BACK TO BASICS: THE PATH TO ENHANCING AFRICAN ADHERENCE TO INTERNATIONAL HUMANITARIAN LAW*

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Introduction

As of 2014, 52 per cent of the world's armed conflict incidents occurred in Africa, an increase of 10 per cent on 2013. As a result, Africa is often the focus of much media attention when demonstrating the violent nature of armed conflict. Africa is seen as the theatre of untold human suffering. In 2000, African leaders recognised that the scourge of conflict in Africa is a major impediment to Africa's development.[2] Sixteen years later the African Union has made advances in addressing conflicts and the root cause through the African Peace and Security Architecture and the African Governance Architecture. These efforts, in the frame of Agenda 2063[3] and the aspiration to 'end all wars by 2020', have the potential to advance the peace and security agenda on the continent. Consequently, notions of conflict prevention and conflict resolution, good governance and security sector reform have taken centre stage in recent peace and security dialogue, leaving ratification of international instruments as the '*parent pauvre*'.

This article recalls the importance of ratification and, in particular, implementation of international humanitarian law (IHL) treaties as a means of affording protection to victims of armed conflict. Whilst it is

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1 See J Cilliers 'Future (im)perfect: Mapping conflict, violence and extremism in Africa' (2015) *ISS Paper* 287, available at https://www.issafrica.org/publications/papers/future-im-perfect-mapping-conflict-violence-and-extremism-in-africa (accessed 15 November 2016).

2 See preamble of the Constitutive Act of the African Union.

3 Agenda 2063 is the African Union's strategic approach for the development and progress of the continent. It sets out aspirations to be achieved by 2063. See African Union (AU) 'AGENDA 2063', available at http://agenda2063.au.int/en/ (accessed 5 October 2016)

acknowledged that the mere act of ratifying a treaty does not in itself afford protection, it is the first step in a series of actions that may have the result of enabling protection or at least addressing violations where they occur. Protection is undeniably the greatest challenge in today's conflicts.[4] Protection lies at the heart of IHL: the idea that even war has limits and that those not taking, or no longer taking, part in conflict must be protected. However it is not the law itself that affords protection but rather compliance with the law. Ratification is a first step in the journey towards compliance and an important indicator of a state's commitment to broader continental objectives. As noted by the African Union Commission

> ratification signifies the acceptance by the ratifying States not only of the legal obligations enshrined in the instruments, but also their commitment to respond to Africa's common development and integration challenges which these instruments, and the shared values, aim to address. Domestication of the instruments serves to mobilise Africans, as it ensures that the espoused values feature in the domestic practices and interactions of all peoples in their respective countries and various corners of the Continent.[5]

Notwithstanding its importance, ratification of IHL treaties by African states has slowed in the last few years. This article shows the status of ratification of IHL treaties in Africa and aims to identify various barriers to ratification. It recalls the importance of treaty law as a means of developing the law of war and proposes practical solutions to address the challenges that states may experience in the ratification of IHL treaties and the means through which the ratification rate can be improved. Before addressing the status of ratification[6] on the continent the article deals with the relevance and value of treaties as a source of IHL.

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4 See the joint warning of the ICRC President and the UN Secretary-General issued in October 2015, available at https://www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning (accessed 16 April 2016).

5 'Concept note for the regional workshop on the importance of ratification and domestication of OAU/AU treaties of direct relevance to African Union shared values' (August 2013), available at http://fliphtml5.com/ncli/mnbx (accessed 5 January 2017).

6 It is important to note that a state may be bound to an international instrument in a number of different ways, notably signature, ratification, accession, acceptance, and approval. While international agreements make provision for signature, this merely expresses the willingness of the signatory state to consider proceeding to ratification, acceptance or approval and creates an obligation on the signatory state to refrain from acts that would defeat the object and purpose of the treaty. Ratification is a clear indication by a state of its consent to be bound by a treaty. Accession usually occurs after a treaty has entered into force, as it is the act

Treaties as a source of international humanitarian law

The often-cited article 38 of the Statute of the International Court of Justice lists the following sources of law: international conventions, international custom, general principles of law recognised by civilised nations, judicial decisions and the teachings of the most highly-qualified publicists as subsidiary means for determining the rules of international law. While there is no *a priori* hierarchy of sources in international law, in practice treaty law is the strongest source of international law. In part it is owing to the fact that its content is in print, which in itself inspires confidence as there is clarity on the substance, as well as because the content and substance of treaty law generally is agreed upon. However this is only half the story. The clear weakness of treaty law is that a state will not be bound by the provisions of a treaty it has not ratified, at least as a matter of treaty law.[7] As a matter of international law, states are free to enter into a treaty or not, making them a less universal source of law than, for example, custom.

Notwithstanding, treaty law in the field of IHL is an important source of law, since it is the means through which very practical and contemporary issues can be addressed. It is also a relevant source of law as it offers flexibility to address real humanitarian challenges. IHL began as a set of principles contained in ancient customs that were codified in the nineteenth century. Much of what we know today as the rules of war or the law of armed conflict is contained or has its roots in The Hague Conventions[8] and the Geneva Conventions together with their Additional Protocols.[9] These instruments were born of history and the

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by which a state binds itself to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Acceptance or approval has the same legal effect as ratification and is usually used by states where domestic constitutional law does not require the treaty to be ratified by the Head of State. For the purposes of this article, the term 'ratification' shall be used to refer to any of the above means of binding a state to an international instrument. See United Nations 'Glossary of terms relating to Treaty actions', available at https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml (accessed 17 March 2016).

7 Certain treaty provisions have attained the status of *jus cogens* and as such are applicable and create international obligations notwithstanding ratification. Principles regarding the unlawful use of force in the United Nations Charter is an example of such provisions. For further discussion on this, see 'Report of the International Law Commission' (1966) vol II *Yearbook of the International Law Commission* 248.

8 Hague Conventions of 1899 and 1907. See full list at https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp. (17 March 2016).

9 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), Geneva Convention for the Amelioration

lessons learnt following the conflicts that occurred in the late eighteenth and early nineteenth centuries. The provisions of these instruments were thus adopted as a reaction to the way wars were fought at the time.

To illustrate the point, World War I saw the use of mustard gas as a weapon of war. Following the use of this weapon and its horrific effects, a clause prohibiting the use, manufacture, and importation of asphyxiating, poisonous or other gases in Germany was inserted in the Treaty of Versailles.[10] Given the public outrage at the effects of mustard gas, negotiations ensued that resulted in the conclusion of the Geneva Gas Protocol of 1925.[11] Next, World War II (WWII) notably was characterised by mass civilian causalities, something not seen since the Thirty Years War of 1618–1648. Strategies utilised in WWII included air bombing, night raids, and tactics that sought to destroy entire cities and in so doing resulted in mass civilian casualties. In reaction to this erosion of the spatial distinction between civilians and combatants, there was a gathering of states in Geneva which led to the conclusion of the Geneva Conventions of 1949, with their emphasis on protecting those who are not, or no longer are, taking a direct part in hostilities. Even after this large volume of law was concluded the law continued to develop in reaction to the nature of armed conflict.

