups identified as being responsible for determining the agenda of the global debate (academics, governments, armed forces, civil society and international organizations) provides for multiple entry points in furthering the goal of mainstreaming IHL in Africa, and Africa in the global debate. The value of this article lies much more in identifying the problem and the complexities that caused the problem, and by so doing framing the debate, than in providing the solution. This is because only once there is awareness of the problem can those individuals and entities who are in a position to be part of the solution direct their actions to mainstreaming IHL in Africa.

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