

Africa and the Domestic Implementation of the Geneva Conventions and Additional Protocols: Problems and Solutions

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Abstract

The Geneva Conventions have achieved universal ratification, and Additional Protocols I and II are binding on all African states except Eritrea and Somalia; however, their observance in African conflicts is flawed and inconsistent. From deliberate attacks on civilian populations to abduction and hostage-taking, humanitarian rules are openly flouted. Through an extensive assessment of the domestic measures required to implement the Geneva Conventions and Protocols in Africa, this article identifies the current level of implementation, existing gaps and possible non-legal factors that impact respect for the instruments in African conflicts. Violations are often associated with historical, political, religious and social factors that tainted the instruments' lofty provisions and bequeathed a legacy that challenges the obligation to respect. Additionally, continuous political and religious struggles and the search for identity and relevance have displaced the ideals of the instruments' humanitarian provisions. Reversing this trend requires an approach that appeals to and engages the continent beyond the traditional argument of obligation to respect.

Keywords

Problems of IHL in Africa, solutions to IHL problems in Africa, Africa and international humanitarian law, respect for IHL in Africa, domestic implementation of IHL, IHL compliance in Africa

INTRODUCTION

Africa is arguably the continent with the greatest incidence of armed conflict since World War II. In the last three decades, at least 23 of Africa's 54 states

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have been involved in armed conflict.¹ The applicability, universality and customary nature of the Geneva Conventions (the Conventions)² is not in doubt.³ Their universal ratification imposes an obligation to respect and to ensure that others comply with the rules in armed conflicts.⁴ While no state in Africa has openly rejected the Conventions and their two Additional Protocols (the Protocols),⁵ their observance in African conflicts is pitiful. It is not a case of isolated acts; a pattern is discernible, reminiscent of a society devoid of basic humanitarian rules. From deliberate attacks against the civilian population and civilian objects, to abduction, torture and hostage-taking, the open flouting of basic humanitarian rules often creates untold hardship for the victims of armed conflict.

Since the beginning of modern international humanitarian law (IHL) in 1864, the international community has understood that successful implementation depends on actors at the domestic level.⁶ This is because domestic actors must comply with their national laws,⁷ hence IHL treaties mandate adopting domestic measures to facilitate compliance. Some western states have even made the provision of international assistance to poor states conditional on the ratification of humanitarian and human rights treaties.⁸ The

1 These are Angola, Burundi, Burkina Faso, Cameroon, the Central African Republic (CAR), Chad, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Djibouti, Egypt, Eritrea, Ethiopia, Liberia, Libya, Mali, Niger, Nigeria, Rwanda, Sierra Leone, Somalia, South Sudan, Sudan and Uganda. See also G Waschefort "Africa and international humanitarian law: The more things change the more they stay the same" (2016) 2/98 *International Review of the Red Cross* 593.

2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention Relative to the Treatment of Prisoners of War, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (all of 12 August 1949).

3 See "Partial award, prisoners of war, Ethiopia's claim 4, between the Federal Democratic Republic of Ethiopia and the state of Eritrea" (1 July 2003, Eritrea-Ethiopia Claims Commission) The Permanent Court of Arbitration, The Hague, paras 31–32. The commission seemed to suggest that the rules in the Geneva Conventions have become customary in nature and that, if a state contests a rule, it would be the duty of that state to establish that a particular provision is yet to attain such status.

4 See U Palwankar "Measures available to states for fulfilling their obligation to ensure respect for international humanitarian law" (1994) 34/298 *International Review of the Red Cross* 9.

5 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 1977 (AP I); and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non- International Armed Conflicts of 1977 (AP II).

6 See M Bothe, T Kurzidem and P Macalister-Smith *National Implementation of International Humanitarian Law: Proceedings of an International Colloquium Held at Bad Homburg, June 17–19, 1988* (1990, Martinus Nijhoff) at xvii.

7 Ibid.

8 See, for example, the US Foreign Assistance Act 1961. See also Swiss Agency for Development and Cooperation, the State Secretariat for Economic Affairs and the Federal Department of Foreign Affairs' Human Security Division of Switzerland.

legal systems in Africa consisted of civil law, common law, religious law and customary laws. These systems have impacted the laws applicable to armed conflict situations on the continent. This article examines, to the extent necessary, the relevance of these systems in relation to the adoption of domestic measures for the implementation of IHL in Africa and the respect or otherwise of IHL rules as contained in the Geneva Conventions and Protocols.

Research for this article utilized the National Implementation Database of the International Committee of the Red Cross (ICRC), which compiled the instruments adopted to implement IHL. The existing legislation in African states was analysed in detail. The author identified the measures required for implementing the Conventions and the Protocols at the national level and examined African states' existing legislation, policies, documents and manuals on IHL. The author also investigated and analysed legislation and policies from other sources, such as the websites of Parliaments and states' humanitarian and human rights organizations, as well as the laws applicable to armed conflict situations in each African state. The author was assisted by two bilingual speakers (Arabic and French) to identify relevant instruments in those languages. The author also examined the ICRC's English summary of instruments in languages other than English and international organizations' reports concerning particular subject matter.

Undoubtedly, treaty ratification is crucial, as it establishes the legal obligation to respect the treaty; however, it is not as simple as mere ratification, as the African experience has demonstrated. Progress has certainly been made in the adoption of domestic measures; nevertheless, concerns exist.⁹ These concerns have been expressed in numerous fora, including the yearly regional IHL seminar for Southern Africa and Indian Ocean Island.¹⁰ The lack of compliance with the rules of the Conventions and Protocols is partly due to the non-existence of appropriate domestic instruments and partly due to the actors' perceptions of IHL rules. This article argues that the failure to adopt some critical measures might have influenced IHL violations in Africa, and this problem is also connected to the historical, sociological and economic factors typical on the African continent.

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- 9 *Implementing IHL in West Africa: Participation of West African Countries in International Humanitarian Law Treaties and Their National Implementation* (2018 report, Economic Community of West African States / ICRC), available at: <<https://www.icrc.org/en/document/implementing-ihl-west-africa-redux>> (last accessed 6 March 2022). Specifically, there are concerns about measures regarding the adoption of criminal repression of IHL violations, protection of the Red Cross / Crescent emblems, marking of protected persons and property, and IHL dissemination.
- 10 See, for example, "Joint statement by Republic of South Africa and ICRC on 18th regional IHL seminar" (7 September 2018, ICRC), available at: <<https://www.icrc.org/en/document/joint-statement-republic-south-africa-and-icrc-18th-regional-international-humanitarian-law>> (last accessed 6 March 2022).

This article focuses on two significant issues: assessing the extent of domestic implementation of measures under the Conventions and Protocols; and canvassing the argument that the failure to adopt all the measures and implement them in practice during armed conflicts is connected to non-legal factors. The article is therefore in two parts: the first examines the extent of the adoption of domestic instruments on the continent; the second discusses the non-legal factors that contribute to the inadequate implementation of the Conventions and Protocols in Africa. The essence of the first part is to examine the current state of the implementation of the Conventions and Protocols on the continent, which helps provide an entry point regarding the interventions required concerning, for example, advocacy and awareness creation. The essence of the second part is to provide a possible explanation as to why some of the implementation measures are yet to be adopted and why violations continue to occur. This will empower the relevant advocacy actors and the international community to appreciate and adopt approaches that could engage law and policymakers to counter these non-legal factors for the overall implementation of the instruments. Part two, therefore, complements part one in ensuring that the identified gaps and practical implementation problems are addressed by adopting approaches that consider the underlying factors hampering the implementation of the instruments on the continent.

PART ONE

MEASURES FOR THE DOMESTIC IMPLEMENTATION OF THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

Adoption of domestic measures for IHL compliance is critical. Respect for the rules can hardly be achieved if appropriate measures are not in place.¹¹ IHL implementation measures have been temporally categorized as between during peacetime, during armed conflict and after conflict.¹² Essentially, the measures relate to the promotion, prevention and repression of IHL violations.¹³ Promotion measures include dissemination,¹⁴ translation (where necessary)¹⁵

11 D Fleck "Implementing international humanitarian law: Problems and priorities" (1991) 31/281 *International Review of the Red Cross* 142.

12 M Sassòli "The implementation of international humanitarian law: Current and inherent challenges" (2007) 10 *Yearbook of International Humanitarian Law* 46.

