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## **Africa and the Law of Armed Conflict: The more things change, the more they stay the same**

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### ***Abstract***

The law of armed conflict (LOAC) maintains a low profile on the African continent. On the one hand LOAC issues do not feature prominently in the armed conflict debate within Africa; and on the other, African states and people do not significantly participate in the global LOAC debate. These problems can be traced to the historical exclusion of Africa in the development of modern LOAC. There are essentially five groups who determine the agenda of the global debate: academics; governments; armed forces; civil society; and international organizations. Each of these groups provides an entry point to address the problems identified.

### ***Keywords***

Law of Armed Conflicts in Africa; Historical Development of Law of Armed Conflict in Africa; Colonialism and the Law of Armed Conflict; African perspective on the Law of Armed Conflict

### **Introduction**

The First World War (WWI) was particularly significant in the context of the law of armed conflict or international humanitarian law (LOAC/IHL) in Africa. It marked the first occasion upon which African states engaged in armed conflict legally bound (in a material sense) by conventional international LOAC.<sup>1</sup> African theatres of WWI were much more expansive territorially when compared to African theatres of World War II (WWII). Africans participated in WWI in three contexts: 1) colonial wars fought between local tribes and

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<sup>1</sup> See the discussion of the application of LOAC during the Second Boer War below, as this example arguably provides a limited exception to the general statement that conventional LOAC first found application to African armed forces during WWI.

colonialist forces, such as the Zaian War in Morocco.<sup>2</sup> 2) Wars between opposing colonial powers within Africa, such as the East Africa Campaign (WWI) fought primarily between the British and German Empires in East Africa both of which utilized African forces extensively.<sup>3</sup> 3) African soldiers deployed in European theatres of WWI subject to the command and control of officers from their colonial masters.<sup>4</sup> It is impossible to know exactly how many Africans fought in European theatres of WWI. It has been estimated that the Allies mobilized 650,000 colonial troops in Europe – however, this figure includes not only Africans.<sup>5</sup> Britain did not mobilize any African troops in European theatres of war, but did do so in the Middle East. Yet according to Koller, “unlike Britain, the French deployed large numbers of African troops in Europe, including 172,800 soldiers from Algeria, 134,300 from West Africa, 60,000 from Tunisia, 37,300 from Morocco, 34,400 from Madagascar and 2,100 from the Somali Coast”.<sup>6</sup> The East Africa Campaign serves well to illustrate the level of African involvement, and African suffering during WWI. As Paice has stated:

The death toll among the 126,972 British troops who served in the East Africa campaign was officially recorded as 11,189 – a mortality rate of nine per cent – and total casualties, including the wounded and missing, were a little over 22,000. The loss of life among armed combatants was, however, only the tip of the iceberg... By the end of the war more than one million

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<sup>2</sup> This armed conflict was fought from 1914 to 1921 between France and the French Protectorate of Morocco on the one hand, and the Zaian Confederation (together with various Berber tribes) on the other. During WW1 the Zaian Confederation received support from the Central Powers.

<sup>3</sup> The East Africa Campaign lasted from August 1914 to November 1918. African forces from across the British Empire was mobilized; German forces also relied heavily on local conscripts.

<sup>4</sup> Christian Koller, “The Recruitment of Colonial Troops in Africa and Asia and their Deployment in Europe during the First World War”, *Immigrants & Minorities*, Vol. 26, Nos. 1/2, March/July 2008, pp. 111–133.

<sup>5</sup> *Ibid*, p. 113.

<sup>6</sup> *Ibid*, p. 114.

[African] carriers had been recruited by the British in their colonies and in German East Africa, of whom no fewer than 95,000 had died...<sup>7</sup>

The African armed forces that fought under colonial masters were bound to conventional LOAC not by virtue of the status of the ‘states’ to which they belonged being fully sovereign, as indeed most of them were not. Instead, they were bound by virtue of the fact that they acted as functionaries of their ‘colonial masters’ – most of whom were parties to antecedent LOAC conventions. More than a century has now passed since the beginning of WWI and it is unfortunate and unjust that Africans have still not been properly recognized for their contribution and sacrifice during the ‘Great War’. Even more unfortunate is the fact that during this past century LOAC has failed to come into its own in the most conflict-ridden continent post-WWII.<sup>8</sup>

The landscape of international law has changed dramatically since the 28<sup>th</sup> of June 1914 when Gavrilo Princip fired those fateful shots – from a system of western hegemony and colonial domination to an all-inclusive international framework of sovereignly equal states.<sup>9</sup> This massive structural metamorphosis of international law did not occur in a vacuum. We find that today Africa, both on the inter-state level and the academic level, maintains a very low profile in as far as the global debate on the LOAC goes. This is perhaps the principle reason why the most acute contemporary challenges to the LOAC in Africa do not feature prominently in this global debate. This lack of engagement with the LOAC, in turn, is very likely symptomatic of the exclusion of African states in the formative years of modern conventional LOAC. As such, this contribution is moulded around two related ideas: ‘the

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<sup>7</sup> Edward Paice, *Tip & Run: The Untold Tragedy of the Great War in Africa*, Weidenfeld & Nicolson, London, 2007, pp. 392-393.

<sup>8</sup> Virgil Hawkins, *Stealth Conflicts: How the World’s Worst Violence is Ignored*, Ashgate, Aldershot, 2008. Hawkins analysed conflict death tolls between 1990 and 2007 by calculating the land area of continents or regions in proportion to conflict. His calculation revealed that 88% of deaths were in Africa, 8% in Asia, 2% in Europe, and 1% each in the Americas and the Middle East. The statistics for the period since 2007 are roughly the same.

<sup>9</sup> Princip assassinated Archduke Franz Ferdinand of Austria on this date. It is widely agreed that this assassination was a linchpin that soon resulted in WWI.

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marginalization of Africa in the global LOAC debate’ and ‘the marginalization of LOAC in the armed conflict debate within Africa’.

The first part of this contribution, ‘Africa and the Development of the Law of Armed Conflict: From the 1864 Geneva Convention to the 1977 Protocols’, consists of a discussion of the status of African states during the colonial period and as such, their exclusion, for the most part, from international negotiations regarding LOAC. The Second Boer War, which predates WWI, is also discussed as the first African conflict where the Laws and Customs of War (as opposed to conventional LOAC) were applied as a matter of law.<sup>10</sup> This discussion informs our understanding of why the Laws and Customs of War had not featured in Africa prior to the Second Boer War. This first part of the contribution serves to provide context to the second part of the contribution, ‘Africa in the Global LOAC Debate; and the LOAC Debate in Africa’. Here the dual contention that LOAC is not included in the armed conflict debate within Africa, and that LOAC challenges of particular concern and relevance within Africa are not included in the global LOAC discourse is considered. In particular, the role players that determine the agenda of the global debate are identified; and the extreme focus on pan-Africanism in regional integration within Africa is discussed as a stumbling block to the mainstreaming of more global regimes of law such as LOAC. Finally, the last part of the contribution touches on ‘The Future of LOAC in Africa’. In this part the role of the ICRC is highlighted in the mainstreaming process of LOAC within Africa.