From 1960 onwards colonial wars ravaged the African continent and notions of wars of national liberation took root. Given that many of the principles contained in the Geneva Conventions were limited in their application to international armed conflict, most of the Geneva Conventions did not apply to these new wars that were experienced across Africa. Consequently, in 1977, states negotiated and concluded Protocol I Additional to the Geneva Conventions, which contains an important clause extending the application of the 1949 Geneva Conventions to wars of national liberation. Simultaneously, Protocol II Additional to the Geneva Convention was drafted in order to afford

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of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), Geneva Convention relative to the Treatment of Prisoners of War (GCIII), Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV) (12 August 1949), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (APII), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005 (APIII), available at https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

10 Art 71 of the Treaty of Versailles (28 June 1919).

11 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (17 June 1925).

a measure of protection to those affected by non-international armed conflict. This trend of developing law to meet real needs continued into the 21st century. With a backdrop of mass displacement in Africa, the African Union gathered in 2009 to negotiate a common framework to address internal displacement. As a result, the African Union Convention on Internally Displaced Persons was adopted. The youngest treaty in IHL is the Arms Trade Treaty (ATT) which was adopted in 2013. The idea of an ATT had been discussed within the UN system for approximately seven years before its adoption.[12] In the final stages of the negotiation partly the Arab Spring fuelled discussions on arms control. In Africa reality hit home when a link was drawn between the Arab Spring, the fall of the Gadhafi regime in Libya in 2011 and the flow of weapons to states to the south and west of Libya, resulting in a flare-up of conflicts in the Sahel.[13] The result was keen interest in the ATT, particularly from the Economic Community of West African States (ECOWAS).

This example demonstrates the importance of treaty law in IHL, the purpose of which is to set standards that are of real humanitarian significance. Given that conflicts are ever evolving, constant development of the law is a necessity. Drafters of the 1949 Geneva Conventions never imagined the modern conflict landscape: wars today are fought in a vastly different way. The weapons of war are more sophisticated and the tactics more advanced and aggressive, which challenges the basic understanding of war space and time. The principles concluded in the 1949 Conventions still apply, but these rules are insufficient on their own to address very practical and current challenges.

In sum, treaty law is a crucial source of IHL as it provides a platform for states to amplify the fundamental rules contained in the Geneva Conventions by agreeing to certain standards of behaviour. However, depending on whether a state's domestic legal system is monist or dualist, ratification alone may not give rise to obligations at the domestic level. However, ratification does give rise to international obligations, which in itself is a gain.

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12 The UN negotiation process that led to the ATT began in 2006. See S Bauer, P Beijer & M Bromley 'The Arms Trade Treaty: Challenges for the first conference of states parties' (2014) 2 *SIPRI Insights on Peace and Security*, available at http://books.sipri.org/files/insight/SIPRIInsight1402.pdf (accessed 31 March 2016).

13 See report on firearms trafficking in West Africa, available at https://www.unodc.org/documents/toc/Reports/TOCTAWestAfrica/West_Africa_TOC_FIREARMS.pdf (accessed 31 March 2016).

Status of ratification[14]

IHL treaties are understood to be those treaties that have an impact on the law of war, either because they afford protection in armed conflict or address the conduct of hostilities as well as the means and methods of war. The International Committee of the Red Cross (ICRC) in its treaty database[15] categorises IHL treaties in the following way: protection treaties, weapons treaties and repression treaties.

Protection treaties

Protection treaties in IHL are those that afford protection to persons, property or the environment during (and in certain circumstances following) times of armed conflict. These include: the Geneva Conventions and their Additional Protocols, the Convention on the Rights of the Child,[16] the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[17] the Convention on Cultural Property and its Protocols[18] and the Environmental Modification Convention of 1976.[19] The Geneva Conventions are some of the few instruments in international law that enjoy universal ratification. Historically, what is noticeable about the ratification trend of these conventions is that they often have been among the first international instruments to be ratified by a state, and such ratification takes place relatively early in the history of a state.

For many African states, the Geneva Conventions were ratified soon after independence. This is the case especially for Francophone African states most of which gained independence in 1960.[20] The majority ratified the Geneva Conventions in the 1960s: Benin (1961), Burkina Faso (1961), Cameroon (1963), Central African Republic (1966), Côte d'Ivoire (1961), Democratic Republic of the Congo (1961), Gabon (1965),

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14 Statistics on ratification are taken from the ICRC database, available at https://www.icrc.org/ihl and as at 29 March 2016.

15 Available at https://www.icrc.org/ihl.

16 20 November 1989.

17 25 May 2000.

18 Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999).

19 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (10 December 1976).

20 For a full list of African Independence dates see 'Decolonization of Africa', available at www.saylor.org/site/wp-content/uploads/.../Decolonization-of-Africa.pdf *(*accessed 31 March 2016*)*.

Mali (1965), Mauritania (1962), Niger (1964), Senegal (1963) and Togo (1962).

On one hand it is understood that the Geneva Conventions are among the first global instruments to be developed in the post-World War II peace and security architecture. Following decolonisation, ratification of these instruments was an opportunity for newly-independent African states to come to the table as equals with other states, an important step in their legitimacy and endorsement by the international community.

On the other hand the aftermath of WWII was a fresh reality, strengthening the importance of the Conventions. The trend of swift ratification of the Geneva Conventions is due to the measure of respect that is accorded to the Geneva Conventions in Africa,[21] and continues: Djibouti gained independence in 1977 and ratified the Geneva Conventions in 1978; Namibia gained independence in 1990 and ratified the Conventions in 1991; Zimbabwe gained independence in 1980 and ratified the Conventions in 1983; South Sudan, formed in 2011, ratified the Geneva Conventions in 2013. There is near universal ratification of Protocols I and II Additional to the Geneva Conventions. In most instances African states tended to ratify these Protocols at the same time as the four Geneva Conventions. This tendency is not the case with Additional Protocol III, which to date has only three ratifications[22] out of the 54 African states.

As in the case of the Geneva Conventions, the ratification status of the Convention on the Rights of the Child is very good with near universal ratification of the main Convention; 43 out of 54 African states have ratified its Optional Protocol on the Involvement of Children in Armed Conflict ('Optional Protocol'). The dialogue on children affected by armed conflict gained momentum in Africa in the 2000s owing largely to campaigns by civil society and international organisations; the ratification trend of the Optional Protocol has been a steady process among African states ratifying gradually after 2000. These ratifications, though slow in comparison with the Geneva Conventions, are still impressive as compared to other protection treaties in IHL, such as those dealing with property and the environment. To illustrate this point, the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict has a ratification status of 30 out of 54 African states, its First Protocol, seventeen out of 54 and its Second Protocol a mere ten out of 54. There does not appear to have been a wave of ratifications on the cultural property instruments in the same way as with the Geneva

21 This is quite apart from the issue of compliance with the Convention.

22 Kenya (2015), South Sudan (2013) and Uganda (2008).

Conventions, nor does there appear to be any trend in the way that states ratify these instruments. The cultural property instruments were adopted in the aftermath of WWII which resulted in massive destruction of religious and cultural buildings.