13 See J Chan "Implementation of international humanitarian law" (2000) 8/2 *Asia Pacific Law Review* 218.

14 The Four Geneva Conventions of 12 August 1949 (GC I–IV): GC I, art 47; GC II, art 48; GC III, art 127; and GC IV, art 144. AP I, arts 83 and 87; and AP II, art 19.

15 GC I, art 48; GC II, art 49; GC III, arts 41 and 128; GC IV, arts 99 and 145; and AP I, art 84. See also M Sassòli, AA Bouvier and A Quintin *How Does Law Protect in War?* vol 1 (3rd ed, 2011, ICRC).

and domestication.¹⁶ Preventive measures include IHL training to the military, and the establishment and regulation of national societies¹⁷ and information bureaux.¹⁸ Repression measures include punishment of IHL violations, protection of the Red Cross / Crescent emblems (Emblem), and protection of fundamental and procedural guarantees during armed conflict. The application of these requires legislation.¹⁹ Other measures such as the supervision of agents,²⁰ inquiries²¹ and appointment of protecting powers²² are ad hoc and only exist during armed conflicts. Each measure is essential in the overall implementation process; although their nature and timing vary, problems or challenges can impact other measures. For example, adopting a legislative measure for repression is essential, but it would be a challenge to prevent violations if there is no proper dissemination. Conversely, although dissemination facilitates awareness, failure to repress renders prevention less effective.

Adherence to the Conventions and the Protocols “is only the first step”. Ensuring their implementation requires more than ratification.²³ Respect for IHL requires concrete measures and a legal framework that ensures “national authorities, international organisations, the armed forces and other bearers of weapons understand and respect the rules, including taking practical measures and preventing and punishing violations”.²⁴ Unfortunately, unlike the regime of international human rights law, no mechanism exists for the formal reporting of IHL implementation because of resistance by states.²⁵ The adoption of resolution V at the 25th International Conference of the Red Cross and Red Crescent was the only compromise. It “appeals to governments and National Societies to give the ICRC their full support and the information to enable it to follow up the progress achieved in legislative and other measures taken for the implementation of international humanitarian law”.²⁶

16 Ibid.

17 GC I, art 26; GC IV, art 63; AP I, art 81; and AP II, art 18.

18 GC III, arts 122–24; and GC IV, arts 136–41.

19 Such as to provide for penal sanctions (GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; and AP I, arts 11 and 85–90) and the use, abuse and misuse of the Emblem (GC I, arts 44 and 53–54; GC II, arts 44–45; AP I, arts 18, 37–38, 66, 85 and annex 1; and AP II, art 12), provisions relating to fundamental guarantees (GC I, art 3; GC II, arts 3 and 12; GC III, arts 3 and 13–17; GC IV, arts 3 and 27–34; AP I, arts 11 and 75–77; and AP II, arts 4–5 and 7), provisions for judicial and disciplinary guarantees, rights of prisoners of war and detainees (GC I, art 3; GC II, art 3; GC III, arts 3, 5, 17, 82–90, 95–108 and 129; GC IV, arts 5, 31–35, 43, 64–78, 99–100 and 117–126; AP I, arts 44–45 and 75; and AP II, art 6).

20 Sassòli “The implementation of international”, above at note 12 at 54.

21 Ibid.

22 GC I, art 8; GC II, art 8; GC III, art 8; and GC IV, art 9.

23 See Chan “Implementation of international humanitarian”, above at note 13.

24 *The Domestic Implementation of International Humanitarian Law: A Manual* (2015, ICRC) at 5.

25 M Mubiala “International humanitarian law in the African context” in MK Juma and A Suhrke (eds) *Eroding Local Capacity: International Humanitarian Action in Africa* (2002, Nordiska Afrikainstitutet) 37.

26 See “Resolutions of the twenty-fifth international conference of the red cross” (1986, ICRC) 26/255 *International Review of the Red Cross*, res V(3).

Beyond ratification, differences in domestic implementation exist. The legal tradition of some states mandates domestication or transformation, in order for treaties to have domestic application.²⁷ While changes in legal traditions are noticeable, and it is no longer the case that all common law traditions are dualist and require domestication of a treaty before it becomes part of domestic law, some states continue to retain that tradition. It is also common to find in most civil law states in Africa that ratified treaties are part of domestic law. In both traditions, however, some non-self-executing provisions would need enabling legislation.²⁸ Both these legal traditions exist in Africa.²⁹ Enabling legislation empowers domestic actors and may suggest the existence of political will to implement the treaties. Although IHL treaties supplement or complement each other, it is nevertheless useful to analyse each treaty's implementation to identify existing gaps separately.

DOMESTIC IMPLEMENTATION OF THE MEASURES IN AFRICA

The domestic implementation of the Conventions and Protocols encompasses adopting measures to promote, prevent and repress IHL violations.

Promotion of IHL in Africa

This section covers domestication, translation, dissemination and, for convenience, training of combatants. Regarding domestication, the international system's horizontal structure gives states the exclusive power to determine how their international obligations are to be discharged, notwithstanding the binding nature of ratified treaties.³⁰ This theoretical construct relates directly to a state's power to determine its own legal, economic, social and political systems. States are yet to jettison this power,³¹ except where a contrary obligation exists that requires a state to perform an obligation in a particular way.

Consequent upon the colonial legacy, most African states follow the civil law tradition and the constitutions of most of these states do not require domestication of the Conventions. However, the laws of 16 African states, typically

27 DL Sloss and MPV Alstine "International law in domestic courts" in W Sandholtz and CA Whytock (eds) *Research Handbook on the Politics of International Law* (2017, Edward Elgar) 79.

28 For example, the Conventions and the Protocols mandate repressing IHL violations including the grave breach provisions, but this is only possible if enabling legislation exists that is consistent with the constitutional provisions and principles of the international criminal justice system (for example, the principle of legality).

29 In the case of the civil law tradition, see, for example, the constitutions of the following African states: Angola (art 21(1)), Benin (art 147), Burkina Faso (art 151), Burundi (art 292), Cameroon (art 45), CAR (art 69), Chad (art 222), Congo (art 185), Côte d'Ivoire (art 87), DRC (art 215), Guinea (art 79), Mali (art 116), Mauritania (art 80), Mozambique (art 18), Niger (art 132), Rwanda (art 190), Senegal (art 91) and Togo (art 140). Under common law, see, for example, Ghana (art 75(2)), Malawi (sec 211) and Nigeria (sec 12).

30 M Mendez *The Legal Effects of EU Agreements* (2013, Oxford University Press) at 2.

31 *Ibid.*

common law states, do require domestication.³² Out of these 16, 11 have domesticated the Conventions,³³ leaving Liberia, Somalia, Sudan, Tanzania and Zambia. Except for Eritrea and Somalia, all African states are parties to the two Protocols. However, except for Kenya, where international law applies directly, no African state has domesticated any of the Protocols as an independent law. There is no domestication of any of the Protocols in Botswana, Gambia, Liberia, Nigeria, Sudan, Tanzania, Uganda or Zambia. In Ghana,³⁴ Namibia³⁵ and Zimbabwe,³⁶ domestic legislation covers the Conventions and grave breaches provisions in Protocol I. The Geneva Convention Acts 2012 in Sierra Leone and South Sudan gave effect to the Conventions and the Protocols. This is problematic, to say the least, because domestic courts in these states lack the jurisdiction to enforce the Conventions and the Protocols. As a result, relevant institutions and personnel are left without the necessary legal protection to discharge their obligations. Enabling legislation is the gateway to implementing non-self-executing treaty provisions. Of the 54 states in Africa, 45 have legislation for repressing IHL violations either as standalone laws or as part of existing criminal, penal or military codes. While this legislation exists, domestication is nevertheless essential to address legal challenges concerning the regimes of protected persons and prisoners of war (POWs) and non-international armed conflict. In terms of the domestication and adoption of enabling legislation, the continent's record is not bad. However, although it is possible to invoke state responsibility, it defeats the object if a ratified treaty has no legal force at the domestic level. The construct that empowers states to determine appropriate methods to meet treaty obligations does not permit evading responsibility. The failure or refusal to domesticate a ratified treaty is incompatible with the principle of good faith.

Regarding translation, estimates suggest that Africa has around 1,000–2,000 languages, in four large families.³⁷ Most of these languages are oral,³⁸ but a large number are in written form. The number of languages in each state

32 These are Botswana, Gambia, Ghana, Kenya, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

33 Botswana: Geneva Conventions Act 1970 (Act No 28); Gambia: The Geneva Conventions Act (Colonial Territories) Order in Council 1959; Ghana: Geneva Conventions Act 2009 (Act 780); Kenya: The Geneva Conventions Act 1968 (cap 197); Malawi: Geneva Conventions Act 1967; Namibia: Geneva Conventions Act 15 2003; Nigeria: Geneva Conventions Act 1960; Sierra Leone: The Geneva Conventions Act 2012 (Act No 14); South Sudan: Geneva Conventions Provisional Order 2012; Uganda: The Geneva Conventions Act 1964; Zimbabwe: Geneva Conventions Act 1981 (Act No 36).