Many of the arguments put forward in this contribution hold true also for other parts of the developing world, notably South America and much of Asia. However, the present contribution is written from an African perspective, with reference to African considerations.

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<sup>10</sup> The Boer Wars were two separate armed conflicts, the First Boer War was fought between the United Kingdom and the South African Republic from 20 December 1880 – 23 March 1881. The Second Boer War, which was a much more significant armed conflict, both in intensity and duration, was fought between the British Empire on the one hand and the Zuid-Afrikaansche Republiek (Transvaal – known as the South African Republic) and the Oranje-Vrijstaat (Orange Free State) on the other hand, and lasted from 11 October 1899 to 31 May 1902.

## **Africa and the Development of the Law of Armed Conflict: From the 1864 Geneva Convention to the 1977 Protocols**

Today much attention is placed on the rapid expansion and diversification of international law, which has led to different sub-sets of international law competing for dominance with one another. International lawyers generally have a grasp of the historical development of modern international law during the era of empire – which was characterized by western hegemony, exclusionism and exceptionalism. In contrast to this narrative of the development of general international law, the parallel development of the law of armed conflict, as a sub-regime of international law, is generally portrayed as an all-inclusive, universal regime of law. For instance, in the introductory chapter of ‘The Handbook of International Humanitarian Law’ Greenwood paints the picture of such an all-inclusive regime that reflects practices from across the globe, and concludes “the theory that humanitarian law is essentially ‘Eurocentric’ is in reality more a criticism of most literature on the subject than a reflection of historical fact”.<sup>11</sup> There thus seems to be a clear disconnect between ‘our’ understanding of the antecedent state of international law during the 19<sup>th</sup> and early 20<sup>th</sup> centuries, and ‘our’ understanding of the development of modern conventional LOAC, which occurred during the same period.

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<sup>11</sup> Sir Christopher J. Greenwood “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, 2<sup>nd</sup> Edition, p. 16. Upon taking over authorship of this chapter for the 3<sup>rd</sup> edition of the publication, O’Connell retained this sentence, Mary Ellen O’Connell “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013, 3<sup>rd</sup> Edition, p. 16. It is true that archeologically and anthropologically there is evidence of customary practice from within Africa and elsewhere that corresponds broadly to some principles both of modern law *jus ad bellum* and *jus in bello*. However, no study has been undertaken to determine the degree and specificity of overlap. Moreover, the mere existence of such past practices in no way establishes a causal relationship between these practices and modern conventional LOAC. In fact, the factors that influenced the development of international law during the elaboration of early modern conventional LOAC very much suggests that there is no such causal relationship.

Modern conventional LOAC largely found its genesis in the first Geneva Convention of 1864 and the Hague Regulations of 1899 and 1907. In their elaboration, prevailing considerations that moulded general international law at the time surely also influenced them.<sup>12</sup> In order to appreciate the context of the development of LOAC in Africa, it is imperative to address the status of African states within the international legal order during the period contemporary with key developments of such conventional LOAC.

During the 19<sup>th</sup> and early 20<sup>th</sup> centuries European empires managed to absorb into their domain of power virtually the entire territory of Africa. The only states on the continent that arguably escaped western colonialism are Ethiopia and Liberia, and they are tenuous examples at best.<sup>13</sup> While significant administrative colonial rule was never established in Liberia and Ethiopia, these states certainly did not escape the wrath of colonialism or alien domination all together. The practice of claiming territory in Africa predated the development of doctrine to justify such claims to territory. Most of the early modern informal colonial claims in Africa were based on colonial treaties.<sup>14</sup> These treaties were essentially written

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<sup>12</sup> Simma has warned that the effects of such expansion and diversification should not be overstated, and different sub-regimes of international law, including the modern LOAC, developed and continues to exist very much within the structural confines of international law more generally. Bruno Simma, “Fragmentation in a Positive Light”, *Michigan Journal of International Law*, Vol. 25, 2004, pp. 846-847.

<sup>13</sup> Between 1921 and 1947 the American Colonization Society formed a settlement of freed American slaves of African descent in Liberia (although in reality more settlers’ roots traced to Central America than Africa). This settlement was conceived of within the rhetoric of colonialism. During 1947 Liberia declared independence as Africa’s first republic. However, for the period 1947 until 1980 the so-called Americo-Liberians, who represented a significant minority in Liberia, absolutely dominated political power in that country. For its part, Ethiopia lost the Second Italo-Ethiopian War culminating in Italy’s military occupation of Ethiopia under the flag of Italian East Africa. Italian East Africa was short-lived, as in 1940 Italy aligned itself with the Axis Powers and by the end of 1941 the Allied Powers liberated Ethiopia during the East Africa Campaign.

<sup>14</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960*, Cambridge University Press, Cambridge, 2001, pp.136-137.

documents signed and entered into by illiterate (in the western sense) village chiefs, in a language they did not understand, transferring all people within their village and their ancestor's claims to the territory and its resources to the colonizing entity. It was on this basis that King Leopold II of Belgium infamously claimed the territory of modern day Democratic Republic of the Congo (DRC) as his own.<sup>15</sup> The legendary explorer Stanley was the primary agent through which Leopold secured these treaties in the context of the Congo Free State. Sir Richard Francis Burton's claim that "Stanley shoots negroes as if they were monkeys" goes some way in indicating that Belgian forces in the DRC considered themselves to operate in a legal and moral vacuum.<sup>16</sup>

The concept of empire as it manifested in Africa was much more nuanced than the term 'colonialism' suggests. Koskenniemi argues that there were various methods and mechanisms through which western powers could extend their exclusive influence in African states, which did not amount to formal administration and thus the establishment of a colony.<sup>17</sup> Lord Lindley provides the example of British Bechuanaland: "an interesting example of a protectorate in which the internal as well as the external sovereignty has passed to the protecting Power, but the territory has not been formally annexed, so that, in the eyes of British law, it is not British territory".<sup>18</sup> One effect hereof was that British law did not apply within the relevant territory. As a result, Britain was able to maintain a *de facto* colony, without being hampered by British law, which for example outlawed slavery.

Over time, doctrine developed to justify legally the colonization of non-western peoples. Essentially the justification for establishing colonial administrations, and acquiring territory

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<sup>15</sup> *Ibid*, pp. 155-166.

<sup>16</sup> See generally, Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Pan Books, London, 2006. See also generally, John Bierman, *Dark Safari: The Life behind the Legend of Henry Morton Stanley*, Hodder and Stoughton, London, 1991.

