ARMED CONFLICTS AND THE *LEX SPECIALIS* DEBATE IN AFRICA: IMPLICATIONS OF THE EMERGING WOMEN'S AND CHILDREN'S-RIGHTS REGIMES

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1 Introduction

The relationship between international human-rights law (IHRL) and international humanitarian law (IHL) is a familiar subject of uncertainty and debate in the context of both armed conflict and peacekeeping activities during armed conflict. However, African positions on this debate are generally less well known, notwithstanding the fact that many of the world's armed conflicts and much of its peacekeeping occurs on the continent.[1] This neglect is of concern, partly because African positions deserve a more prominent place in general global debates, but also because the neglect results in African developments — and their inevitable teething difficulties and internal tensions — not receiving sufficient critical interrogation or scholarly support.

These concerns are illustrated by the subject matter of this article, namely the developing women's and children's-rights regimes applicable in Africa, and that of an earlier article on the AU's emerging framework for peacekeeping and security on the continent (known as the African Peace-and-Security Architecture), on which it builds.[2]

Most international lawyers will by now be broadly comfortable with the idea that IHRL finds extensive application during armed conflict, notwithstanding IHL's traditional status as the *lex specialis* at such times. The International Court of Justice has confirmed the basic lines of this position.

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1 F Viljoen 'The Relationship between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach' in E de Wet & J Kleffner (eds) *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (2014) 303, makes a similar observation about scholarship on African judicial and quasi-judicial institutions.

2 J Fowkes 'The Relationship between IHL and IHRL in Peacekeeping Operations: Articulating the Emerging AU Position' (2017) 61 *Journal of African Law* 1.

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[3]

As this open-ended language reflects, however, the details are rather less clear than the basic point that IHL cannot claim general exclusivity during armed conflict.[4] The rule of *lex specialis* itself is also not always clear, whether in specific relation to deciding on the application of IHL and IHRL or as an international legal doctrine in general. In practice, the maxim is used to refer to two different things: to a more specific rule giving effect to a general one, implying no conflict, but simply greater elaboration, and to a specific rule that represents an exception to a general one, implying

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3 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Reports 136 para 106.

4 The global literature on these matters is extensive; I have benefitted especially from MJ Dennis 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119; SC Breau 'The Impact of the Responsibility to Protect on Peacekeeping' (2006) 11 *Journal of Conflict and Security Law* 429; H Krieger 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 265; C Droege 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310; AE Cassimatis 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623; J Sarkin 'The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application from at Least the Nineteenth Century' (2007) 1 *Human Rights and International Legal Discourse* 125; M Sassòli & LM Olson 'The Relationship between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599; M Milanović 'Norm Conflicts, International Humanitarian Law and Human Rights Law' (2009) 14 *Journal of Conflict and Security Law* 459; O Hathaway et al 'Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 *Minnesota Law Review* 1883; D Bethlehem 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 *Cambridge Journal of International and Comparative Law* 180; D Jinks 'International Human Rights Law in Time of Armed Conflict' in A Clapham & P Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (2014) 656; I Scobbie 'Human Rights Protection during Armed Conflict: What, When and for Whom?' in De Wet & Kleffner (note 1 above) 3.

a sharp conflict. In addition, it is not always easy to say which of two rules is more specific to a given situation.[5] This latter problem is encountered quite regularly in debates on the relationship between rules of IHL and IHRL in armed conflict; the African developments considered here are no exception, as we will see. Sometimes it appears that the thinking on this issue is still influenced by old habits and that there is some adherence to the view that accepts that, during armed conflict, the rules are different and IHL accordingly takes precedence. At other times, it seems that tensions arise simply because large questions about the relationship between IHL and IHRL remain — and drafters are still grappling with them — or, for known reasons, drafters sometimes have incentives to gloss over some issues to secure broad state agreement.

The earlier article, examining the AU's emerging Peace-and-Security Architecture, took up these debates over IHL and IHRL's application during armed conflict in the context of the robust stance to peacekeeping being adopted by the AU.[6] This stance builds on its assertion of a unilateral power to intervene in African states in response to serious breaches of rights, even in the absence of the UN Security Council approval that the UN Charter requires.[7] Developing doctrines for peace-support operations display a firm commitment to modern, expansive understandings of peacekeeping that encompass the use of offensive force to protect civilians and build better states.[8] I argued in the earlier

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5 A Lindroos 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 *Nordic Journal of International Law* 27 42; N Prud'homme '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 *Israel Law Review* 356; and the work of the International Law Commission (ILC) study group on *lex specialis* led by M Koskenniemi; see esp ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN Doc A/CN4/L682 (13 April 2006) esp paras 88–107.

6 See, eg, T Murithi 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the Africa Union Mission in Sudan and the African Union Mission in Somalia' (2008) 17 *African Security Review* 70; J Sarkin 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2 *Global Responsibility to Protect* 371; T Murithi 'The African Union at Ten: An Appraisal' (2012) 111 *African Affairs* 662; A Jeng *Peacebuilding in the African Union: Law, Philosophy and Practice* (2012) esp 175–177, 180–201, 282–284 and 286–92.