34 Geneva Conventions Act 2009.

35 Geneva Conventions Act 2003.

36 Geneva Conventions Act No 36 of 1981, as amended by Geneva Conventions Amendment Act 1996.

37 These families are Niger-Congo, Nilo-Saharan, Afroasiatic and Khoisan. See "Introduction to African languages" (Harvard University), available at: <<https://alp.fas.harvard.edu/introduction-african-languages>> (last accessed 6 March 2022).

38 Ibid.

varies, ranging from three³⁹ to more than 300.⁴⁰ Official languages in Africa are predominantly colonial, with a few exceptions and additions due to diversity and complexity.⁴¹ By and large, three languages are prominent: French, English and Arabic. While most African states have one of these official languages, many of the population speak only local languages. It is undoubtedly difficult for some African states to translate the text of the Conventions and Protocols into all the local languages. The Conventions and Protocols require the parties to communicate their official translations to each another through the Swiss Federal Council.⁴² Translations are, however, limited to states' official languages.⁴³

The ICRC has, in the past, translated article 3, which is common to the Conventions (Common Article 3), into nine African languages and provided a summary of the Conventions in Lingala, Swahili, Tshiluba and Kikongo.⁴⁴ The Conventions have also been translated into local languages in Burundi and Somalia,⁴⁵ as well as Amharic in Ethiopia.⁴⁶ However, there appears to be no other translation into dominant local languages in Africa. While this is not legally required, the absence of such a translation could negatively impact the wider dissemination and understanding of the Conventions, especially among armed groups.

Regarding dissemination and training, it is commonly understood that respect for IHL depends on awareness,⁴⁷ and state parties must disseminate knowledge of IHL as widely as possible.⁴⁸ Dissemination facilitates knowledge acquisition that contributes to the overall protection of war victims.⁴⁹ In identical terms, all the Conventions oblige states to disseminate knowledge of the Conventions.⁵⁰ The Protocols also require states to disseminate their provisions.⁵¹ Realising that the effects of armed conflicts extend beyond

39 For example, Libya.

40 For example, Nigeria.

41 For example, English was adopted in Nigeria due to national diversity and complexities. In Tunisia, Arabic is predominantly spoken alongside French; and Kenya and Tanzania use Swahili and English.

42 GC I, art 48; GC III, art 128; and GC IV, art 145.

43 See JS Pictet *The Geneva Conventions of 12 August 1949: Commentary 1* (1952, ICRC).

44 C Ewumbue-Monono "Respect for international humanitarian law by armed non-state actors in Africa" (2006) 88/864 *International Review of the Red Cross* 918.

45 Ibid.

46 See "Geneva Conventions translated into Amharic" (10 May 2002) *The New Humanitarian*, available at: <<http://www.thenewhumanitarian.org/news/2002/05/10/geneva-conventions-translated-amharic>> (last accessed 6 March 2022).

47 "The obligation to disseminate international humanitarian law" (February 2003, ICRC), available at: <<https://www.icrc.org/en/download/file/1042/obligation-dissemination-ihl.pdf>> (last accessed 6 March 2022).

48 Ibid.

49 Ibid.

50 GC I, art 47; GC II, art 48; GC III, art 127; and GC IV, art 144.

51 AP I, arts 80, 82–83 and 87; and AP II, art 19.

combatants, dissemination should cover all individuals and groups, including those that contribute to ensuring respect for the law.⁵²

In Africa, IHL is disseminated in five broad ways. First, dissemination through national IHL committees, currently established by 17 states.⁵³ These committees liaise with the national authorities (including the armed forces and police) and civil society. There are no criteria for the establishment or composition of a national IHL committee. Some of the committees consist of government officials, with a periodic invitation extended to experts.⁵⁴ Some have included the ICRC and national society representatives.⁵⁵ In some states, the committee is combined with the committee for the protection of human rights,⁵⁶ and some have included experts as permanent members. Secondly, dissemination under an adopted instrument or mechanism (law, policy, directives or manuals, for example) that requires IHL to be incorporated into the pedagogy of military training.⁵⁷ Thirdly, dissemination by the state in collaboration with the ICRC and national societies to train armed forces and disseminate IHL rules.⁵⁸ Although national societies play a vital

52 This includes the police, judges, parliamentarians, qualified personnel, media, students and civil society. IHL is to be included in the military's practical training, rules of engagement, military manuals and training instructions, as well as university teaching.

53 These are Algeria, Benin, Burkina Faso, Cape Verde, Chad, Comoros, Côte d'Ivoire, Egypt, Kenya, Liberia, Libya, Madagascar, Morocco, Senegal, Sudan, Togo and Tunisia.

54 This is the case for example in: Algeria (see Presidential Decree of 4 June 2008 establishing the National Commission of International Humanitarian Law); and Burkina Faso (see Law on Creation of Interministerial Committee on Human Rights and International Humanitarian Law 2005).

55 For example: Benin (see Decree No 98–155 creating the National Commission on the Implementation of International Humanitarian Law 1998); Egypt (see Prime Minister's Decree No 149 of 2000 on the Establishment of a National Committee for International Humanitarian Law); Kenya (see Notice No 4135 on the Reconstitution of the National Committee for the Implementation of International Humanitarian Law 2016); and Togo (see Interministerial Decree on the Creation of the Inter-ministerial Committee on the Implementation of International Humanitarian Law 1997).

56 Such as in Chad (see Law on the Establishment of the National Committee for Human Rights 1994).

57 States with this approach include: Uganda (The Chief of Defence Forces Directive: Dissemination of the Law of Armed Conflict, Uganda People's Defence Forces, Chief of Defence Forces 2006); DRC (The Annual Directive issued by the minister of defence introduced annual IHL training sessions within the armed forces in all military units); Burundi (IHL is part of forces' training); Cameroon (IHL is incorporated into military training by the Directive on Training on International Humanitarian Law and the Law of War); Malawi (IHL training is part of military training, and training is conducted at the Defence Forces College: Law of War Manual (Department of Defence)); Mali (Directive No 653/CEMGA/S-CEM/OPS/D.OMP-DIH of 24 August 2010 introduced compulsory IHL military training at all levels); Ethiopia (IHL is part of the training curriculum within the Ethiopian National Defence Forces and IHL is also taught at the Police University College and regional training centres); and Ghana (IHL courses are part of the training curriculum within the defence forces and personnel undergo routine training).

58 Relevant states include Namibia, Nigeria, South Africa and Gambia.

dissemination role in virtually all African states, in some states, they are the sole disseminators of IHL.⁵⁹ Fourthly, dissemination through university teaching; states with an instrument or institution for IHL dissemination also allow IHL teaching in their universities.⁶⁰ Fifthly, dissemination by national societies; in Lesotho and Mauritius, for example, only the National Red Cross Society carries out IHL dissemination. Dissemination of IHL rules does not appear to be a problem in Africa.

Prevention of IHL violations in Africa

This section assesses six preventive measures. The first is identifying and marking protected persons and property.⁶¹ Available information indicates that 19 states have implemented this measure: Benin,⁶² Burkina Faso,⁶³ Cameroon,⁶⁴ Central African Republic (CAR),⁶⁵ Egypt,⁶⁶ Ghana,⁶⁷ Liberia,⁶⁸ Libya,⁶⁹ Mali,⁷⁰ Morocco,⁷¹ Mozambique,⁷² Niger,⁷³ Nigeria,⁷⁴ Rwanda,⁷⁵ Senegal,⁷⁶ South Africa,⁷⁷ Sudan,⁷⁸ Togo⁷⁹ and Uganda.⁸⁰ The second relates to the protection of medical personnel⁸¹ and facilities.⁸² It is encouraging to note that most

59 This is the case in Lesotho and Mauritius, for example.

60 Examples include Algeria, Benin, Burkina Faso, Burundi, Cape Verde, Chad, Comoros, Côte d'Ivoire, Egypt, Kenya, Liberia, Libya, Madagascar, Malawi, Morocco, Senegal, Sudan, Togo, Tunisia and Uganda.