<sup>17</sup> M. Koskenniemi, above note 14, pp. 124-125.

<sup>18</sup> Lord M.F. Lindley, *The acquisition and government of backward territory in international law: Being a treatise on the law and practice relating to colonial expansion*, Longmans, Green And Co, London, 1926, p. 187.

through the means of occupation was founded on the notion that the relevant territory was *terra nullius*. That is to say that the territory was occupied by ‘savages’ who were not politically organized.<sup>19</sup> The inherent hegemony of this construct is well illustrated by Lord Lindley’s writings on “backward territory” in international law of 1926 where he stated that “territory which is *territorium nullius* may pass under the dominion of a Sovereign” by occupation and accretion. He went on to state that on the other hand, “transference of territory under a Sovereign to the *territorium nullius* may take place” by abandonment, forfeiture and destruction.<sup>20</sup> It is interesting to note the transacting parties are the Sovereign and the *territorium nullius*, no mention is made of the people indigenous to the *territorium nullius*.

Koskenniemi speaks of ‘the myth of civilization: a logic of exclusion-inclusion’ when addressing the development of international law in the period contemporary with the first Geneva Convention of 1864 and the Hague Regulations.<sup>21</sup> The concepts of statehood and sovereignty, and the concomitant international legal personality that attaches to states proper was to undergo dramatic metamorphosis leading up to and following the Geneva Convention of 1864. However, this metamorphosis was gradual. Not only African states were marginalized during the early development of conventional LOAC. It was only in 1856 with the adoption of the Peace Treaty of Paris that a non-Christian state, Turkey, was regarded as a member of the international community of civilized states. This accounts for the fact that only twelve western European states negotiated the Geneva Convention of 1864. Only three African states ratified this Convention.<sup>22</sup>

During 1899 Russia, as convener of the first Hague Conference invited twenty-six states to participate. In addition to the European states, the Islamic Republic of Iran, China, Japan, Siam, Turkey and the United States (US) were invited. By 1907, when the US took the

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<sup>19</sup> During the 19<sup>th</sup> and early 20<sup>th</sup> centuries there was a nuanced debate regarding the regulation by international law of European engagement with the non-European world. The particularities of this debate go above and beyond the scope of this contribution.

<sup>20</sup> Lord M.F. Lindley, above note 18 above, p. 187.

<sup>21</sup> M. Koskenniemi, above note 14, pp. 127.

<sup>22</sup> Congo (17 December 1888); Orange Free State (28 September 1897); and the South African Republic (30 September 1896).



initiative to organize the second Hague Conference, forty-seven states were invited, of which only Ethiopia, Costa Rica and Honduras did not attend. On this occasion those invited included a significant number of Central and South American states. Ethiopia was the only African invitee. These events were significant, but, at the time, they were still met with considerable scepticism. For his part, Westlake concluded that even though China, Siam and Persia participated in the Hague Conferences, their admission into the “system” nevertheless fell short of “recognizing the voices as of equal importance with those of the European and American Power”.<sup>23</sup> To date, from the African Continent, only Ethiopia (during 1935), Liberia (during 1914) and South Africa (during 1978) have ratified any of the Hague Conventions/Declarations emanating from the Hague Conferences of 1899 and 1907.

By the time the Geneva Conventions of 1949 were negotiated, fifty-nine states participated. Thus, during the period between the recognition of Turkey as a sovereign state during 1856, and the negotiation of the 1949 Geneva Conventions, membership to the international community of civilized states expanded significantly. As a corollary, so too did the number of states which actively engaged in the development of conventional LOAC. Nevertheless, from an African perspective not much had changed. Only Egypt and Ethiopia represented the African continent at the negotiations of the 1949 Geneva Conventions.<sup>24</sup>

A wave of decolonization followed the adoption of the Geneva Conventions of 1949, and by the time the conference was convened to elaborate the 1977 Additional Protocols, 135 states participated, with thirty-nine states representing the African continent.<sup>25</sup> Moreover, of the twelve National Liberation Movements from eight countries who attended as delegates, eight groups from six countries were African.<sup>26</sup>

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<sup>23</sup> John Westlake, “The Native State of India”, (1910), in L. Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, Cambridge, 2014, p. 623.

<sup>24</sup> “Final Record of Diplomatic Conference of Geneva of 1949”, Vol I, 1949, pp. 158-170.

<sup>25</sup> “Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva”, Vol II (1974-1977), 1977, pp. 25-408.

<sup>26</sup> *Ibid.*

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The importance in understanding the aforementioned history, for purposes of this contribution, lies in the implication that African states played no meaningful role in the negotiations and development of early LOAC instruments. Even more importantly, neither did they benefit from the protection of such instruments. We thus find that foundational notions of LOAC, such as equality of belligerents, were forged along the lines of who ‘civilized’ states deemed to be their equals. In as far as the elaboration of treaty norms is concerned, LOAC is a rather stagnant branch of international law. As such, even though African states now form a part of the international community of sovereign equal states, the era of the development of foundational, conventional LOAC has largely passed. As will be further explored below, it should hardly be surprising that there is a rejection from among many quarters within Africa of legal concepts, the development of which occurred in a manner where African states were intentionally and consciously excluded from participation.

The Second Boer War and the Application of ‘the Laws and Customs of War’: A First for Africa?

While it is true that it was only during WWI that African states engaged in armed conflict subject to conventional LOAC, it is worth mentioning that there is much evidence that indicates that during the Second Boer War both the British and Boer forces constrained their actions in combat due to what they considered their respective legal obligations. The question arises as to what the source of these legal obligations was. The point of departure of Western Powers in the colonial wars was generally that the communities indigenous to the territory in question never had any form of sovereignty to begin with. Sovereignty, as it were, was a concept reserved exclusively for European powers. Westlake argued: “International law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded.”<sup>27</sup> This point of departure was challenged during the Second Boer War, as the Boers too were of European decent. Yet, there was a voice that maintained the general premise regarding colonial territories and their

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<sup>27</sup> J. Westlake, *Chapters on the Principles of International Law*, (1894), in L. Oppenheim above note 23, p. 143, as quoted in M. Koskenniemi, above note 14, p. 127.

peoples in the context of the Second Boer War. Field Marshal Lord Wolsely, Commander-in-Chief, British War Office, expressed the view:

I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races... To attempt to tie our hands in any way, no matter how small, by the 'Laws and Customs of War' proposed for *Civilized* nations at the Peace Conference, would be in my opinion suicidal, for the Boers would not be bound by any such amenities.<sup>28</sup>

This perspective certainly represented the minority view at the time. The source of legal obligations to which both the British and Boer forces subjected themselves, in as far as LOAC is concerned, is either the Laws and Customs of War, or conventional LOAC. The only LOAC convention to which all forces involved were party was the 1864 Geneva Convention. Nevertheless, Major-General Sir John Ardagh, Director, British Military Intelligence, was of the view that the substantive content of the Hague Conventions embodied the Laws and Customs of War, and as such found general application.<sup>29</sup> Ardagh further commented:

The peculiar conditions of the war in South Africa may justify a departure in certain instances from the Laws and Customs of War on the ground of military necessity, but as reciprocity is the foundation of the observance of international rules, it should be most carefully weighed how such departures would affect us if their exercise was appealed to as precedent created by ourselves when we found ourselves engaged in other wars.<sup>30</sup>

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<sup>28</sup> Lord Wolseley to Parliamentary Under-Secretary, War Office 32/850, 14 February 1900, as quoted in Andries W.G. Raath and Hennie A. Strydom, "The Hague Conventions and the Anglo-Boer War" *South African Yearbook of International Law*, Vol. 24, 1999, p. 156.