In Africa, a preoccupation with nation-building and the need to address political issues are the main reasons the cultural property instruments have a lower ratification status. To date, African states require convincing as to the relevance of the Cultural Property Convention and its Protocols as such matters tend to take a back seat to more pressing concerns on peace and security, such as countering violent extremism, weapons contamination and the protection of the civilian population. The Environmental Modification Convention, which dates back to 1976, remains by far the least popular of the protection treaties with a low ratification status of eleven out of 54 states. Conservation and protection of the environment through legal means is still in a nascent stage in Africa, but with the increased significance of climate change and its impact on the use of survival resources as a tactic of war this Convention may begin to gain prominence.

An important treaty not appearing in the ICRC's database is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (Kampala Convention). The Kampala Convention is a treaty whose importance is self-evident on the African continent and is the first of its kind globally. It was adopted in response to the 'gravity of the situation of internally displaced persons as a source of continuing instability and tension for African States',[23] and reflects a determination to prevent and put an end to the phenomenon of internal displacement on the continent.[24] Internal displacement is a global challenge, but for a long time Africa has been the hardest hit, owing primarily to the prevalence of conflict on the continent.[25] The Convention came into operation in 2012 after the fifteenth ratification: a mere three years after its adoption in 2009.

As the first global treaty of its kind it can be assumed that African countries would rally behind the treaty which demonstrates Africa's collective progress. As of 31 March 2016, just under 50 per cent of African states had ratified the Convention, with the ratification rate slowing down since the treaty came into effect. In 2015 only two ratifications were deposited and to date no official ratifications have been deposited in

23 Kampala Convention, preamble, para 1.

24 Kampala Convention, preamble, para 5.

25 J Biegon & S Swart 'The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa: A panoramic view' 2009–2010 *African Yearbook on International Humanitarian Law* 20.

2016, notwithstanding that the world (and a significant portion of Africa) faces the largest ever displacement crisis in human history.[26]

Weapons treaties

Weapons treaties are considered to be those that regulate the use, production, destruction, and stockpiling of weapons, or their transfer. These treaties tend to be more technical in nature than the protection conventions and their association with defence-related issues makes them somewhat of a 'sacred cow'. According to the ICRC database the following make up the list of weapons treaties in IHL: the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction; the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and its Protocols;[27] the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; the 2008 Convention on Cluster Munitions; and the 2013 Arms Trade Treaty.

The Biological Weapons Convention, the Chemical Weapons Convention, and the Anti-Personnel Mine Ban Convention have good ratification rates among African countries, with 40, 52, and 51 ratifications out of 54 respectively. The balance of weapons conventions have a ratification status of less than 50 per cent. More recent weapons conventions, such as the Cluster Munitions and the Anti-Personnel Mine Ban Conventions have better ratification rates, largely due to the critical mass that was generated surrounding the conventions by civil society. The Anti-Personnel Mine Ban Convention, adopted in 1997, had a wave of ratifications among African countries in the late 90s and early 2000s; similarly, the

[26] See the report of the Internal Displacement Monitoring Centre (IDMC), available at http://www.internal-displacement.org/publications/2015/global-overview-2015-people-internally-displaced-by-conflict-and-violence/.

[27] Protocol on Non-Detectable Fragments (Protocol I), 1980, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) 1980, Protocol on Blinding Laser Weapons (Protocol IV), 1980, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended (Protocol II as amended), 1996, Amendment to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects, 2001, Protocol on Explosive Remnants of War (Protocol V), 2003.

Cluster Munitions Convention, which was adopted in 2008, has seen a relatively fast ratification rate in Africa: within four years of the adoption of the Convention just under half (22) of African states had ratified the Convention. The youngest weapon treaty, the ATT, was adopted in 2013 and to date eighteen out of 54 African countries have ratified the Convention. It is interesting to note that of these eighteen ratifications, eleven are members of the ECOWAS, which demonstrates the potential influence that multilateral forums have in the promotion of the ratification of IHL instruments.

Repression treaty

The Rome Statute of the International Criminal Court, aimed at the prevention of international crimes is a much-discussed treaty in view of the ongoing furore which surrounds the antagonism of the AU towards the ICC. Notwithstanding the status of the debate on the ICC, African states to date constitute the largest continental bloc of States Parties to the Rome Statute: 34 of the 54 African states have ratified the treaty, with 21 of these ratifications occurring within three years of the adoption of the Statute. Two African states, South Africa and Burundi, have deposited instruments of withdrawal from the Rome Statute while a further three, Kenya, Namibia and the Gambia, have made decisions to withdraw,

The overall status of ratification of IHL treaties in Africa is average. The ratification status of treaties concerning protection of persons is better than that of treaties that concern protection of property or the environment. Recent ratification of weapons treaties has been good but there remains a lack of demonstrated interest in many of the Protocols to the Convention on Certain Conventional Weapons. It is not possible to state with certainty why African states ratify certain treaties and not others. Many of the armed conflicts have taken place on the African continent: peace and security are continuing concerns for the continent and comprise a significant portion of the African Union's budget. Given this background it is logical that IHL treaties have the necessary prominence and relevance for African states. However, an analysis of the ratification status of IHL treaties in Africa shows that this is not necessarily the case. There are a myriad of possibilities as to why states ratify treaties, including pressure from civil society, but it appears to be clearer why states do not ratify certain conventions.

The purpose in this article is to consider tools that can be used to promote ratification of IHL treaties. However, such a discussion would be incomplete without consideration of the barriers to ratification, an issue dealt with next.

Barriers to ratification in Africa

The rate of ratification of IHL instruments on the African continent is relatively slow,[28] although it must be noted that there are a number of legitimate challenges faced by governments throughout the process of ratification. These challenges range from political to practical considerations and include both internal obstacles (such as administrative lethargy) and external obstacles (such as a lack of political will and the existence of unfavourable political factors.[29] These barriers should not be seen as an excuse for poor ratification rates, but it is important that they be identified, acknowledged and addressed to the extent possible.

In an article written in 1973, which purports to 'propose strategies which could be adopted to improve the African treaty record',[30] Mutharika lists a number of obstacles to the ratification of treaties that create obligations of an internal nature. Although the article was published 43 years ago it is striking that a number of the challenges remain the same: it mentions the following challenges: perceived threats to the notion of national sovereignty, the ensuing burden to accord a certain standard of treatment to persons within its national jurisdiction, consequent financial obligations on a state and the need for states to enact necessary legislation to give effect to the provisions of treaties following their ratification.[31] Additional contemporary obstacles, such as 'treaty fatigue', add to the problem. This article now addresses the relevant challenges to the ratification of IHL treaties in Africa.