61 See GC I, arts 39, 40, 41, 42 and 43; GC II, arts 22, 39, 41, 42 and 43; and GC III, art 21.

62 The Law on the Use and Protection of the Red Cross and Red Crescent Emblems in Benin 2004.

63 The Law on the Use and Protection of the Red Cross and Red Crescent Emblems 2003.

64 Law No 97-2 of 10 January 1997 on the Protection of the Red Cross Emblem and Name.

65 The Law on the Red Cross Emblem 2009.

66 See "Arab Republic of Egypt", available at: <https://www.un.org/en/ga/sixth/63/Addtl_Prot_TEXT/Egypt.pdf> (last accessed 6 March 2022).

67 The Red Cross Emblem (Control) Act 1973.

68 The Liberia National Red Cross Society Act 2008.

69 The Decree on the Use of the Emblem 1981.

70 The Act on the Use and Protection of the Name and Emblem of the Red Cross and Red Crescent 2009.

71 Dahir No 1-58-256 of 15 Rebia II 1378 (29 October 1958) on the Use of the Emblem of the Red Crescent.

72 The Law on the Protection of the Red Cross Emblem 2004.

73 Act No 2006-19 of 21 June 2006.

74 The Geneva Conventions Act 1960, sec 10.

75 The Penal Code 2012, art 130.

76 The Law Relating to the Use and to the Protection of the Red Cross and Red Crescent Emblem 2005.

77 The Implementation of the Geneva Conventions Act, sec 14 and scheds I, II and III.

78 The Interim Decree Law Concerning the Sudanese Red Crescent Society 2005.

79 Law No 99-010 on the Protection and Use of the Red Cross and Red Crescent Emblems in Togo 1999.

80 Penal Code (Exclusive Use of the Red Cross and Red Crescent Emblems) Order 1993.

81 GC I, arts 40 and 41; GC II, art 42; and GC IV, art 20.

82 GC I, arts 19, 36, 39 and 42; GC II, arts 22, 24–27 and 39; and GC IV, arts 18 and 21–22.

states have legal provisions in these respects, but unfortunate that observance is mainly in the breach. There have been recent attacks against medical personnel and facilities in at least 13 states.⁸³ The third concerns the protection of POWs: the non-self-executing provisions of the third Convention require the adoption of a specific measure to protect POWs.⁸⁴ Available information indicates that this measure exists in eight states: Botswana,⁸⁵ Guinea,⁸⁶ Nigeria,⁸⁷ Rwanda,⁸⁸ Senegal,⁸⁹ South Africa,⁹⁰ Tunisia⁹¹ and Uganda.⁹²

The fourth measure relates to the protection of children. Children benefit from the general rules protecting persons taking no part in hostilities and special rules protecting vulnerable persons.⁹³ The Protocols require states to take all feasible measures to ensure that children who have not attained the age of 15 do not participate in hostilities and to refrain from recruiting them into their armed forces.⁹⁴ This is a problem in African conflicts and includes the issue of the abduction and recruitment of child soldiers.⁹⁵ According to one report, 152 million children live in a conflict zone, and “more than one-third of all conflicts involve sexual violence against children”.⁹⁶ To date, while 37 states have no relevant legislation protecting children in armed conflicts, children receive little protection even in states that do have applicable laws.⁹⁷ The

83 Burkina Faso, Cameroon, CAR, DRC, Egypt, Ethiopia, Libya, Mali, Niger, Nigeria, Somalia, South Sudan and Sudan.

84 GC III, art 5.

85 Geneva Conventions Act 1970, secs 5 and 6.

86 Decree D/96/205/PRG/SGG of 5 December 1996: Code of Medical Ethics.

87 Operational Code of Conduct for Nigerian Armed Forces (1967–70).

88 Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes 2003.

89 Decree on Discipline in the Armed Forces 1990.

90 *R v Werner and Others* High Court of South Africa (Natal Provincial Division), 20 May 1947; and *S v Petane* (1988) 3 South African Law Reports 51.

91 Organic Law on the National Authority for the Prevention of Torture 2013.

92 Geneva Conventions Act 1964.

93 See GC IV, arts 24 and 50.

94 AP I, art 77(2) and AP II, art 4(3)(c).

95 Children have been used in armed conflicts in Angola, Burundi, CAR, Chad, DRC, Liberia, Mali, Niger, Nigeria, Rwanda, Sierra Leone, Somalia, South Sudan and Uganda.

96 “Children affected by armed conflict in Africa call on governments to take action to protect most vulnerable” (15 October 2019, Save the Children), available at: <<https://www.savethechildren.net/news/children-affected-armed-conflict-africa-call-governments-take-action-protect-most-vulnerable>> (last accessed 6 March 2022).

97 Those with applicable laws are: Algeria (Family Code 1984; Law No 15-12 on Child Protection 2015); Botswana (Botswana Defence Force Act No 13 of 1977); Burkina Faso (Law on the Protection of the Child 2014); CAR (Law on the Organization of Juvenile Courts 2002); Chad (Presidential Ordinance No 001/PR/2014 on Child Soldiers); Côte d’Ivoire (Decree Determining the List of Hazardous Work Prohibited for Children under Eighteen 2005); DRC (Law on the Protection of the Child 2009); Guinea (Children’s Code of Guinea L/2008/011/AN Act of 19 August 2008); Kenya (Children Act 2001); Mali (Order No 02-062/P-RM on the Code for the Protection of the Child 2002); Niger (Law No 2018-74 of 10 December 2018 on the Protection and Assistance of Internally Displaced Persons); Nigeria (Child’s Right Act 2003); Rwanda (Law relating to

fifth measure is the establishment of national information bureaux to facilitate information collection on protected persons,⁹⁸ although there is no information as to the existence of this in any African state. Lastly is the establishment of civil defence organizations;⁹⁹ available data shows that 28 African states have fulfilled this requirement.¹⁰⁰

Repression of IHL violations in Africa

Effective domestic prosecution of IHL violations requires the existence of a legal framework that characterizes violations as offences. While international tribunals can prosecute IHL violations under customary international law, it would be difficult to do so at the domestic level.¹⁰¹ Since the Conventions and Protocols are not criminal legislation, a relevant statute is required.¹⁰² This would assist in: prosecuting grave breaches, war crimes and crimes against humanity; providing for fundamental and judicial guarantees; regulating the use, abuse and misuse of the Emblem; providing for the protection of healthcare, POWs, civilian internees and other protected persons; and providing for the establishment of national societies. However, the full implementation of the Conventions is an ongoing process and is not limited to the adoption of enabling legislation.¹⁰³ The envisaged criminal legislation encompasses provisions including “criminal procedure; methods of incorporating punishment into criminal law; statutes of limitations; forms of individual criminal responsibility and modes of liability, such as ‘command responsibility’; and inter-state cooperation and assistance in criminal matters”.¹⁰⁴

In terms of the criminal repression of violations, 45 states have criminal legislation to prosecute war crimes and grave breaches.¹⁰⁵ Although some of these states have experienced fewer armed conflict cases, the obligation to

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Rights and Protection of the Child against Violence 2001; Constitution of the Republic of Rwanda 2003; Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes 2003; Sierra Leone (The Constitution of Sierra Leone 1991; Child Rights Act 2007); South Africa (Defence Act 2002); Tunisia (Code of Child Protection; Law on Military Service 2004); and Uganda (Constitution of the Republic of Uganda 1995; The Uganda Peoples’ Defence Forces Act 2005; Births and Deaths Registration Act 1973; and The Children Act 1997).

98 See GC III, arts 122–24; and GC IV, arts 136–41.

99 GC IV, art 63; and AP I, arts 61–67.

100 These are Algeria, Benin, Burkina Faso, Burundi, Cameroon, CAR, Chad, Congo, Côte d’Ivoire, DRC, Egypt, Gabon, Ghana, Guinea, Guinea Bissau, Lesotho, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, South Sudan, Sudan, Togo and Tunisia.

101 The principle of legality in many constitutions requires the application of a written law.

102 See GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; AP I, art 28; and AP II, art 15.

103 Chan “Implementation of international humanitarian”, above at note 13 at 220.

104 *The Domestic Implementation*, above at note 24 at 29.