<sup>29</sup> Major-General Sir John Ardagh, "Ardagh Papers", Microfilm A422, Transvaal Archives, Pretoria.

<sup>30</sup> Major-General Sir John Ardagh, "Ardagh Papers", National Archives of the United Kingdom, PRO 30/40/17.

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It is not uncommon for national armed forces to constrain their actions during battle to specific sets of rules or norms not due to legal obligation per se, but as a result of a policy decision to that effect. We see this often in the modern context with respect to European States who seek to ensure that their operations, in specific contexts, are consistent with the European Convention on Human Rights, even where this Convention does not find application as a matter of law.<sup>31</sup> The contextual basis for understanding the legal status of the Boer forces during the war is to be found in the 1903 judgment by Innes, CJ in the matter *Van Deventer v Hancke and Mossop*.<sup>32</sup>

This case related to a claim for property that was confiscated by British forces during the war. However, the status of various forces at various points in time during and after the war was central to settling the questions of law that lay at the heart of the matter. The case was heard in Pretoria following British victory, and the annexation of the two Boer Republics. As such, the Court was convened as a Court of the Crown. Innes, CJ held:

... from the point of view of a British Court, [the Burgher forces] were a community or body of men possessing no territory as a State and under no form of government which such a Court could recognize as a legal government. But, as between the two contending armies they enjoyed full

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<sup>31</sup> The European Court of Human Rights has rendered a series of judgements on the extraterritorial application of the European Convention on Human Rights, specifically in the context of armed conflict. This growing jurisprudence has been marred by inconsistencies and incoherencies, leading states with a large degree of uncertainty regarding precisely under what circumstances the European Convention on Human Rights will find application to military operations extraterritorially. This confusion has been furthered by the recent judgement in European Court of Human Rights (ECtHR), *Hassan v. United Kingdom*, Judgment, Grand Chamber, 2014, 29750/09, where the Court failed to give clarity on the co-application of International Human Rights Law and LOAC. It is very likely that this general uncertainty impacts upon states' decision to apply the European Convention on Human Rights to military operations as a policy, so as to err on the side of caution.

<sup>32</sup> Supreme Court of Transvaal, *Van Deventer v. Hancke and Mossop*, 1903, TS 401.

belligerent rights. The recognition of such rights is quite consistent with a denial of any claim to sovereignty...<sup>33</sup>

To support its finding in this regard, the Court referred to the US Supreme Court judgment in *Rose v. Himely* where the same reasoning was employed as regards a war between France and its former colony St. Domingo.<sup>34</sup> Thus, a British Court had determined that, as a matter of law, the Burgher forces “enjoyed full belligerent rights”, and as such, as a matter of law, the Laws and Customs of War applied during the Second Boer War. A further interesting observation in this regard is that the past practice of recognition of belligerency did provide for a form of Non-International Armed Conflict (NIAC) long before the elaboration of Common Article 3 to the Geneva Conventions and Additional Protocol II. Nevertheless, the recognition of belligerency was a subjective determination that falls short of modern LOAC standards. It is also telling that the Treaty of Vereeniging that ended the Second Boer War, recognized a form of combatants’ privilege:

No proceedings CIVIL or CRIMINAL will be taken against any of the BURGHERS so surrendering or so returning for any Acts in connection with the prosecution of the War. The benefit of this clause will not extend to certain Acts contrary to the usage of War which have been notified by the Commander in Chief to the Boer Generals, and which shall be tried by Court Martial immediately after the close of hostilities.<sup>35</sup>

Dugard is of the view that even though there are doubts about the independence of the South African Republic, the Second Boer War (1899-1902) was regarded by all states as a war between sovereign independent states – including the United Kingdom.<sup>36</sup> It is important to mention that at the time of the commencement of the Second Boer War, the United Kingdom as well as Zuid-Afrikaansche Republiek (Transvaal) and the Oranje-Vrijstaat (Free State) had

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<sup>33</sup> *Ibid*, pp. 412-413.

<sup>34</sup> Supreme Court of the United States, *Rose v Himely*, 8 U.S. 4 Cranch 241 (1808).

<sup>35</sup> Treaty of Vereeniging, 31 May 1902, (entered into force on 31 May 1902), Art. 4.

<sup>36</sup> John Dugard, *Principles of International Law: A South African Perspective*, Juta, Cape Town, 2011, 4<sup>th</sup> Edition, p. 16.

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all ratified the Geneva Convention of 1864.<sup>37</sup> Nevertheless, this convention is one of extremely limited scope, dealing exclusively with medical assistance to wounded and sick soldiers. Additionally, no appeal was ever made to the application of any of the ten articles that make up this convention during the Second Boer War. As such, conventional LOAC did not find real application during the Second Boer War.

The question arises why this same reasoning, being the basis on which the Laws and Customs of War was applicable to relevant military engagement, was not employed in other wars between colonizing powers and local populations. Many factors certainly impacted on this, the most important of which seems to be that what lay at the heart of the distinction was conceptions of being civilized and being savage. The forces of both the Zuid-Afrikaansche Republiek (Transvaal) and the Oranje-Vrijstaat (Free State), the two Boer Republics who fought the Second Boer War, were of western European descent; they spoke a European language (Dutch); they dressed like Europeans; they were Christian; and they organized themselves politically in a European manner. It was thus more difficult to employ the rhetoric of civilized versus savage in interaction with the Boer forces. No legal criteria were ever developed to determine which peoples were savages and which were civilized – these determinations were based on social constructs and not legal criteria.

### **Africa in the Global LOAC Debate; and the LOAC Debate in Africa**

Speaking of a global debate is in many respects not satisfactory, as there are many on-going debates on LOAC issues at any given time, some global and some more local. These debates are dynamic and take on new dimensions as they progress. Nevertheless, it is useful to be able to refer to those issues that feature prominently and consistently in the contemporary LOAC discourse collectively. For present purposes, the term ‘the global debate’ will be used.