A first general point to note is 'treaty fatigue': states often express concern about 'reporting fatigue', which is a weariness of undertaking additional treaty reporting obligations, and there is also an undeniable weariness amongst states to ratify and implement additional international treaties. A number of public international law instruments are developed on an annual basis, leaving states with a plethora of treaties requiring support and action.[32] Where those treaties do not have

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28 See for example 'EU statement by Ms. Clara Ganslandt, Delegation of the European Union' at the 68th Session of the UN General Assembly First Committee, 18th Meeting Thematic discussion on Conventional weapons, available at http://www.un.org/disarmament/special/meetings/firstcommittee/68/pdfs/TD_28-Oct_CW_EU.pdf (accessed 2 March 2016), which considers the slow rate of adherence to the Certain Conventional Weapons Convention in Africa.

29 See generally T Maluwa (ed) *Law, Politics and Rights: Essays in Memory of Kader Asmal* (2014) 82.

30 AP Mutharika 'Treaty acceptance in the African States' (1973) 3 *Journal of International Law and Policy* 185.

31 Id 189, 191.

32 Four new regional instruments were adopted by the African Union alone in 2014 (see http://www.au.int/en/treaties).

a direct advantage or relevance to a state it is becoming increasingly difficult for civil servants to convince their superiors of the need to ratify such treaties. A related concern for many governments is that there may already be a number of treaties that have been ratified by the state but not yet domesticated.[33] As the majority of international instruments in the field of IHL developed today require implementation through domestic measures,[34] some governments opt to first ensure that existing treaty obligations are met before new treaties are ratified. Although a valid undertaking, the unfortunate reality is that passing laws to implement treaties is often a long and tedious process, especially for many African governments where there is a backlog of draft legislation waiting to be addressed by Parliament. As a result, new ratifications may be delayed indefinitely.

In addition, the role of parliamentarians in this process should not be underestimated. Maluwa refers to the 'long and cumbersome legal procedures that must be negotiated before a treaty is eventually approved or ratified'.[35] Given the role of Parliament in many countries in approving ratification, he notes that

> legislatures may be reluctant to ratify a treaty due to misconceptions, or a lack of appreciation of the legal and political import of the treaty, arising from the failure or inability of the bureaucracies in the relevant government departments to provide the necessary technical advice.

He advises that the role of parliamentarians should be enhanced.

Once a state has decided to ratify an instrument a number of new challenges arise. As is the case with many instruments of public international law, the financial implications of ratification for a state are not always clear. Many treaties require that States Parties contribute a determined annual amount for the proper functioning of the treaty, which often includes the costs of a Secretariat. Examples of such treaties include the 2008 Convention on Cluster Munitions and the 1997 Anti-Personnel Mine Ban Convention.[36] These amounts are determined according to the scale of United Nations' assessments, meaning that smaller states are not expected to contribute as much as larger states, but the exact amount is often not clear until after ratification has taken

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33 Consider for example Lesotho, where from a list of 27 instruments of IHL, eighteen have been ratified (see https://www.icrc.org/ihl), but only three pieces of relevant domesticating legislation exist (see https://www.icrc.org/ihl-nat).

34 See, for example, art 9 of the 2008 Convention on Cluster Munitions and art 9 of the 1997 Anti-Personnel Mine Ban Convention.

35 Maluwa (note 29 above) 83.

36 See art 14 of the 2008 Cluster Munitions Convention and art 14 of the 1997 Anti-Personnel Mine Ban Convention.

place. Such information is necessary for smaller states when lobbying internally for ratification and, if the final assessment is higher than was expected, it can be very difficult to justify ratification to the executive.

Turning more specifically to instruments of IHL, it is clear that many states do not see these treaties as a priority. Despite the number of armed conflicts that have taken place and currently are taking place on the African continent, there are many African states that do not see the direct advantage of ratifying an instrument related to the law of war. This failure could be due to the fact that the country in question is at peace and does not have first-hand experience of the effects of armed conflict on its citizens. Alternatively, it could be that the importance of IHL is not profiled or well-understood in the country and that the platforms for discussing the importance and relevance of IHL do not exist. In addition, even in post-conflict states where the memory of violence is real, issues of development and poverty-reduction understandably are often prioritised over issues related to peace and violence-reduction.

A lack of clarity as to the obligations that a treaty places on a state is another clear barrier to ratification. Many IHL instruments appear complicated and technical, and, as IHL is such a niche area of public law, governments in peaceful states are often less experienced and knowledgeable when it comes to interpreting these instruments. An example is the 2013 Arms Trade Treaty, which has been welcomed by most states but which remains obscure and unclear to many governments. Even if ministries have technicians who understand the domestic consequences of ratification, they are often middle-level civil servants who do not always have influence over the decision-makers in government.

Another challenge directly related to IHL instruments is that they often address a number of issues and impose a number of obligations on a state, with the result that it is not always clear which ministry is responsible for the implementation of that instrument. An example is the African Union Convention on Internally Displaced Persons which refers to a number of areas of public international law (including international human rights law and IHL) and includes obligations that would require action by a number of ministries (including Home Affairs, Foreign Affairs, Finance, Social Welfare, and Defence).[37] Another example is the 1954 Hague Convention on Cultural Property and its Protocols, the domestication of which implicates at a minimum the ministries of Foreign Affairs, Home Affairs, Police, and Culture. Once a state has decided to ratify an international instrument it traditionally chooses a line-function ministry to be responsible but, due to the multi-disciplinary nature of

[37] See Biegon & Swart (note 25 above).

many IHL instruments, this can often be a difficult task with the result that some instruments 'fall through the gaps'.

A further internal challenge is the issue of functional overlap between ministries which often is clearly seen when dealing with weapon-related instruments, as both the ministries of Defence and Foreign Affairs have an important and relevant role to play in the ratification and domestication of such treaties. Foreign Affairs traditionally participates in the development of the treaty and therefore has the bigger picture view; traditionally Defence has the expertise and local knowledge to better understand the implications that ratification will have on the country. Where ministries of Foreign Affairs and Defence do not collaborate from early on in the treaty drafting process, decisions related to ratification can be tense, difficult, and slow.

Some instruments of IHL are interpreted as politically sensitive. These include treaties that ban weapons still used by certain states or that states choose to reserve the right to use (such as the 1997 Anti-Personnel Mine Ban Convention) as well as treaties that place obligations on a state not to treat their citizens in a certain way (such as the AU Convention on Internally Displaced Persons). All of these instruments raise sensitivities within certain states which delay ratification or prevent it altogether. Some reluctance is understandable; it is also clear that often a reaction of sensitivity is really based on a misinterpretation of the provisions or aims of the instrument in question.[38]

Interestingly, some states may be seen as delaying ratification but the reasons for delay are not related to the treaty itself but rather reflect a state's desire to implement their obligations under the treaty before ratifying it. This scenario played out under the 2008 Convention on Cluster Munitions, where states chose to destroy their stockpiles of cluster munitions before depositing an instrument of ratification. This decision prolongs the process of ratification, but it should be seen rather as an interruption to ratification than as a barrier.