105 No such law exists in Djibouti, Equatorial Guinea, Eritrea, Gabon, Lesotho, Mauritania, São Tomé and Príncipe, Somalia or Swaziland.

enact such a law is absolute. However, gaps still exist in states that do have provisions on criminal repression; the measures are not entirely uniform and are even inconsistent with states' obligations under the Conventions. For example, there is no legislation on prosecuting IHL violations in Liberia. In the Republic of Benin, while the Code of Penal Procedure 2012 partially implements the Rome Statute of the International Criminal Court (Rome Statute), there is no domestic measure that criminalizes war crimes. In Guinea Bissau, the provisions in the Penal Code of 1993 are insufficient to cover the broad regime of the grave breach provisions; the offences provided for are limited to torture, cruel, inhuman and degrading treatment or punishment, terrorism, murder and rape. In Guinea, the jurisdiction of the military court, which prosecutes IHL violations, is limited to POWs. In Mali, there is no provision for universal jurisdiction, superior responsibility or war crimes in non-international armed conflict. There is no provision for protecting the Emblem in Guinea Bissau or Cape Verde, and no measure to ensure that protected persons and properties are marked for identification in Cape Verde, Côte d'Ivoire, Gambia or Guinea Bissau.

In addition, even where criminal repression provisions exist, there have been few prosecutions. This is the situation in CAR, Congo, Nigeria and Uganda. This problem is, however, not new.¹⁰⁶ For about a century, states have been reluctant to prosecute. The UN and the ICRC have called on states to prosecute war criminals,¹⁰⁷ but without much success. The failure to prosecute led to the establishment of the International Criminal Court (ICC). This, however, did not entirely address the problem because the complementarity principle of the Rome Statute gives priority to national prosecution.¹⁰⁸ At the ICC, cases are inadmissible where states are genuinely willing and able to carry out the investigation or prosecution.¹⁰⁹ This underscores the importance of domestic courts and relevant legislation, because some conventional domestic criminal laws¹¹⁰ are inadequate to address IHL violations. The argument that the ordinary domestic penal code can cater for IHL violations runs counter to the express provision that states undertake to enact any legislation necessary to provide effective penal sanctions.¹¹¹ Presently, only Uganda¹¹² and CAR¹¹³ have specialized courts for the prosecution of international crimes. Compounding the problem further, the adoption of amnesty

106 This problem had existed for almost a century, even before 1949; see K Dormann and R Geib "The implementation of grave breaches into domestic legal orders" (2009) 7/4 *Journal of International Criminal Justice* 703 at 704-06.

107 See "Report of the UN secretary-general to the Security Council on the protection of civilians in armed conflict", UN doc S/1999/95Z (8 September 1999).

108 Rome Statute, art 1.

109 Id, art 17(1)(a).

110 Such as the crime of perfidy.

111 GC I, art 49; GC II, art 50; GC III, art 129; and GC IV, art 146.

112 International Crimes Division of the High Court of Uganda.

113 Special Criminal Court in the CAR.

programmes by some states (such as Uganda,¹¹⁴ Sierra Leone¹¹⁵ and South Sudan)¹¹⁶ and lighter sentences for heinous crimes¹¹⁷ defeat the idea of accountability and impunity prevention.¹¹⁸ The adoption of specific national legislation needs to be accompanied by effective sanctions.¹¹⁹ It is a misconception that amnesties will bring peace, because peace is more likely to be elusive where injustices exist.

The provision of fundamental guarantees ensures the dignified treatment of protected persons.¹²⁰ Civilians and combatants must be humanely treated irrespective of their roles in the conflict, and specific obligations exist in this respect.¹²¹ In Africa, the provision of fundamental guarantees is one area where significant gaps exist because only 14 states have relevant legislation.¹²² Some may argue that bills of rights in constitutions and domestic conventional law provisions (such as civil and criminal procedure codes) are relevant here. However, reliance on these instruments can be problematic because, while human rights law provisions apply even during armed conflicts, the applicable standard is that of the *lex specialis* [the law governing specific subject matter, which overrides that governing general subject matter]. Some practical challenges may therefore arise. The Conventions and Protocols, for example, contain a unique categorization of persons, such as protected persons and POWs, that criminal legislation would need to consider. There may not be relevant provisions for these persons under conventional criminal law.

114 See Amnesty Act of Uganda 2000.

115 See the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone 1999, art IX.

116 “South Sudan: Crippled justice system and blanket amnesties fuelling impunity for war crimes” (7 October 2019, Amnesty International), available at: <<https://www.amnesty.org/en/latest/news/2019/10/south-sudan-crippled-justice-system-and-blanket-amnesties-fuelling-impunity-for-war-crimes/>> (last accessed 6 March 2022).

117 Such as, for example, the use by the Gacaca courts of community service for participants in genocide in Rwanda.

118 “Central African Republic: Bar amnesty for atrocity crimes: Political dialogue should not absolve war criminals” (24 August 2018, Human Rights Watch), available at: <<https://www.hrw.org/news/2018/08/24/central-african-republic-bar-amnesty-atrocity-crimes>> (last accessed 6 March 2022).

119 Dormann and Geib “The implementation of grave breaches”, above at note 106 at 708.

120 See GC II, arts 3 and 12; GC III, arts 3 and 13–17; and GC IV, arts 3 and 27–34.

121 Some of these obligations include: ensuring respect for, and protection of, the sick, wounded and shipwrecked, prohibition of violence to their persons and lives; ensuring humane treatment of POWs, respect for their persons, maintenance and equality of treatment; prohibition of outrages upon personal dignity, in particular, humiliating and degrading treatment; ensuring respect and protection of the civilian population, prohibition of physical or moral coercion against protected civilians, prohibition of corporal punishment against such persons; prohibition of collective punishment, pillage and reprisal; and prohibition of taking of hostages. See GC II, arts 3 and 12; GC III, arts 3 and 13–17; GC IV, arts 3 and 27–34; AP I, arts 11 and 75–77; and AP II, arts 4–5 and 7.

122 These states are Botswana, Burkina Faso, Chad, Congo, Kenya, Libya, Madagascar, Nigeria, Rwanda, Senegal, South Africa, Tunisia, Uganda and Zimbabwe.

Lastly, national legislation is required to prevent the abuse and misuse of protected Emblems.¹²³ As at March 2022, 23 African states are yet to enact such legislation.¹²⁴ This can create obstacles in the repression of abuse or misuse.

It is clear therefore that progress has been made in adopting domestic measures, although gaps still exist in critical areas. However, as has been shown, even where measures exist, violations are often not addressed. This indicates that the problem of violations is partly due to a lack of adequate measures and partly due to other non-legal factors.

PART TWO

OBLIGATION TO RESPECT AND FACTORS THAT INFLUENCE IHL VIOLATIONS IN AFRICA

The argument for compliance with IHL is commonly based on the obligation to respect, contained in the Conventions, Protocol I¹²⁵ and customary law.¹²⁶ The UN Security Council (Security Council),¹²⁷ the African Commission on Human and Peoples' Rights¹²⁸ and the ICRC usually refer to these rules when calling on parties to respect IHL. While the obligation to respect is valid in the context where such obligations were assumed willingly to achieve the object and purpose of the treaties, it is not the case when there are

123 See GC I, arts 53–54; GC II, arts 44–45; AP I, annex 1, arts 18, 37–38, 66 and 85; and AP II, art 12.

124 These states are Algeria, Angola, Cape Verde, Congo, Côte d'Ivoire, Djibouti, DRC, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Guinea Bissau, Madagascar, Malawi, Mauritania, Seychelles, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Swaziland, Tunisia and Zimbabwe.

125 Geneva Conventions of 12 August 1949, Common Art 1; and AP I, art 1.

126 The International Court of Justice (ICJ) has determined that *id*, Common Art 1 is now part of customary international law: *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (judgment of 27 June 1986) *ICJ Report* (1986) at 104, para 220.

127 See for example: res 764 (1992) of 13 July 1992; res 771 (1992) of 13 August 1992; and res 780 (1992) of 6 October 1992.