Whether it be technological innovation that creates new means of armed conflict, or whether it be challenges to fundamental notions of the law of armed conflict posed by new methods, the global discourse on the law of armed conflict is directed – for the most part – by ‘the cutting edge’ as determined by the needs of a select few western states. Along these contours

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<sup>37</sup> The Zuid-Afrikaansche Republiek and the Oranje-Vrijstaat ratified the Convention on 30 September 1896 and 28 September 1897, respectively.

we see massive bodies of work develop on topics such as cyber warfare and terrorism, among many others. Indeed, the technology that drives new means of armed conflict is so dynamic that in a consumerist style the debate keeps shifting from one technology to the next. This drive to focus on the cutting-edge largely ignores marginalized conflicts in developing countries, particularly non-international armed conflicts, and this focus on the new is, in my view wrongly, premised, in part, on the assumption that we have largely exhausted debate on the old.

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

#### Determining the Agenda of the Contemporary Global LOAC Debate

Before determining which issues feature in this debate, and equally important which issues do not feature, it is relevant to consider who the parties are who set the agenda for this global debate. There are essentially five groups of actors who have the potential, in any given case, to influence the agenda of the global debate: academics; governments; armed forces; civil society; and international organizations (including regional organizations).<sup>38</sup> States remain the primary agents through which international law, including LOAC, is developed. Among these five groups, states are represented both by the group “governments” as well as the group “armed forces”. This is so because in the context of LOAC armed forces often play a very central role in determining a state’s policy in respect of LOAC issues. Each of these entities pursue unique goals and agendas. However, the goals and agendas of governments, armed

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<sup>38</sup> The media do not influence the agenda of the global debate directly, as they may take up a relevant issue, such as UAVs or child soldiering, but they do not couch the issue as a LOAC issue as opposed to an IHRL issue. Having said that, the media plays a massive roll in drawing attention to LOAC issues, such as UAVs and child soldiering.

forces and international organizations (as state-based organizations) will often be loosely aligned. Engagement with specific IHL issues by these role players is determined by what is relevant to them and their agendas at any given point in time. They all engage with one another, and they also engage with their networks beyond their states. The agendas of many of these role players take on an added layer of political complexity in the context of peace support and multi-national operations. Of these groups of actors it is only academics which have the freedom to pursue research agendas that are not related to current events or developments. However, academically there is generally less value in pursuing a research agenda divorced from the pertinent legal questions of the time. I am not suggesting that role players belonging to each of these five categories absolutely have to engage with an issue for that issue to make it onto the agenda – indeed, this is usually not the case. Often, military and government lawyers will be very tight-lipped about specific LOAC issues. For instance, when it became public knowledge that the US is using Unmanned Aerial Vehicles (UAVs) in the context of its targeted killing programmes, the issue of the use of weaponised UAVs skyrocketed to the top of the agenda of the global LOAC debate. Those responsible for this were for the most part academics, civil society and functionaries within international organizations. Nevertheless, it is supremely important to note that while the US government and US armed forces, for obvious reasons, often avoid pertinent issues, when they do engage with matters such as UAVs they do so within the language and structural parameters of LOAC (that is not to say that their positions are necessarily in conformity with LOAC).<sup>39</sup>

While not an exhaustive list, most will agree that the following issues have featured prominently in the global debate during the past decade: automated weapons such as UAVs; issues related to the scope of regulation of NIAC; cyber warfare; detention issues; non-state armed actors (both in the context of IAC and NIAC); the so-called War on Terror; peace support operations; and the notion of Direct Participation in Hostilities (DPH). Very importantly, I am not arguing that these issues are irrelevant to African states – instead I am arguing that these issues are not necessarily the primary issues of concern in the context of ongoing armed conflicts in Africa. Moreover, where these are issues of such concern, they are

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<sup>39</sup> See for example, Harold H. Koh (Legal Adviser, U.S. Department of State, *ex officio*), “The Obama Administration and International Law”, Annual Meeting of the American Society of International Law, 25 March 2010.



not discussed within the global debate from the African perspective. All of the issues listed above can be divided into two categories: new issues that came to the fore on the one hand, and more traditional issues that have regained significance on the other. New issues, for the most part, are technologically driven such as remote technologies and cyber warfare.<sup>40</sup> These issues are not of equal significance to armed conflict in Africa when compared to armed conflicts in which the US and other developed countries have been party to in recent times. In the context of traditional issues the question is why do they regain significance?

The number of armed conflicts at any given time will probably surprise most. The DRC, for example, have seen the parallel existence of multiple ongoing armed conflicts, of an international and non-international character, at the same time. It is, however, not surprising that from among this vast array of armed conflicts internationally it is only a handful that set the trends as far as the global debate on IHL is concerned. This is not due to any specific agenda of exclusion, or exceptionalism. Instead, when countries within which LOAC is prioritized (that is to say where there is a critical mass of LOAC expertise and focus from among a combination of role players belonging to the five categories mentioned above) engage in armed conflict, debate on issues that affect the specific armed conflict intensifies dramatically. Many of the issues that have become relevant in the context of western military engagement in Iraq and Afghanistan, such as detention during NIAC,<sup>41</sup> have long existed in the context of many armed conflicts in states across Africa. However, because of a lack of engagement with IHL within these states, these issues were not elevated in any significant way, to the global level of discourse and debate.

“African solutions for African problems” and the Marginalization of LOAC in Africa<sup>42</sup>

Again, while not being an exhaustive list, during the past two decades alone there has been armed conflict in: Cameroon; the Central African Republic; Chad; Côte d’Ivoire; Djibouti; the DRC; Egypt; Eritrea; Ethiopia; Liberia; Libya; Mali; Niger; Nigeria; Sierra Leone; Somalia;

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<sup>40</sup> Nevertheless, debate regarding changes in the way in which armed conflicts are conducted can also feature under this category.

<sup>41</sup> See for example, *Hassan v. United Kingdom*, above note 31.

<sup>42</sup> The phrase “African solutions for African problems” was coined by the economist George Ayittey during 1993.

South Sudan; Sudan; and Uganda. Some of these states, notably the DRC and Somalia, continue to suffer from armed conflict and have done so for multiple decades. The human cost of armed conflict on the African continent has been devastating. The death toll of the Second Congo War has been estimated, at the most liberal end of the spectrum at 5.4 million people, and at the most conservative end of the spectrum at 860 thousand people.<sup>43</sup> Africa is indeed a continent of many problems.