Finally, it must be pointed out that African engagement in the development of IHL and conversely the use of IHL to address issues specific to the African continent is seriously lacking. The development of IHL does not always appear to recognise priorities on the African continent; African governments are typically less involved than their western counterparts in treaty drafting and negotiation, and African experts are not consistently invited to global IHL consultations. Where African governments do not see their concerns or opinions reflected in

[38] An example would be misunderstanding the aim of the Arms Trade Treaty to be to prohibit all trade in arms, whereas the true aim is to prohibit the illicit trade in certain categories of weapons.

the development of this body of law and where IHL is not profiled and debated on the African continent, it may continue to be brushed aside in favour of branches of law considered to be more popular, notably international human rights law.

Practical tools for enhancing ratification rates

Despite these challenges there are a number of tools and activities that can help enhance compliance with IHL instruments by African states. Mutharika highlights a few of these: drafting of treaties in a manner that makes them readily understood, the ability of the executive to fully explain the meaning and implications of a treaty to policy-makers, the presence of specialised personnel during the negotiation and domestication stages and adopting a strategy of wide publicity to engender public support.[39] Some of these suggestions are explored in more detail below. The tools examined in this section are largely based on the experience of the authors.

Technical support

In cases where states do not ratify instruments due to a lack of understanding of the implications of the treaty or the content of the domesticating legislation, technical support services can be of assistance. In the field of IHL a number of technical support models exist. For example, in 1996 and at the request of States Parties to the Geneva Conventions, the ICRC established its Advisory Service.[40] The Advisory Service is a global network of specialised legal advisors who work closely with state authorities, providing expert advice on IHL treaties, promoting the implementation of IHL and exchanges between governments on implementation.[41] Through the ICRC's Advisory Service states have insight into the technical implications and requirements of the treaties that they ratify as well as access to tools such as fact sheets, model laws, and research materials.[42] The Service does not supplant the work of governments but aims to support states to better understand IHL treaties and, as such, operates with due regard to the specific needs, political systems and legal traditions of the state.

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39 Mutharika (note 30 above) 190–192.

40 See P Berhman 'The ICRC's Advisory Service on International Humanitarian Law: The challenge of national implementation' (1996) 312 *International Review of the Red Cross*, available at https://www.icrc.org/eng/resources/documents/article/other/57jn57.htm.

41 Ibid.

42 See https://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law.

Such advice can be very helpful but is only a starting point: although the ICRC has made its expertise available through this network of legal advisors, the experts are not seconded to governments and their contributions are thus limited by time. In this regard it may be useful to consider accepting seconded drafting experts, although secondments are not always welcomed by governments. Some governments consider this model too intrusive and prefer that technical skills be conveyed through a drafting workshop. In this case the legal advisor convenes the relevant ministries and imparts targeted drafting knowledge and skills. As mentioned above, IHL often has a bearing on a number of fields, ranging from defence and corrections, to health and culture. Given the broad application of IHL, secondments are often targeted in nature: a legal advisor is seconded to impart knowledge on a specific instrument. The advantage of this model is that time is dedicated to understanding the technical implications of one treaty. The idea of a secondment is welcomed, but there are some African states which express concern when skills are drawn from beyond the continent: in this instance, one may consider using local capacities. For example, in 2011 Oxfam International and the Arms Control Coalition established ATT Legal, a platform that offers legal expertise on the ATT.[43] The platform makes use of a network of lawyers who are drawn from specialised law firms, academic institutions, and independent lawyers who offer their services on a *pro bono* basis to assist organisations and governments with understanding their obligations under the ATT and implementing the treaty.[44] The advantage of this structure is that ATT Legal can offer services with due consideration to the country and in some instances may be able to offer local expertise, a factor which many African governments welcome.

Whatever model African states prefer, a myriad of options is available for states to address the technical challenges posed by many IHL treaties.

Understanding financial obligations

Once ratified many international instruments place financial obligations on states, which include the cost of domestic measures, such as adopting national legislation, disseminating the provisions of the instrument and destroying stockpiles of certain weapons. However, this also refers to the obligation to provide financial contributions for the implementation of the treaty. Such costs can be clear from the text of the treaty itself, for example, article 8 of the Chemical Weapons Convention provides for the establishment of the Organisation for the Prohibition

43 See http://controlarms.org/en/attlegal/ (accessed 31 March 2016).
44 Ibid.

of Chemical Weapons (OPCW),[45] the costs of which are to be covered by States Parties in accordance with the UN scale of assessment, adjusted to take into account differences in membership between the UN and the OPCW.[46] However, States Parties may only be made aware of costs at a later stage: it was only at the Sixth Review Conference of the Biological Weapons Convention that a decision was taken to establish an Implementation Support Unit,[47] which would be funded by contributions from States Parties participating in meetings based on the UN scale of assessment pro-rated to take into account the number of States Parties participating in meetings.[48] These financial obligations on States Parties make sense as the proper implementation of treaties can never be cost-free; however, states are not always clear on the need for a financial contribution or on the amount that they will be asked to contribute. It is proposed that the Secretariats of the various treaties engage in simple practical steps to alleviate this concern among states, including providing signatory states with estimates of the contributions that will be required from them should they become States Parties.

Analysis of domestication before ratification

The ICC and Africa debate referred to above highlights some of the challenges for treaty ratification in Africa.[49] Discussions have focused on the assertion that the ICC is biased against Africa: at the heart of the discussion is the African Union (AU), which has adopted a number of resolutions the effect of which are to strengthen growing circumspection regarding the Rome Statute. The discussion became less about the Rome Statute than about treaty-making in general, when in July 2015 Omar Al Bashir, President of the Republic of the Sudan, attended the 25th AU Summit in Johannesburg, South Africa, without consequence, notwithstanding the existence of an ICC warrant for his arrest and confirmation of the same by the North Gauteng High Court, basing its decision on obligations arising from South Africa having implemented

45 Art 8 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

46 G Lamb 'Negotiating an Arms Trade Treaty: A toolkit for African States' (2012) *Institute for Security Studies* 127.

47 Sixth Review Conference of the States Parties to the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

48 Lamb (note 46 above) 125.

49 For a full discussion on this see M du Plessis, T Maluwa & A O'Reilly 'Africa and the International Criminal Court' (2013), available at https://www.chathamhouse.org/publications/papers/view/193415.

legislation on the Rome Statute.[50] Following these events, media discussion has turned on whether South Africa had been too hasty in ratifying and implementing the Rome Statute.[51] The ruling party in South Africa, the African National Congress, declared that it wanted to withdraw from the ICC and the executive has since deposited an instrument of withdrawal with the United Nations.[52] Incidences like this have led some African states, including Namibia,[53] to consider that it is best to understand the full implications of implementation prior to ratifying an instrument.