128 See for example: Resolution 7 (ACHPR/Res.7 (XIV) 93) of 1–10 December, 1993 on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights; Resolution 14 (ACHPR/Res.14 (XVI) 94) of 25 October - 3 November 1994 on the Situation of Human Rights in Africa; Resolution 15 (ACHPR/Res.15 (XVII) 95) of 13–22 March 1995 on Sudan; Resolution 68 (ACHPR/Res.68 (XXXV) 04) of 21 May - 4 June 2004 on Darfur; Resolution 74 (ACHPR/Res.74 (XXXVII) 05) of 27 April - 11 May 2005 on the Situation in Darfur; Resolution 109 (ACHPR/Res.109 (XXXXI) 07) of 16–30 May 2007 on the Situation in Somalia; Resolution 138 (ACHPR/Res.138 (XXXXIV) 08) of 10–24 November 2008 on the Human Rights and Humanitarian Situation in Zimbabwe; and Resolution 139 (ACHPR/Res.139 (XXXXIV) 08) of 10–24 November 2008 on the Human Rights Situation in Democratic Republic of Congo.

underlying problems or where states participate without a genuine intention to respect the rules. Addressing violations in African conflicts requires an understanding of the dynamics of African conflicts and the historical antecedents and grounds / motivations for the violations or inability to comply with IHL. The ICRC's roots of restraint in war¹²⁹ underscored the relevance of an interdisciplinary approach and the role of social, ethical and moral factors on decision-making regarding compliance. If the Conventions and Protocols are to be respected, it is critical that the factors underpinning violations by both state and non-state actors (which, in the parties' view, often take precedence over legal obligations) be clearly understood and engaged. These factors that promote non-compliance must be countered using a paradigm and arguments that appeal to the parties' backgrounds and interests. Non-legal factors can facilitate respect, or neglect, for IHL.¹³⁰

While not entirely conflicted, the relationship between Africa and the Conventions is not an engaging one. This is not to suggest that the Conventions are incompatible with African cultural traditions, because that issue is uncontroversial.¹³¹ Moreover, the Conventions did not introduce rules that are substantially different from those that existed in pre-colonial Africa.¹³² However, the relationship indicates that ratification (and adoption of domestic measures) is not sufficient to guarantee compliance. Moreover, an examination of the relationship shows that the refusal and sometimes the failure to comply with or adopt some measures connects with historical grievance and western legacy, political and religious struggles, and social and economic challenges.

Western legacy and historical grievance

Legal experts seek to avoid discussing the vexed colonial impact on African mindsets due to the historical, political and social implications. However, if compliance with IHL rules means anything, ignoring difficult and sometimes uncomfortable discussions will not help. On the contrary, it is through addressing the concerns raised by these issues that understanding can be achieved and agreements obtained.

129 "Roots of restraints in war" (2018, ICRC) at 9.

130 See M Sassòli *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (2019, Edward Elgar) at 74–75.

131 See C Greenwood "Historical development and legal basis" in D Fleck (ed) *The Handbook of International Humanitarian Law* (2nd ed, 2008, Oxford University Press) 1 at 16.

132 See Y Diallo "African traditions and humanitarian law" (1976) 16/185 *International Review of the Red Cross* 387; EG Bello "Shared legal concepts between African customary norms and international conventions on humanitarian law" (1984) 23 *Military Law and Law of War Review* 285; G Okoth-Obbo "Traditional African humanitarian law and the other issues concerning the humanitarian law" (1988) 4 *Lesotho Law Journal* 199; AN Njoya "The African concept" in UNESCO (ed) *International Dimensions of Humanitarian Law* (vol 1, 1988, Martinus Nijhoff Publishers) at 5–12; and Mubiala "International humanitarian law", above at note 25.

It must be appreciated that decades-long colonial domination, mental enslavement¹³³ and suppression of Africans' cultural values continue to linger on the continent.¹³⁴ At the onset of independence, the interests of many African leaders centred on the promotion of pan-Africanism, a movement aimed at strengthening the bond of solidarity in Africa to counter the negative influence of colonization. That idea has never died.¹³⁵ In debates on IHL at both interstate and academic levels, Africa "maintains a very low profile" because, inter alia, of the Eurocentric control of IHL during its formative period.¹³⁶ The colonial regimes denied Africa the political importance associated with treaty participation. The continent's attitude towards the Conventions is related to how the continent was treated in 1949, when, except for three states (of which only two participated),¹³⁷ Africa made little or no contributions to the rules. Pre-colonial Africa is not devoid of customary rules on armed conflicts,¹³⁸ but there is no evidence to suggest that such customs played any role when the rules were drafted.¹³⁹ Rather than giving voice to the continent, colonialism and the slave trade destroyed Africa's cultures and traditions on armed conflicts.¹⁴⁰

Additionally, the Conventions' selective and biased application and the colonial regimes' refusal to apply humanitarian rules in their conflicts with Africans have not been forgotten. Colonial powers only applied the Conventions in their conflicts between each other. During the decolonization wars, not only did the colonial masters refuse to apply even Common Article 3, but they challenged its applicability.¹⁴¹ Selectivity and bias were also reflected in respect of the criminal repression of violations, as the colonial

133 M Pheko "Effects of colonialism on Africa's past and present" (31 May 2012) *Pambazuka News*, available at: <<https://www.pambazuka.org/global-south/effects-colonialism-africas-past-and-present>> (last accessed 6 March 2022).

134 See E Kodjo *Africa Tomorrow* (1987, Continuum).

135 From their foreign policy instruments to their speeches, African leaders have repeatedly underscored the impact of colonialism on the continent and the need to focus on strengthening relationships with fellow African states: JJ Quinn "African foreign policies" in *Oxford Research Encyclopedia of International Studies* (2010), available at: <<https://doi.org/10.1093/acrefore/9780190846626.013.117>> (last accessed 29 March 2022). See also EC Ujara and J Ibieta "Foreign policy in Nigeria's fourth republic: A critical analysis of some unresolved issues" 10/1 *Journal of International and Global Studies* 40.

136 Waschefort "Africa and international humanitarian law", above at note 1.

137 These are Egypt, Ethiopia and Liberia.

138 Diallo "African traditions and humanitarian law", above at note 132.

139 Waschefort "Africa and international humanitarian law", above at note 1.

140 See Mubiala "International humanitarian law", above at note 25. See also BO Igboin "Colonialism and African cultural values" (2011) 3/6 *African Journal of History and Culture* 96.

141 VF Wodie "Africa and humanitarian law" (1986) 26/254 *International Review of the Red Cross* 249 at 250. See also the Portuguese reservation to the Conventions, available at: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=663716D11E477ECFC1256402003F977C>> (last accessed 6 March 2022), quoted in Waschefort "Africa and international humanitarian law", above at note 1 at 605.

regimes declined to prosecute the atrocities committed against Africans, such as those by Germany and Belgium in the Great Lakes Region.¹⁴²

Africa demonstrated its position at the International Conference on the Reaffirmation and Development of IHL Applicable in Armed Conflicts. It promoted the adoption of Protocol I, which addresses its concerns. In particular, Africa was interested in issues related to the participation and decisive roles of foreign elements in African conflicts as racialized, exclusionary dominators, foreign occupiers or supporters of an armed non-state actor.¹⁴³ As a result of the colonial legacy, Africa prioritized humanitarian issues with external influences. It resisted the complete regulation of non-international armed conflicts and refused to accord any status to groups fighting established governmental authorities.¹⁴⁴ African states were not alone in the rejection of the ICRC's Protocol II proposal. Still, this unified position showed how historical perspectives could influence the future course of events and how non-legal factors can influence the observance of legal rules. Africa resisted the internationalization of internal conflicts,¹⁴⁵ mainly on account of factors beyond the traditional importance of the rules.

Additionally, the ethnic conflicts and civil wars in post-colonial Africa have their roots in the practices of colonial administrations.¹⁴⁶ The politics of divide and rule, the segregation of people along ethnic and tribal lines, and the arbitrary drawing of boundaries have established a practice of dividing otherwise related people.¹⁴⁷ Visual examples are the ethnic-based characterization of Hutus and Tutsis in Rwanda and the transfer by Belgium of Rwandese to the DRC: acts that have undoubtedly led to conflicts that have produced the worst humanitarian crises on the continent.¹⁴⁸ Resentment of these practices is reflected in present-day Africa¹⁴⁹ and the continent's mistrust of Eurocentric instruments.

142 M Mubiala "Addressing colonial wrongdoing in the Great Lakes region of Africa" (audio presentation, 16 November 2019, recorded by the Centre for International Law Research and Policy at Yangon, Myanmar), available at: <<https://www.cilrap.org/cilrap-film/191116-mubiala/>> (last accessed 6 March 2022).

143 For example, the internationalization of wars of national liberation, apartheid and the issue of mercenaries.

144 See G Musila "Armed non-state entities in international law: Status and challenges of accountability" in W Okumu and A Ikelegbe *Militias, Rebels and Islamist Militants: Human Insecurity and State Crises in Africa* (2010, Institute for Security Studies) 89 at 97–98.

145 See Mubiala "International humanitarian law", above at note 25.

146 See J Baloro "International humanitarian law and situations of internal armed conflicts in Africa" (1992) 4/2 *African Journal of International and Comparative Law* 449.