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

Sadly, the heads of state and government who attended the summit defended their position to insulate themselves from ICC prosecution based on the political ideal of ‘African solutions to African problems’. Hiding behind this

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<sup>43</sup> The International Rescue Committee (IRC) has concluded that 5.4 million excess deaths occurred between August 1998 and April 2007 (Benjamin Coghlan, Pascal Ngoy, Flavien Mulumba, Colleen Hardy, Valerie Nkamgang Bemo, Tony Stewart, Jennifer Lewis and Richard Brennan, “Mortality in the Democratic Republic of the Congo: An ongoing crisis”, International Rescue Committee, p.ii.). On the other hand, The Human Security Report Project of Simon Fraser University disputes these findings, finding instead that the armed conflict related fatalities for this period is closed to 860,000 (Human Security Report 2009/2010: The Causes of Peace and the Shrinking Costs of War, *Human Security Report Project*, 2010, p. 43). For an academic discussion of methodology see, Michael Spagat, Andrew Mack, Tara Cooper and Joakim Kreutz, “Estimating War Deaths: An Arena of Contestation”, *Journal of Conflict Resolution*, Vol. 53, 2009, pp. 934-950.

to serve their self-interest is both a misuse and a perversion of the ideal. Such instrumentalisation of this ideal erodes its moral force as well as its political and institutional significance for enabling the continent to take the lead in dealing with the challenges it faces.<sup>44</sup>

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

I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states – never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned nearly two and a half centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorization of justice to the artificially imposed limits of nation states. This is not only because ... "injustice anywhere is a threat to justice everywhere" (though that is hugely important as well). But in addition we have to be aware how our interest in other people across the world has been growing, along with our growing contacts and increasing communication.<sup>45</sup>

Much attention has been placed of late on creating buy-in among armed non-state actors into LOAC principles, with the underlying idea being that voluntary compliance will be enhanced

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<sup>44</sup> Solomon A. Dersso, “The AU's ICC summit: A case of elite solidarity for self preservation?”, *Institute for Security Studies*, 15 October 2013, available at: <http://www.issafrica.org/iss-today/the-aus-icc-summit-a-case-of-elite-solidarity-for-self-preservation> (all internet references were accessed in June 2015).

<sup>45</sup> Amartya Sen, “Global Justice” in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds.), *Global Perspectives on the Rule of Law*, Routledge, Oxon, 2010, pp. 69-70.

should there be such buy-in by the armed actor in question.<sup>46</sup> This approach has been operationalized specifically in Africa and other parts of the developing world.<sup>47</sup> At the same time, it is overlooked that in the African context, there is often little buy-in into the LOAC even from state actors. The historical discussion with which this contribution commenced serves to contextualize the present-day lack of engagement with LOAC within Africa.

As armed conflict issues are not discussed within the parameters of LOAC in Africa, the question arises in which areas other than LOAC are these issues absorbed? The rhetoric within Africa is largely one of pan-Africanism and regional integration. The preamble to the Constitutive Act of the African Union commences with these words: “Inspired by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States”. Additionally, the stated goals of the African Union, as provided for in the Constitutive Act, include:

- (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; [...]
- (c) accelerate the political and socio-economic integration of the continent;
- (d) promote and defend African common positions on issues of interest to the continent and its peoples; [...]
- (j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; [...]

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<sup>46</sup> See for example, Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 5-51.

<sup>47</sup> The organization Geneva Call leads the field in such direct engagement with armed non-state actors, this organization has been active in twenty-seven states, including eight African states (Burundi; DRC; Mali; Niger; Senegal; Somalia; Sudan; and Western Sahara).

(1) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.<sup>48</sup>

There is little doubt that this embrace of pan-Africanism and regional integration in Africa is a response to historical western domination and subjugation.<sup>49</sup> As a result, collectively, African states have selectively embraced regimes of law that fit into the goals of pan-Africanism and regional integration. International Human Rights Law (IHRL), for example, is very well suited to these goals. Through the application of developed IHRL concepts, such as the principle of subsidiarity, the operationalization of legal norms can occur mostly in a more local space – the African continent. Despite being the least developed of the three regional human rights systems, the African system has received a great deal of attention. Africa has produced leading human rights law scholars whose voices are heard, and taken seriously, on the international stage. Many African universities play host to academic centres and research focus groups on IHRL. Across Africa there are innumerable African grass roots human rights NGOs that act as a check on state power. For the most part debate regarding LOAC issues are either absorbed or muffled by the vibrant IHRL debate, and within the architecture of human rights law, on the continent. This has further been facilitated by the recent emphasis on the co-application of LOAC and IHRL, as a result of the fact that such co-application emphasizes the relevance of IHRL to the regulation of the conduct of hostilities and the protection of victims of war. This is not to say that such co-application is undesirable, but rather that, by definition, IHRL cannot cater for all aspects of the regulation of the conduct of hostilities and the protection of victims of war. There thus seems to be an attempt to fit a square peg in a round hole.

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<sup>48</sup> Constitutive Act of the African Union, 1 July 2000, 2158 UNTS 3 (entered into force 26 May 2001), Art. 3.

<sup>49</sup> Indeed, the Organization of African Unity (OAU), the predecessor to the African Union (AU), was set up with the express purpose of promoting “the unity and solidarity of the African States” and “to eradicate all forms of colonialism from Africa”. As provided for in Charter of the Organization of African Unity, 25 May 1963, 479 UNTS 39 (entered into force 13 September 1963), Art. 2.

Viljoen has argued that Africa has indeed played a major role in developing LOAC.<sup>50</sup> The title of Viljoen's contribution is "Africa's contribution to the development of international human rights and humanitarian law" – he thus addressed both IHRL as well as LOAC together. The examples Viljoen cites of Africa's contribution to the development of human rights are plentiful, and include: unique facets of the African Charter on Human and Peoples' Rights;<sup>51</sup> developments regarding children's rights initiated by the African Charter on the Rights and Welfare of the Child;<sup>52</sup> developments regarding refugee protection initiated by the Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa;<sup>53</sup> environmental protection with specific reference to developments brought on by the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention.<sup>54</sup> In addition to these developments which emanated from within Africa, Viljoen also indicates that African states played a meaningful role in the development of the UN human rights architecture.<sup>55</sup> The argument that Africa engages actively with the development of human rights, both regionally and internationally, is very compelling. In contrast hereto, the examples drawn upon to indicate Africa's contribution to LOAC are limited to the establishment of the International Criminal Tribunal for Rwanda

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<sup>50</sup> Frans Viljoen, "Africa's contribution to the development of international human rights and humanitarian law", *African Human Rights Law Journal*, Vol. 1, No. 1, 2001, pp. 18-39.

<sup>51</sup> *Ibid*, pp. 19-22. Group or peoples' rights serve as a very good example.

<sup>52</sup> *Ibid*, pp. 22-23. Viljoen illustrates that in many respects the African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force 29 November 1999), provides better protection than the United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>53</sup> *Ibid*, pp. 23-28. The expansion of the concept "persecution" for purposes of refugee status determination by the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974), is emphasised.