Such an exercise involves an enquiry into the substance of the international obligations that arise as a result of ratification. A state would conduct an assessment in order to determine whether those international obligations are compatible with its domestic law. Where there is incompatibility a state has three choices: to ratify, not to ratify or to ratify with reservations where possible. The latter is essential because in international law a party cannot invoke its domestic law as justification for a failure to perform a treaty obligation.[54] Where international obligations arising from the treaty are not contrary to an existing domestic

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50 *Southern African Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP); *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (4) BCLR 487 (SCA). See for discussion MJ Ventura 'Escape from Johannesburg? Sudanese President Al-Bashir visits South Africa, and the implicit removal of head of state immunity by the UN Security Council in light of *Al-Jeddah*' (2015) 13 *Journal of International Criminal Justice* 995; D Tladi 'The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1027; E de Wet 'The implications of President Al-Bashir's visit to South Africa for international and domestic law' (2015) 13 *Journal of International Criminal Justice* 1049. See also http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ for a full discussion on the case.

51 See B Mbindwane 'South Africa must "unsign" the Rome Statute. Here's why' *Daily Maverick* (13 October 2015), available at http://www.dailymaverick.co.za/opinionista/2015-10-13-south-africa-should-un-sign-the-icc-rome-statute.-heres-why./#.Vv5iBLsw_7Y (last accessed 30 October 2016).

52 See D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al-Bashir saga' 2016 *African Journal of Human Rights Law* (forthcoming). See the following reports: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/11925482/South-Africas-ruling-party-ANC-votes-to-withdraw-from-the-International-Criminal-Court.html, https://www.enca.com/south-africa/anc-wants-exit-icc.

53 See the following reports: http://www.news24.com/Africa/News/namibia-clarifies-withdrawal-from-the-icc-20160314, http://www.namibian.com.na/index.php?page=archive-read&id=144660.

54 Art 27 of the Vienna Convention on the Law of Treaties (22 May 1969).

law, a decision to ratify may be simpler. However, where there is a conflict of laws the state is required to decide to amend its domestic law to bring it in line with the international obligation or simply not to sign and ratify. Where a state leans towards not ratifying, such a decision is best taken only after due consideration of important factors such as regional integration and diplomatic concerns.

Taking the ATT as an example, it is possible to speculate what happens if a state does not ratify and has no domestic processes in place to regulate the trade in arms within its borders. If that state is surrounded by states with strong mechanisms on the regulation of trade, it may open itself up to increased criminal activity as it becomes a corridor for the movement of arms. In this case, ratification becomes a practical consideration to avert a further problem. The importance of such a practical consideration is elevated when dealing with armed conflicts: for many years, academics in war studies have observed the clustering of armed conflicts and attributed this to several factors, ranging from economic challenges to governance issues.[55] This situation is particularly true of Africa where there is clear evidence of the clustering of conflicts: Sierra Leone and Liberia, the Great Lakes region and, more recently, the Lake Chad Basin. The added complication of the existence of spill-over conflicts and the cross-border humanitarian consequences of such conflicts increases the need for a regional approach to ratification. Thus, before a state decides not to ratify an instrument, particularly in IHL, it is essential to consider the regional implications. Even if a state concludes that in fact it will ratify an instrument, it is imperative to consider the practical implications, such as costs, reporting requirements, institutional capacity to oversee implementation as well as weapon clearance obligations.

Consequently, in order to appreciate the full implication of ratification a state can conduct a compatibility assessment with due regard to practical considerations. The hesitation of states to ratify, in favour of carrying out this process prior to ratification, should not necessarily be regarded as negative; rather, it should be welcomed as it would ameliorate the gap that so often exists between ratification and implementation.

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55 See for example H Hegre et al 'Toward a democratic civil peace? Democracy, political change, and civil war, 1816-1992' (2001) 95 *American Political Science Review* 33 and E Miguel, S Satyanath & E Sergenti 'Economic shocks and civil conflict: An instrumental variables approach' (2004) 112 *Journal of Political Economy* 725.

IHL training

Given the relative obscurity of IHL as a branch of public international law it is understandable that countries which have not experienced conflict at first hand do not have confirmed governmental expertise on the subject. However, it is evident that countries that have experienced conflict in the past or that have recently become embroiled in conflict also lack solid knowledge of the provisions of IHL.[56] This lack has clear consequences for the application of IHL in those countries should the need arise, but also affects that government's willingness to consider the ratification and implementation of treaties on IHL.

One tool that can be used to encourage interest in, and the prioritisation of, IHL instruments is training. Such training can be conducted by a state's National IHL Committee, by a local think tank or civil society organisation,[57] or by an international organisation such as the ICRC. Where an international organisation provides IHL training, it is recommended that such training be conducted together with a local partner in order to ensure that the training is appropriately contextualised, culturally sensitive and received with a sense of ownership by the participants. Training can be conducted purely for those individuals who have a direct impact on the advancement of IHL at the national level, notably civil servants, high-level politicians, parliamentarians or members of the armed forces. In addition, the audience for IHL training can be extended to reach those that may have an indirect influence on the advancement of IHL at the national level, including university students, academics, and the diplomatic community.

The primary benefits of training in IHL are clear: an increased awareness results in increased knowledge and increased interest. It also capacitates civil servants to participate in the various stages of treaty development, from treaty negotiation to domestic ratification and national implementation. There are also a number of indirect advantages

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[56] Consider for example Angola, a country that experienced civil war from 1975 to 2002, and yet where from a list of 27 instruments of IHL, eight have been ratified, only two of which were ratified post-conflict (see https://www.icrc.org/ihl). In addition, Angola has adopted only a single piece of relevant domesticating legislation (see https://www.icrc.org/ihl-nat).

[57] Organisations such as the Institute for Security Studies, which has offices in Pretoria, Nairobi, Dakar and Addis Ababa, regularly provide training for African stakeholders on issues related to IHL, including international criminal justice and conflict prevention (see for example https://www.issafrica.org/events/3rd-east-african-magistrates-and-judges-association-training-workshop-on-responding-to-terrorism-international-and-transnational-crimes). Other local organisations that may organise relevant trainings include the National Red Cross and Red Crescent Societies.

that can be gained from providing IHL training: these include developing and consolidating relationships with government interlocutors (both those that receive the training and where applicable those that co-host the training), enhancing credibility as a partner in the field of IHL (where training is provided by an external organisation, whether local or international) and taking the opportunity to learn from government participants as to their priorities (where training is provided by an external organisation, whether local or international).

Role of the African Union and Regional Economic Communities

Reference was made above to the importance of regional harmony in the law of armed conflict. Such harmony can be achieved in Africa through the use of existing structures such as the African Union Commission and the Regional Economic Communities (RECs).