7 Constitutive Act of the African Union, art 4(h). In practice, the AU has, to date, always acted under UN mandates and, given its dependency on international funding, is likely to continue to do so: see, eg, E de Wet 'Regional Organizations and Arrangements: Authorization, Ratification, or Independent Action' in M Weller (ed) *The Oxford Handbook on the Use of Force in International Law* (2015) 314.

8 See UN *United Nations Peacekeeping Operations: Principles and Guidelines* (2008), often referred to as 'Capstone'; S Wills *Protecting Civilians: The*

article, however, that the existing statements of these doctrines display a kind of split consciousness.[9] On the one hand, they refer frequently to rights and rights-based goals; on the other, they retain a strong sense of the traditional idea that, during armed conflict, IHL takes over. The issue of the relationship between the two bodies of law is seldom taken up explicitly in these sources, while the best interpretation of the legal view implicit in them, I argued, is a kind of narrowed *lex specialis* view in which IHL prevails at least during the point-and-shoot parts of modern expansive peacekeeping, but IHRL has an important role at all other times.

This particular effort at striking the IHL/IHRL balance, which receives little or no attention, merits a place in the debate, but it also deserves more critical engagement. Among its weaknesses is the one that this article takes up in detail, namely that it does not take adequate account of the degree to which modern IHRL applies to armed conflict. The increasingly expansive general concerns of IHRL find natural application to things that happen during armed conflict and peacekeeping. The IHRL regime also increasingly includes elements specifically designed for such situations, making it difficult to decide which is the more specialised body of law.

With this in mind, this article examines IHRL developments in the women's and children's-rights regimes applicable in Africa. Its main contention is that the commitments that African states have already made and are still making in these two contexts — both in signing on to global IHRL regimes and in joining African regional instruments — entail a considerable and pervasive application of IHRL in times of armed conflict, and especially in the context of peacekeeping activity. African human-rights instruments, as we will see, would appear themselves to retain some traces of the habit of thinking that IHL takes over in times of armed conflict (although, to a lesser degree, than is true of the AU military documents I examined in the earlier paper). However, a greater discord arises when these two bodies of law are considered together: it then becomes clear that the African IHRL commitments considered in this paper already spill out of the boxes into which the emerging approaches informing the AU military-peacekeeping policy would implicitly put them. In

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Obligations of Peacekeepers (2009) chaps 2–3; R Murphy *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (2007); D Shraga 'The Interplay between Human Rights and International Humanitarian Law in UN Operations' in De Wet & Kleffner (note 1 above) 211; J Karlsrud 'The UN at War: Examining the Consequences of Peace-enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali' (2015) 36 *Third World Quarterly* 40; and the emerging AU sources cited in Fowkes (note 2 above).

9 Fowkes (note 2 above) esp 9–18.

terms of global thinking, this expansive approach to IHRL's application is, of course, not especially surprising: my concern lies instead in examining some of its features and in drawing attention to their implications for AU thinking in other contexts.

In focusing on developments in the IHRL regime, I do not mean to deny that developments have also been occurring within IHL itself, especially after the work of the Rwandan and Yugoslavian tribunals. Within African institutions, however, these developments have been far less prominent. The development of AU institutions and human-rights work forges on, with IHL rather taken for granted in its midst.[10] Among the reasons for this, in addition to the obvious point that African bodies have more direct control over the content of their own policy documents and rights instruments than they do over the rules of IHL, is that there has been relatively little engagement of these issues in African judicial institutions. The African Commission of Human and People's Rights has used IHL as an interpretative source when applying IHRL, but the cases remain limited. There have also been some uncertainties regarding the jurisdiction of the African Court on Human and Peoples' Rights — established under the African Charter — to consider IHL at all, although this latter hindrance would not trouble the new amalgamated African Court on the current instruments.[11] From the perspective of this article, all this simply means is that there is currently more to learn about African thinking from looking at developments in IHRL.

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10 The focus is also not intended to deny the substantial overlap between the bodies of law or the importance of details of the IHL debate, such as the distinction between international and non-international armed conflicts; see, eg, Scobbie (note 4 above) 8–13.

11 The African Court on Human and Peoples' Rights has jurisdiction over disputes under the African Charter and other so-called human-rights treaties, creating uncertainty about whether the IHL treaties fall under this category. See 2004 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, art 3(1); Viljoen (note 1 above) 323–325; M Hailbronner 'Laws in Conflict: The Relationship between Human Rights and International Humanitarian Law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339 352–353. The protocols for the amalgamated court have yet to come into force, but contemplate a much wider jurisdiction over international and treaty law that encompasses IHL: see Protocol on the Statute of the African Court of Justice and Human Rights, arts 28 and 31; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Annex: Statute of the African Court of Justice and Human and Peoples' Rights, art 14 (proposing, an extensive and unique individual jurisdiction over IHL violations); Viljoen (note 1 above) 326–328.