<sup>54</sup> *Ibid*, pp. 23-28. African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3 (entered into force 16 June 1969) and the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 30 January 1991, 2101 UNTS 177 (entered into force 22 April 1998).

<sup>55</sup> *Ibid*, pp. 31.

(ICTR) and its jurisprudence; the adoption of the Rome Statute and the establishment of the ICC;<sup>56</sup> and the regulation of mercenaries.<sup>57</sup> These examples are not nearly as compelling as those he cited in respect of human rights. Firstly, the ICTR was created through a Security Council Resolution,<sup>58</sup> only three African states voted on the resolution, of which one voted against – being the only vote against; secondly, both the ICTR and ICC belong more properly to international criminal law and not LOAC;<sup>59</sup> and finally, the regulation of mercenaries is indeed an area of LOAC in which Africa played a leading role. However, citing Taulbee,<sup>60</sup> Viljoen acknowledges:

The African response can be explained primarily with reference to the fact that the mercenary has become ‘the symbol of racism and neo-colonialism within the Afro-Asian bloc’, because the recurring scenario was one of ‘white soldiers of fortune fighting black natives’.<sup>61</sup>

Thus it seems that African states’ motivation for engaging with this issue is directly linked to their lack of motivation in engaging with LOAC more generally, being the colonial history. Viljoen’s contribution further serves as a good example of the point made above, that in the African context the LOAC debate is, for the most part, absorbed into IHRL. This is not a criticism of Viljoen, who specifically acknowledges that “international humanitarian law is

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<sup>56</sup> Rome Statute of the International Criminal Court, 17 July 1998, (entered into force 1 July 2002), UN Doc. A/CONF.183/9.

<sup>57</sup> The first ever convention regulating mercenary activities was elaborated in Africa, OAU Convention for the Elimination of Mercenarism in Africa, 3 July 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (entered into force 22 April 1985).

<sup>58</sup> UN SC Res. 955, 8 November 1994.

<sup>59</sup> LOAC certainly plays a very meaningful role in the development of international criminal law (ICL). Nevertheless, ICL has developed into a sub-regime of international law in its own right, and we find that concepts of LOAC origin take on a separate character as war crimes within ICL.

<sup>60</sup> James L. Taulbee, “Myths, mercenaries and contemporary international law”, *California Western International Law Journal*, Vol. 15, 1985, p. 342.

<sup>61</sup> F. Viljoen, above note 50, p. 37.

distinct from international human rights law”.<sup>62</sup> Indeed there are many virtues in the co-application of IHRL and LOAC, and in multi-, inter- and trans-disciplinary scholarship more generally. However, in an environment where LOAC issues are dealt with mostly by human rights lawyers, often these issues are subjugated to human rights thinking and ideals which is not always consistent with the ideals of LOAC, and, there is the further implication that these issues are not dealt with by subject-matter experts.

The preceding discussion serves largely as an indictment of African role players for failing to come to the LOAC table and make their voices heard. This is, however, not the entire picture. First, as the initial part of this contribution suggests, the colonial history impacted heavily on creating a climate of scepticism of international, largely western, concepts such as the LOAC from among African states. Secondly, a seat is generally not reserved for African role players at the LOAC table on the international level. For example, only one expert from Africa participated in the process that led to the adoption of the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (DPH Study).<sup>63</sup> It is worth mentioning that with the prevalence of NIACs within Africa, the notion of DPH is of incredible significance to the African continent. Another example is the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual).<sup>64</sup> The Tallinn Manual process was an expert-driven process, initiated by the NATO Cooperative Cyber Defence Centre of Excellence, an accredited NATO ‘Centre of Excellence’.<sup>65</sup> This may suggest that the process included only participants from NATO member states. However, this is not the case. For instance, Colonel Penny Cumming (Australian Defence Force) participated as an expert. None of the experts, peer reviewers or editors involved in this process are African. It is true that at present cyber warfare is not a threat in Africa comparable to other parts of the world. Nevertheless, it certainly is one of the major global future threats

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<sup>62</sup> *Ibid*, pp. 31-32.

<sup>63</sup> Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law”, *International Committee of the Red Cross*, May 2009.

<sup>64</sup> Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

<sup>65</sup> *Ibid*, p. 16.



in which all states internationally have an interest. What is further interesting is the extent to which the experts involved in the DPH study and the Tallinn process overlap.<sup>66</sup> This may well entrench a sentiment that exists in some quarters: that a small clique of western experts dominates these processes.

From the preceding discussion there seems to be a disconnect between the attitude from within Africa regarding engagement with LOAC, that is to say a conscious lack of engagement with the global debate, and the attitude from those international role players who are well established within the LOAC debate regarding bringing Africa to the table. On the one hand, it appears that the colonial experience of western domination and subjugation has entrenched a sentiment within African states of distrust of more international and perhaps western concepts such as LOAC. At the same time, international role players certainly do not exclude African participants intentionally. Rather their experience is such that there is not a will from within African states to participate in these processes, and to develop the subject-matter expertise necessary to engage with the LOAC debate on the global level. Clearly the solution to this problem requires active engagement from both sides of this divide.

### **The Future of LOAC in Africa**

The means and methods of armed conflict in Africa have in no way remained stagnant during the century since the beginning of WWI, but developments in the African context are much less technologically driven. Some of the issues of specific concern in contemporary armed conflict in Africa include: the criminalized character of contemporary armed conflicts (including the scramble for natural resources); the effects of porous borders and mobile non state armed actors; issues regarding the application *rationi loci* of LOAC; the escalation and

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<sup>66</sup> Unlike the Tallinn Manual, the DPH Study does not list the names of the experts that were involved in the process. This is likely due to the considerable controversy that was caused when a significant number of these experts withdraw from the process. Nevertheless, the *New York University Journal of International Law and Politics*, Vol. 42. No. 3, 2010, was dedicated to a forum in which the DPH Study was debated. Kenneth Watkin; Michael N. Schmitt; Bill Boothby; W. Hays Parks; and Nils Melzer all contributed to this special edition, and they were all part of the expert group. Of these individuals only W. Hays Parks was not included in the expert group for the Tallinn Manual process.

de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of LOAC; child soldiering; and linking violence to disorganized organized armed groups. Some of these issues have featured in the global debate, while others have not. The criminalized character of contemporary armed conflicts in Africa, and the associated exploitation of natural resources, as well as child soldiering are issues that have received very broad attention. One key example in this regard is the Kimberley Process Certification Scheme.<sup>67</sup> At the same time other issues, such as the escalation and de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of LOAC, do not feature in any significant manner in the global debate. Yet still other issues, such as non-state armed actors, that has long existed in the African context, do feature in the global debate, but this is largely due to this problem having occurred in much more recent history in the context of armed conflicts to which developed states are party.