African lawyers writing in 1973 proposed the following: 'The OAU Legal Office together with the Commission of African Jurists could play a useful role in researching the implications of treaties of this type on national decision-making and could also look into the possibility of a collective African approach'.[58] In 2009 the African Union Commission of International Law (AUCIL) was established as an independent advisory organ of the African Union Commission.[59] The AUCIL operates in terms of its statute and exists to carry out, among others, the following objectives: to undertake activities relating to the codification and progressive development of international law in Africa, to assist in the revision of existing treaties and to identify areas in which new treaties are required. Whilst the promotion of AU laws is the AUCIL's main focus, its mandate permits it to engage in matters of international law in general, extending to research and conducting studies. In view of the AUCIL's consultative powers it is not able to impose standards on the Commission or AU member states. However, given its mandate, it has the structural capability to support and promote the ratification of IHL treaties. In the first place it is a platform through which expertise can be pooled. The AUCIL has established a forum on international law and African Union law, which brings together legal experts from academia, policy and practice.[60] This platform is an opportunity for government legal experts to discuss technical challenges and make recommendations to address them. In October 2015 the fourth AUCIL forum was hosted in Cairo, Egypt. The meeting was held under the theme, 'the challenges of

58 Mutharika (note 30 above) 195.
59 Art 5(2) of the African Union's Constitutive Act (11 July 2000).
60 See http://pages.au.int/aucil/pages/introduction.

ratification and implementation of treaties in Africa'. Such fora can be used to identify practical measures to support governments with specific challenges related to ratification and may also promote regional harmony in law-making. In addition, the AUCIL is in a position to exchange best practices with similar bodies such as the Asian-Africa Consultative Legal Organ (AALCO) or share African challenges even further afield through interaction with the International Law Commission. The AUCIL is an ideal platform through which African states can identify similarities in ratification challenges but also address such challenges as a collective.

A similar role can be played by the RECs. The African Union recognises eight RECs: the Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the ECOWAS, the Economic Community of Central African States (ECCAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC). These regional blocks of African states have the primary role of integrating their regions and though they differ in structure and efficiency they are the building blocks of the AU. Apart from being a platform where states can gather and discuss challenges, the RECs have structures that promote IHL and can offer tools for ratification and implementation of IHL. In the run up to the negotiations on the ATT the ECOWAS played a critical role in promoting an understanding, and the importance, of the ATT among West African states. The ECOWAS concluded an ECOWAS common position and held technical meetings as well as drafting discussions, the purpose of which were to ensure that there would be a strong ECOWAS voice at the ATT diplomatic negotiations.[61] ECOWAS worked closely with international organisations, UN agencies, and civil society to lobby its member states to be active on the issue. During the first diplomatic negotiations on the ATT in 2010, Brigadier General Mahame Toure, ECOWAS Commissioner for Political Affairs, Peace and Security, noted that ECOWAS considered it essential to play an active role in the ATT negotiation process given the more than ten years' experience the region has in dealing with arms control issues.[62] The result is that, as of 31 March 2016, eleven of the eighteen African states who have ratified the ATT are members of ECOWAS.

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61 See the report at http://www.panapress.com/ECOWAS-member-states-reaffirm-common-position-on-arms-trade-treaty-negotiations--12-863857-100-lang2-index.html.

62 See the speech of B Amoa delivered at the United Nations Institute for Disarmament Research on 14 February 2012, available at http://www.unidir.org/files/medias/pdfs/baffour-amoa-waansa-eng-0-380.pdf.

In addition to the above, the African Union Commission could play an increased role in promoting Common African Positions at diplomatic meetings. In 2011 and following consultations in Togo and Ethiopia, the African Union drafted a Common African Position ahead of the Arms Trade Treaty negotiations. This position eventually was not endorsed by the African Union; the process to negotiate its existence enabled African states to engage critically with the substance of the Treaty.[63] An African solidarity approach to treaty ratification has the potential to improve treaty ratifications and such solidarity can be achieved through existing structures such as the AU Commission and the RECs.

National IHL Committees

One means of addressing issues of territoriality between ministries or the lack of proper co-ordination within government on IHL files is the establishment and use of National Committees on international humanitarian law. These committees take various forms but are all interministerial bodies that exist to ensure the proper co-operation between relevant governmental departments in the advancement of IHL at the international and domestic levels. According to the ICRC the main function of these committees is to provide advisory services to the authorities.[64] National IHL Committees were first established following an experts meeting in Geneva in 1996, and now exist in more than 100 countries around the world, including 29 on the African continent.[65]

Where they function accurately and effectively these committees are an excellent tool for ensuring that the necessary co-ordination between all relevant stakeholders on IHL issues is met. The committees typically bring together representatives from ministries of Defence, the National Police Services, Foreign Affairs, Justice, Home Affairs, and Finance to discuss their governments' positions on international developments in the field of IHL and to follow up on their obligations arising from various international and regional IHL treaties they have joined. In a number of countries National IHL Committees are responsible for advising their governments on the potential advantages or pitfalls of ratifying certain instruments, as well as on issues to pay attention to in the process

63 See Lamb (note 46 above).

64 ICRC 'Practical advice to facilitate the work of National Committees on international humanitarian law' (2003) 4, available at https://www.icrc.org/eng/assets/files/other/practical_advice.pdf.

65 'Table of National Committees and other national bodies on international humanitarian law' (2016), available at https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law (accessed 29 January 2016).

of domestication.[66] Where National IHL Committees are well known by their governments they play a vital role in raising the profile of IHL domestically, including through organising dissemination sessions for parliamentarians or the general public.

However, it must be noted that National IHL Committees face a number of challenges: members of the committees typically are mid-level civil servants who do not always enjoy the support of their superiors when it comes to issues of IHL. Committees rarely benefit from government funding and rely on external funding sources to host workshops or send their members to regional and international conferences on IHL. In this regard the ICRC often provides support — technical, material, and financial — to help National IHL Committees to fulfil their functions as co-ordinators and champions of IHL. In addition, committee members can become discouraged by the slow pace of progress in advancing IHL issues, despite the co-ordination and promotion that the committees attempt to provide. It is noted that where committees have close links to their executive or legislature, for example where they are established by an official Cabinet Memorandum or where they are required to report regularly to Parliament, such committees are often better placed to overcome challenges related to internal bureaucracy.

Peer-to-peer meetings

An excellent tool for profiling IHL on the continent is the hosting of peer-to-peer meetings and seminars. These events provide government representatives with the opportunity to be updated on developments in IHL and, perhaps more importantly, to discuss with their peers the challenges they face in profiling IHL on a daily basis, as well as to share best practices for overcoming these challenges. Forty-three years ago Mutharika called for the 'convening of more regional seminars of African legal officers' but cautioned that 'fairly senior legal officers in foreign ministries or justice departments' needed to be invited.[67] Such peer-to-peer meetings can take the form of regional governmental seminars, such as the annual seminars in Pretoria and Naivasha that the ICRC co-hosts with the South African and Kenyan governments respectively.[68]

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66 See for example 'Seventh annual report of the National Humanitarian Law Committee of Mauritius for the year 2008' and 'Republic of Kenya National Committee on the Implementation of International Humanitarian Law brochure' (on file with the authors).

67 Mutharika (note 30 above) 194.

68 See for example 'South Africa: 15th Annual Regional Seminar on International Humanitarian Law — summary report', available at https://www.icrc.org/en/document/15th-annual-regional-seminar-international-humanitarian-law-preto-

They can also take the form of smaller workshops intentionally designed to bring representatives of National IHL Committees together, such as the workshop co-hosted by the ICRC and the Lesotho National IHL Committee in January 2014, which brought together representatives from the committees in Lesotho, South Africa, Zimbabwe, and Namibia.