147 See "Report on the situation of human rights in Rwanda submitted by René Degni-Ségui, special rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994" (E/CN.4/1997/61), paras 14–18, available at: <<https://digitallibrary.un.org/record/228462?ln=en>> (last accessed 6 March 2022).

148 See Mubiala "Addressing colonial wrongdoing", above at note 142.

149 See A Cowell "Colonialism, bloodshed and blame for Rwanda" (10 April 2014) *New York Times*, available at: <<https://www.nytimes.com/2014/04/11/world/europe/colonialism-bloodshed-and-blame-for-rwanda.html>> (last accessed 6 March 2022).

Many non-international armed conflicts in Africa have religious dimensions. The non-state actors involved in conflicts, such as Boko-Haram in Nigeria, Al-Shabab in Somalia, Nusrat al-Islam wal-Muslimin in Mali and the Lord's Resistance Army in Uganda, prosecute their conflicts on religious claims. It is important to understand these groups' operational and ideological claims and their perspectives of the Conventions and the Protocols. The obligations in Common Article 3 are basic and humanitarian, but sadly not respected by these groups. The groups are against anything "western", and any appeal to instruments they perceive as "western" will not only fail but will invoke further hostility as a demonstration of hatred against "western values". To generate respect for IHL rules, a different approach is necessary, which takes into consideration the groups' characteristics and the conflicts.

Political struggles

Wodie noted some of the problems that impacted the functioning of IHL in Africa:

"Generalization of the one-party system, growth of personal political power, and fake elections closed the way to democratic alternatives and favoured coups d'état and civil wars in Africa. Neither the leaders of the coups d'état, nor the leaders of governments threatened by civil wars were at all eager to apply the humanitarian law of Geneva as expressed in Article 3."¹⁵⁰

Much has indeed changed across Africa from the period after independence. Since the early 1990s, there was noticeable movement from one-party, invariably autocratic systems that dominated the political landscape, to the expansion of political space with the adoption of multiparty systems and a shift from coups d'état to periodic elections. However, it appears that the interest remains the same. In many African states, the operation of a multiparty political system is in name only, as the desire for absolute power by the leaders and oppressive practices against the opposition remain unchanged.¹⁵¹ While periodic elections occur, dictatorial practices and tendencies are prevalent, and the incumbents are often returned with a questionable percentage of votes.¹⁵² The unquenchable thirst to remain in power is also reflected in the changing of laws to remove constitutional term limitations.¹⁵³ As observed,

150 Wodie "Africa and humanitarian law", above at note 141 at 251.

151 Opposition continues to be treated in an oppressive manner in Angola, Burundi, Cameroon, Chad, Congo, Djibouti, Egypt, Equatorial Guinea, Gabon, Rwanda, Sudan, Uganda and Zimbabwe.

152 Examples are Paul Kagame of Rwanda with 98.8% in 2017; Abdel Fattah al-Sisi of Egypt with 97.1% in 2018; Teodoro Obiang Nguema Mbasogo of Equatorial Guinea with 93.7% in 2016; Ismaïl Omar Guelleh of Djibouti with 87% in 2016; Idriss Deby of Chad with 76.1% in 2016; and Paul Biya of Cameroon with 71.3% in 2018.

153 For example, in Cameroon, Chad, Congo, Djibouti, DRC, Eritrea, Rwanda, Sudan, Togo and Uganda. Other states, such as Ethiopia, Gambia, Lesotho and Morocco, have no

the growth of personal political power and fake elections did not allow both the leaders, and those struggling to overthrow them, the consideration to apply humanitarian rules. In other words, the power struggle between both sides overshadowed the obligation to apply IHL.

Social and economic challenges

At the inter-state and academic levels, the African continent does not have a strong history of engagement with IHL.¹⁵⁴ This has a connection with the capacity of the relevant actors that influence the global debate on IHL.¹⁵⁵ While the number of IHL scholars on the continent continues to increase, IHL debate on the continent in respect of human rights remains low.¹⁵⁶ The non-engagement today is not necessarily caused by exclusion; it is because those who are to draw and engage the international community's attention on IHL issues of concern to Africa have limited capacity.¹⁵⁷ There is a symbiotic relationship between knowledge and activism, and knowledge and the capability to influence action. While there are African scholars with an interest in IHL, few have written extensively on the operation of IHL in Africa.

Connected to this problem is the role of governments and armed forces, which are undoubtedly critical actors in the national implementation of IHL and significant contributors to IHL violations. While states are obliged to promote, prevent and repress IHL violations, very often they not only fail to discharge these obligations but potentially undermine them. IHL success depends heavily on "the hierarchical structures of the state - and above all, the military command - both for dissemination and for implementation".¹⁵⁸ It is hard to imagine how an intentional violator will discuss and punish violations. Government discussions of IHL are often limited to violations by armed opposition groups.¹⁵⁹ In situations where the political will to promote IHL compliance exists, socio-economic conditions operate to undermine that will, as the processes can be hampered by budgetary constraints and

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term limit. However, some states have succeeded in resisting such attempts from their leaders, such as Zambia, Nigeria, Niger and Burkina Faso.

154 Waschefort "Africa and international humanitarian law", above at note 1.

155 Waschefort identified these actors as academics, governments, armed forces, civil society and international organizations.

156 See F Viljoen "Africa's contribution to the development of international human rights and humanitarian law" (2001) 1/1 *African Human Rights Law Journal* 18.

157 Waschefort "Africa and international humanitarian law", above at note 1 at 609-10.

158 D Thürer "The 'failed state' and international law" (1999) 81/836 *International Review of the Red Cross* 731.

159 Take for example the conflict between the Ugandan Peoples Defence Forces and the Lord's Resistance Army. While each side has committed violations, the government's focus is often on the Lord's Resistance Army. Equally numerous violations have been committed by Nigerian armed forces, but the government's concern there is often on Boko Haram and other related terror groups.

sometimes a weak legal system that cannot prosecute violations effectively. Rwanda's situation during the genocide¹⁶⁰ and current problems in Somalia¹⁶¹ and South Sudan¹⁶² are typical examples.

The role of civil society and non-governmental organizations (NGOs) offers a ray of hope. These actors play critical roles in IHL implementation and transitional justice¹⁶³ and operate as crucial partners to states,¹⁶⁴ the African Union and the ICC.¹⁶⁵ With their power of scrutiny and utilization of available legal norms, these actors have and continue to influence the implementation of IHL. However, most of these organizations on the continent suffer from operational challenges, including budgetary constraints and government hostilities.¹⁶⁶

RECOMMENDATIONS: PROPOSED APPROACH TO INCREASE RESPECT FOR IHL IN AFRICA

Without doubt, measures for the domestic implementation of the Conventions and Protocols are essential in many respects. Nevertheless, IHL violations can nevertheless occur when underlying reasons for the violations are not addressed. Many states in Africa, including those experiencing armed conflicts, have adopted important measures but the existence of these measures has failed to prevent such violations. Appeal to article 1,

160 "Rwanda: Justice after genocide - 20 years on" (28 March 2014, Human Rights Watch), available at: <<https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years#:~:text=In%201996%2C%20Rwanda%20adopted%20a,reformed%20justice%20system%20were%20unmanageable.>> (last accessed 6 March 2022).

161 "Somalia legal profile" (Proelium Law LLP), available at: <<https://proeliumlaw.com/somalia-legal-country-profile/>> (last accessed 6 March 2022).

162 "South Sudan: Crippled justice system", above at note 116.

163 See for example H van d Merwe and J Brankovic "The role of African civil society in shaping national transitional justice agendas and policies" in S Williams and H Woolaver (eds) *Civil Society and International Criminal Justice in Africa: Challenges and Opportunities* (1st ed, 2016, Juta) 225.

164 For the contribution of civil society organizations in international criminal justice, see H Woolaver "Partners in complementarity: The role of civil society in the investigation and prosecution of international crimes in South Africa" in Williams and Woolaver, id, 129; A Mudukuti "The Zimbabwe torture case: Reflections on domestic litigation for international crimes in Africa" in Williams and Woolaver, id, 287.

165 See N Belay and J Biegon "Civil society and international criminal justice in Africa: Perspectives on the proposed African court of justice and human rights" in C Jalloh, KM Clarke and V Nmechielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019, Cambridge University Press) 1101; J Dugard "International criminal law, the international criminal court, and civil society" in Williams and Woolaver, id, 3. See also S Williams and E Palmer "Civil society and amicus curiae interventions in the international criminal court" in Williams and Woolaver, id, 40.