Why do some of these issues feature in the global debate, and others not? There are many factors that influence this, including: both resource exploitation and child soldiering were key issues in highly visible armed conflicts in Africa, such as the Sierra Leone and Liberian civil wars; both resource exploitation and child soldiering are issues of concern beyond LOAC – that is to say areas of law such as IHRL and environmental law also engage with these issues directly; in the context of resource exploitation the consumer market is often western (such as diamonds and columbite-tantalite). Nevertheless, even these issues of particular African concern that are discussed within the global debate do not feature much in the debate within Africa. Child soldiering, for example, is not exclusively an African problem, but it certainly has been a greater problem within Africa than elsewhere for many years. Yet, the civil society organizations, governments and academics that engage with this issue most vigorously are generally not African.

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<sup>67</sup> Kimberley Process Certification Scheme (Kimberley Process) is a process created by UN GA Res. 55/56, 29 January 2001, in order to “give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds”. The Kimberley Process has also received the support of the Security Council, UN SC Res. 1459, 28 January 2003.

This contribution has been submitted to the ICRC Review, and is currently under peer review. As such please do not distribute the document.

It is not possible to devise a concrete, pre-determined, action plan for the mainstreaming of LOAC within Africa, and Africa in the global LOAC debate. Achieving this goal will require a flexible and comprehensive approach. As mentioned before, the focus should be on enhancing the LOAC debate within Africa. Should this be achieved, the inclusion of African issues within the global debate will occur as a matter of course. As a start, it is most important to identify entry points, around which momentum can be built. Much of the preceding discussion has focused on Africa as a regional entity. However, this regional entity is made up of states, and states act in their own interest before acting in the regional interest. It is not feasible to have focused this contribution at individual state considerations, as this would involve 54 states that make up the African continent. However, it will not be realistic not to recognize the fact that the LOAC debate within each state is unique. Of the five role players identified before (academics; governments; armed forces; civil society; and international organizations) it is unlikely that the initiative will come from governments or the armed forces of any specific states. What is needed is an entity that has the potential to engage with each state in Africa, and specifically those states affected by armed conflict. Two such entities exist: the International Committee of the Red Cross (ICRC) and the AU. Ewumbue-Monono and Von Flüe identified the transition from the OAU to the AU as a watershed moment for ICRC engagement in promoting IHL within Africa.<sup>68</sup> In reflecting on ICRC engagement with the OAU these authors recognized that:

Although on balance OAU-ICRC cooperation in promoting humanitarian law has had some positive effects, these could be increased in cooperation with the African Union, which has wider objectives and has created new opportunities for promoting and implementing international humanitarian law in Africa.<sup>69</sup>

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<sup>68</sup> Churchill Ewumbue-Monono and Carlo von Flüe, “Promotion of International Humanitarian Law through Cooperation between the ICRC and the African Union”, *International Review of the Red Cross*, Vol. 85, No. 852, December 2003, p. 764.

<sup>69</sup> *Ibid*, p. 760.

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Unfortunately, after thirteen years, it appears that the level of engagement with LOAC within the AU has not progressed. It is thus unlikely that the AU would, of its own accord, intensify its engagement with LOAC. As such, it still falls to the ICRC to not only engage with states individually, but also to work with the AU in placing LOAC firmly on the agenda of the armed conflict debate within Africa.

The ICRC has a delegation accredited to the African Union, and has thirty-three delegations in Africa in total. Moreover, the ICRC delegation to the African Union has had “observer status” first at the OAU and then the AU since 1992. The ICRC delegations in Africa are very active in LOAC training and dissemination. This is of incredible importance, as we know that the benefits of LOAC are not unlocked through enforcement, but through compliance. For compliance to occur within armed forces two essential ingredients are required: proper training and discipline. What more could then be done? Notwithstanding these efforts, it is clear that, for example, AU engagement with LOAC is not significant. While the ICRC is very involved in Africa, the organization does not involve Africa significantly in their affairs at Head Quarters level. This is well evidenced by the lack of involvement of African experts in substantive ICRC studies. This is certainly an area in which the ICRC can improve in respect of engagement with Africa.

A further issue is that, as a Swiss organization, the ICRC also fits into the mould of ‘Eurocentrism’ of which many African entities are particularly critical and sceptical. This problem can be mitigated in a number of ways. The ICRC can decentralize their engagement strategy with the AU by engaging more extensively with African civil society – that is to say not the global NGOs with a footprint in Africa, but instead the African initiated NGOs. These civil society organizations may in turn engage with the AU and member states. The ICRC can also make much greater use of local expertise in training and other areas of engagement. Let Africans be the mouthpiece to advocate LOAC ideals to Africans wherever feasible. These suggestions may appear to serve to manipulate states and role players in Africa, by “disguising” the work of the ICRC. However, this is not the case. Instead, the ICRCs understanding and manner of work will also develop through working closer with African role players.

## **Conclusion**

The need for greater African involvement in the LOAC debate was recognized by Bello when he proposed the establishment of an African Institute of International Humanitarian Law during 1984.<sup>70</sup> There are people in Africa working within the five sectors that determine the global LOAC debate that work tirelessly at elevating LOAC within Africa, and Africa in the global LOAC debate. It is unfortunately a rather lonely endeavour. African states and role players have participated very strongly in the development of other areas of international law, with international criminal law as a key example due to its proximate existence with LOAC. Unlike the case with the LOAC, African states played a central role in developing international criminal law, not only in the context of treaty negotiations, but also jurisprudential development specifically in the context of the ICTR and the Special Court for Sierra Leone. The deterioration of the relationship between the ICC and African states is a very sad and unfortunate state of affairs. Nevertheless, African involvement, and certainly initial buy-in into the international criminal law project can serve as a beacon of hope, and perhaps a blue print for the mainstreaming of LOAC within Africa, and Africa in the global LOAC debate.

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

In this contribution I have emphasised the role of the ICRC in facilitating the mainstreaming of LOAC in Africa. There are other entry points too. Each of the five role players identified as

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<sup>70</sup> Emmanuel G. Bello “A Proposal for the Dissemination of International Humanitarian Law in Africa Pursuant to the 1977 Protocols Additional to the Geneva Conventions of 1949”, *Military Law and Law of War Review*, Vol. 23, 1984, p. 311.

This contribution has been submitted to the ICRC Review, and is currently under peer review. As such please do not distribute the document.

primarily being responsible for determining the agenda of the global debate (academics; governments; armed forces; civil society; and international organizations) provides for multiple entry points in furthering the goal of mainstreaming LOAC in Africa, and Africa in the global debate. The value of this contribution lies much more in identifying the problem and the complexities that caused the problem, than providing the solution. This is because only once there is awareness of the problem can those individuals and entities who are in a position to be part of the solution direct their actions to mainstreaming LOAC in Africa.