Another benefit of regional and sub-regional peer-to-peer meetings is that they provide an opportunity for like-minded governments from the same region to discuss the advantages and disadvantages of various IHL treaties. These meetings serve the purpose of allaying fears in areas of political sensitivity regarding a certain treaty or of clarifying obligations on governments under the provisions of the treaty. Such peer-to-peer discussions have more impact than continued engagement with, or pressure from, an external organisation with a vested interest in seeing IHL promoted at the national level.

Peer-to-peer meetings can also be staged at the international level. For example, a Commonwealth meeting of National IHL Committees is organised every four years by the Commonwealth Secretariat, the ICRC, the British Red Cross Society and a partner government. A universal meeting of National IHL Committees is also organised by the ICRC and a partner government every four or five years. The benefits of such meetings for African Committees include the opportunity to learn from other like-minded regions and the encouragement to develop common positions (albeit informally) on various IHL issues. In his opening statement, at the Opening Ceremony of the Third Meeting of Representatives of National Committees on International Humanitarian Law of Commonwealth States in October 2013, the Trinidad and Tobago Minister of Foreign Affairs commented on the significance of a meeting for Commonwealth States given their 'strong historical relationship ... common institutional arrangements and share[d] ... common values'.[69]

Increased prominence of IHL on the continent

The value of IHL in Africa today seems to be self-evident. On a continent where peace and security issues dominate the agenda and curtail development and where election violence can easily degenerate

ria (accessed 2 March 2016) and 'Kenya: Making progress with national implementation of IHL', available at https://www.icrc.org/eng/resources/documents/feature/2014/07-09-kenya-seminar-implementation-ihl.htm (accessed 2 March 2016).

69 Address by the Honourable Winston Dookeran at the Opening of the 3rd Meeting of Representatives of National Committees on International Humanitarian Law of Commonwealth States, available at http://www.foreign.gov.tt/news/2013/oct/18/address-hon-winston-dookeran-min-foreign-affairs-o/ (accessed 3 March 2016).

into armed conflict, one assumes that states will ratify IHL treaties and appreciate their value with little resistance. However, this is not always the case: IHL often remains a background concern in Africa and greater prominence is given to human rights issues. Whilst IHL and human rights are complementary bodies of law and should not be seen as in competition, it is telling that university curricula often include IHL as part of a broader international law course whereas courses such as international trade and investment, human rights, and international criminal law often are stand-alone courses. In addition, IHL is not often institutionalised in the same way as human rights: often one finds a government department that deals exclusively with human rights issues and, from time to time, IHL is subsumed under this department; seldom does IHL stand alone. This marginalisation extends to multilateral bodies, in particular if they are located in peaceful regions. For example, the SADC Secretariat in its structure does not have a focal point on IHL or humanitarian concerns; instead they are discussed within the frame of peace and security and without a dedicated agenda for the development of the laws of war outside of peace operations or general humanitarian concerns as such.

To some extent increasing the prominence of IHL may encourage more ratification as it addresses the barrier of the perceived irrelevance of IHL. Better visibility of IHL can be attained through training, through increased reference to IHL in global humanitarian dialogue as well as through the integration of IHL in policies and guidelines. As mentioned above, training is a means through which IHL instruments can be better understood, but such training simultaneously gives exposure to the relevance of IHL and increases its prominence. Training should not be confined to academic curricula in universities and tertiary institutions, but should be extended to professional courses such as those taught at diplomatic schools as well as to government seminars and meetings. Increasing the prominence of IHL can be done by ensuring that IHL is not forgotten on the global humanitarian agenda. In May 2016 delegates gathered for the first World Humanitarian Summit which was the culmination of several regional consultations held across the globe and which sought to carve out a future humanitarian agenda. Many recognise the importance of protection being at the heart of the debate, but it is not always acknowledged that IHL is a legal regime that affords protection to those suffering the consequences of armed conflict. Consistent and clear reference to IHL by stakeholders in such global processes has the effect of increasing the prominence of IHL. Lastly, IHL informs many of the policies that shape and guide humanitarian action, as has long been the case with the military but not with civilian policy-makers. It is generally

accepted that states carry the obligation to disseminate IHL.[70] With recent findings that dissemination alone is not enough there has been an increased call for the integration of IHL in military doctrine and training. For instance, the ICRC, as part of its prevention approach, considers that for effective compliance IHL must not only be disseminated in military training but also must be considered in all military decision-making and communications.[71] In the same way, civilian humanitarian policies, guidelines, and decision-makers should make express reference to IHL. Many humanitarian policies make reference to IHL in a preamble, however, increasingly, the prominence of IHL requires more than a preambular reference: it requires instead a comprehensive interaction of IHL with the policy. The African Humanitarian Policy Framework, which dedicates a section to the relevance of IHL for the policy, is a good example in this regard.

Conclusion

Africa continues to live with the consequences of armed conflict. Mass displacement of populations has caused a major loss in human capital and agricultural output. It has also resulted in exacerbated conflict trends such as the flow of weapons and, more recently, radicalisation. The protracted nature of many of these conflicts means that some African youth stand to be born and live much of their lives facing conflict or the consequences of conflict. Simultaneously, the continent finds itself at a time when it is determining its own agenda with a view to enhancing progress. Any progress made in Africa stands to be hampered by the continued challenge brought about by instability due to armed conflict. Therefore, there is an imperative for Africa to do her utmost to prevent the scourge of conflict. The proper application and implementation of IHL has the potential to limit the consequences of armed conflict.

Given the importance of IHL in Africa, African states should support the development and promotion of IHL instruments as a crucial component of the proper implementation of this body of law. This role entails respecting and ensuring respect for IHL,[72] an important part of which is the ratification of the numerous instruments that comprise the body of IHL. Such ratification is important not only for the purpose of

70 See art 47 (GC I), art 48 (GC II), art 127 (GC III) and 144 (GC IV), arts 83, 87 (AP I) and 19 (AP II).

71 For a full discussion see E Stubbins Bates 'Towards effective military training in international humanitarian law' (2014) 895/896 *International Review of the Red Cross* 96 809.

72 See common art 1 to the 1949 Geneva Conventions.

strengthening IHL but also for solidifying Africa's position as a strong voice on the topic.

This article has shown, despite the importance of IHL, the level of ratification of IHL instruments on the African continent is relatively low: as described above, this often can be explained by a number of factors, both internal and external, including ignorance of IHL, limited human and financial resources, as well as a plethora of international law instruments demanding attention. Where a state is interested in an IHL treaty but faces such challenges, there are a number of practical tools that may be useful in overcoming obstacles to ratification, which range from internal processes to support from external resources.

However, as helpful as these tools may be, they will only be useful if a state has a genuine interest in engaging with this body of law. If the African voice is not reflected in the development of IHL, it will be difficult for African states to identify with and genuinely support the content of IHL instruments. Ratification of treaties is an important step on the path to ensuring compliance with IHL. It begins with African states lending their voice to diplomatic negotiations for treaties, ratifying the treaties, and taking steps at the domestic level to implement the treaties. If the continent of Africa is to advance and achieve the 'Africa we want', it must go back to basics.