166 Many civil society organizations and NGOs suffer from a lack of human and material capacity, including funding, to function effectively. In addition, some of these organizations are harassed by both state and non-state armed groups.

common to the Conventions and Protocol I, has achieved little success despite its utilization by states, international organizations and institutions in African conflicts. There continue to be IHL violations in Nigeria, Mali, Cameroon, Chad, Niger, Somalia, Congo, Libya and other states. These demonstrate that mere appeal to legal obligations is not enough and that new approaches to engaging the actors to cease violations must be explored. The ICRC research on the roots of restraints in war demonstrated the importance of this approach. This approach must of necessity be two-pronged: an appeal in a manner that takes into consideration the factors promoting violations discussed above and enables states to observe their legal obligations. These must involve all the relevant actors, including parties to the Conventions and Protocols, the ICRC, Security Council, African Union, national societies, NGOs and academic researchers.

The primary responsibility of domestic implementation rests with states,¹⁶⁷ and African states need to recognize these legal and moral obligations. The obligation to respect argument seemed to adopt a uniform approach. This will not help with some states and armed groups. The legal obligation argument would not deter states that have ratified the Convention and the Protocols on grounds other than their humanitarian values and choose to violate the instruments deliberately. States must be convinced to consider that the Conventions and the Protocols reflect cultural and traditional rules that predate colonial experience. Arguments must be centred on demonstrating that promoting, preventing and punishing violations of the Conventions and Protocols would reinforce the protection of victims of armed conflicts and provide additional benefits of fostering humanitarian and cultural values. Resources must be devoted to further research into African culture on armed conflicts and the treatment of enemies and their connection with the existing IHL rules. Awareness and advocacy must be geared toward enlightening the armed forces, political leaders and armed opposition groups. States can facilitate further dissemination through university teaching and elementary education,¹⁶⁸ and building synergies with civil society organizations.

As a humanitarian and neutral organization, the ICRC has a mandate “to work for the faithful application of international humanitarian law”¹⁶⁹ and has provided legal and technical support to national authorities in numerous ways, including in their national implementation efforts.¹⁷⁰ The ICRC has drafted a manual to guide state parties,¹⁷¹ has been tracking relevant domestic

167 Chan “Implementation of international humanitarian law”, above at note 13 at 218.

168 Mubiala “International humanitarian law”, above at note 25.

169 See Statute of the International Red Cross and Red Crescent Movement, art 5(2)(c).

170 Through the ICRC Advisory Service on International Humanitarian Law. See “The ICRC advisory service on international humanitarian law”, available at: <<https://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law>> (last accessed 6 March 2022).

171 “The domestic implementation of international humanitarian law” (ICRC), available at: <<https://www.icrc.org/en/doc/resources/documents/publication/pdvd40.htm>> (last

legislation and policies adopted by states,¹⁷² and has been good at promoting the adoption of appropriate mechanisms in line with states' obligations. Nevertheless, the organization has acknowledged that the need "to take new initiatives to reach out to all actors" can hamper its operations.¹⁷³ In this context, the ICRC should seek to identify additional mechanisms to engage all actors in national implementation efforts. It can, for example, adopt a context-specific approach in its relationship with states and armed opposition groups in appealing for compliance with the humanitarian rules, using obligations connected to religious and cultural affiliations. Requiring Boko Haram to comply with Common Article 3, for example, is likely to lead to its further violation because of its policy of hatred towards any ideology erroneously perceived to be western. The group has demonstrated this hatred and its refusal to comply with Common Article 3 by engaging in actions prohibited by the article, such as extrajudicial killings, abduction and deliberate targeting of the civilian population. Appeal to the Conventions is therefore unlikely to persuade the group. However, requiring them to comply with the obligations in the Qur'an and Hadith (which are essentially the same as the provisions of Common Article 3) will most likely receive acceptance. In addition, the ICRC can help translate the Conventions into dominant local languages and demonstrate their correspondence with religious provisions and cultural values. This will help counter the perception that linked the Conventions to western culture.

Through the African Union Commission on International Law in conjunction with the ICRC, the African Union can facilitate effective dissemination and training of IHL dedicated to studying contemporary issues of concern to IHL on the continent. This will address historical prejudices and boost the initiative that is centred on promoting the African solution to African problems.¹⁷⁴

The Security Council and African Commission on Human and Peoples' Rights have previously passed several resolutions requiring parties to comply with their IHL obligations; this should move to ensure further that appropriate legal and institutional implementation mechanisms exist at the domestic level. Under Protocol I, states are to cooperate with the UN in respect of severe violations of the Conventions and Protocol. Although this only applies to

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accessed 6 March 2022). See also "National implementation of international humanitarian law: Documentation" (ICRC), available at: <<https://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation>> (last accessed 6 March 2022).

172 See "National implementation of IHL" (ICRC), available at: <<https://ihl-databases.icrc.org/ihl-nat>> (last accessed 6 March 2022).

173 Speech by the ICRC's director-general, Angelo Gnaedinger, to the Donor Retreat on the Consolidated Appeals Process and Coordination in Humanitarian Emergencies, Montreux, Switzerland, 26–27 February 2004.

174 See Waschefort "Africa and international humanitarian law", above at note 1 at 611.

parties to Protocol I,¹⁷⁵ the Security Council can, through a chapter seven resolution, require all parties to the Conventions to adopt the necessary domestic measures. IHL violation undoubtedly is a threat to respect for fundamental human values and “belongs to the framework of the maintenance and re-establishment of international security”.¹⁷⁶ The UN can support weaker states in meeting these obligations. The importance of this is to ensure that the will of conflicting parties to implement the Conventions is secured through appeals other than only the legal obligation argument, and that mechanisms to repress violations at the domestic level are consistent with the principles of the international criminal justice system.

Recognizing that some measures are complex and technical, requiring expertise, support, assistance and cooperation,¹⁷⁷ states must utilize relevant international law provisions on international cooperation and assistance. The obligation to ensure respect also needs to be taken seriously,¹⁷⁸ to render support to weaker states and to require accountability from recalcitrant states at the international level. This support can take several forms and can manifest in diplomatic, technical and financial assistance. While states have previously resisted any monitoring mechanism, it is high time they took positive steps in this respect.

National societies can facilitate campaigns to build consensus and generate appropriate public opinion that can facilitate the adoption of all required domestic measures. They can also assist in the national translation efforts of their states. Their strategy for dissemination needs to consider the continent’s Eurocentric view of the instruments to chart an appropriate entry point for engagement with the relevant actors. States and their populations must be convinced that the Conventions reflect African cultural traditions, notwithstanding their imported character.¹⁷⁹

Civil society and NGOs can support national societies in their dissemination and public opinion generating efforts. Public opinion is influential in “implementing human values”.¹⁸⁰ They can also contribute by putting pressure on states to ensure domestic implementation and promoting compliance by armed groups. Strategies can take the form of a media campaign, lobbying, provision of training and continuing education to judges and legal

175 According to Veuthey, this provision allows for “creativity and flexibility”: M Veuthey “Implementing international humanitarian law: Old and new ways” in BG Ramcharam (ed) *Human Rights Protection in the Field* (2005, Martinus Nijhoff) 87.

176 M Veuthey “The contribution of the 1949 Geneva Conventions to international security” (1999) 18/3 *Refugee Survey Quarterly* 20 at 22–26.

177 Fleck “Implementing international humanitarian law”, above at note 11 at 151.

178 “Legal consequences of the construction of a wall in the occupied Palestinian Territory” (advisory opinion of 9 July 2004) *ICJ Reports* (2004) at 136, para 158. See also para 157.

179 Mubiala “International humanitarian law”, above at note 25.

180 See Veuthey “Implementing international humanitarian law”, above at note 175.

practitioners, and mobilizing entertainment talents¹⁸¹ for content creation. Training and sensitization help in creating necessary awareness that can enable an understanding of the conduct of parties in armed conflicts and in tracking domestic measures taken by states.¹⁸²

Sustained and concerted efforts by researchers can help investigate humanitarian religious and cultural rules and values, identify gaps in states' domestic implementation of the Conventions and facilitate invoking states' international responsibility.

CONFLICTS OF INTEREST

None

181 The ICRC has utilized this means to campaign against violation of IHL; see K Omotoso *Woza Africa! Music Goes to War* (1997, Jonathan Ball).

182 See H Slim "A response to Peter Uvin: Making moral low ground: Rights as the struggle for justice and the abolition of development" (2002) 17 *PRAXIS: The Fletcher Journal of Development Studies* 1.