2 Women's Rights and Gender Issues

AU documents reflect a strong and growing concern for gender.[12] The promotion of gender equality is one of the basic principles of the organisation, according to its Constitutive Act.[13] The AU has promulgated a number of major documents on the issue, including a formal Gender Policy.[14] The concept of 'gender mainstreaming' is emphasised in these instruments and also noted in specific policy documents on peacekeeping and on the new African Standby Force.[15] The African Peer Review Mechanism also assigns a prominent place to gender and the position and status of women.[16]

However, with the important exception of the 2005 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, discussed in detail below, most of these documents are not concerned primarily or at all with legal details and do not take a clear position on the legal basis of the gender-related obligations they describe. The Solemn Declaration on Gender Equality in Africa, issued by AU

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12 For an overview, see F Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee Journal of Civil Rights and Social Justice* 11; for a more critical perspective, see DM Chirwa 'Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 63.

13 AU Constitutive Act (note 7 above) art 4(l).

14 AU Gender Policy available at http://wgd.au.int/en/sites/default/files/Gender%20Policy%20-%20English.pdf (accessed 27 August 2015); see, also, AU 'Press Release: African Union Launches Five-year Gender Peace and Security Programme 2015–2020' (2 June 2015) available at http://www.peaceau.org/uploads/pr.gpsp-2-06-2014.pdf (accessed 22 August 2015).

15 See, eg, 'African Standby Force Peace Support Operations Doctrine' (draft dated November 2006) available at http://civilian.peaceau.org/index.php?option=com_docman&task=doc_download&gid=120&Itemid=61&lang=en (accessed 30 May 2015) chap 4, ss 6 and 68–69; AU 'Report of the Commission on the 2nd Conference of Ministers of Defence and Security on the Operationalisation of the African Standby Force' (24–28 June 2008); Sharm El Sheikh Egypt EX.CL/427 (XIII) available at http://www.peaceau.org/uploads/ex-cl-427-xiii-e.pdf (accessed 20 May 2015), endorsed by the Executive Council 'Decision on the Report of the Commission on the Operationalization of the African Standby Force' EX.CL/Dec430 (XIII) available at http://www.peaceau.org/uploads/ex-cl-dec-430-xiii-e.pdf (accessed 20 May 2015) 22, resolving 'to include in the ASF Doctrine the General Principles for PSO operations (eg respect for human rights and international humanitarian law), with emphasis on gender mainstreaming and child protection'.

16 New Partnership for Africa's Development (NEPAD) 'Declaration on Democracy, Political, Economic and Corporate Governance' available at http://www.chr.up.ac.za/chr_old/hr_docs/arpm/docs/book2.pdf (accessed 27 August 2015) ss 10, 11, 20 and 22.

member states in July 2004, contemplates campaigns against gender-based violence as well as mechanisms against impunity for crimes committed against women. However, it does not specifically refer to IHRL or IHL in this regard in conflict situations.[17] The AU's 2009 Gender Policy, to take another important example, is mainly concerned with institutional issues and broader policy statements rather than with legal questions. Insofar as it is concerned with gender issues in the context of conflict, its focus is not on women as victims, but on promoting the role of women in conflict management, which is one of the document's eight specific policy commitments.[18] It does aim to 'guarantee [women's] protection against violence and rape' and to ensure that women and children 'are incorporated into the mandates of humanitarian intervention and peacekeeping missions', but like the Solemn Declaration, does not trace these goals to specific legal sources.[19]

In this, the Gender Policy bears a resemblance to UN Security Council Resolution 1325.[20] The resolution merits mention here, not only because of its international importance, but also because it has been repeatedly embraced by African institutions. The Solemn Declaration refers to it and the Gender Policy notes that 'Resolution 1325 has already become a powerful tool which has been domesticated by the AU'.[21] As with the Gender Policy, Resolution 1325 is chiefly concerned with better orientating peacekeeping missions in relation to gender issues and expanding the role of women in carrying out peacekeeping missions. The resolution goes further in creating protective duties, calling on 'all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls'. However, while it specifies that the 'law applicable' in these instances includes the 1981 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, discussed below) as well as IHL, the resolution itself does not take the

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17 Solemn Declaration on Gender Equality in Africa available at http://www.un.org/en/africa/osaa/pdf/au/declaration_gender_equality_2004.pdf (accessed 20 May 2015) s 4. S 3, however, explicitly refers to 'the recruitment of child soldiers and abuse of girl children as wives and sex slaves' as violations of the African Charter on the Rights and Welfare of the Child, thus labelling — as a rights issue — phenomena often associated with armed conflict; I return to this in the discussion of children's rights below.

18 AU Gender Policy (note 14 above) 19–20.

19 Id 8 and 20.

20 S/RES/1325 (31 October 2000) See, also, eg the critique of the resolution in A Barrow 'UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law' (2010) 92 *International Review of the Red Cross* 221 229–232.

21 Solemn Declaration (note 17 above) preamble and s 2; AU Gender Policy (note 14 above) 2, 13 and 19–20.

legal issues or the relationship between these bodies of law any further.[22]

Two important instruments, however, do take a much firmer stance on the legal questions: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter the Protocol on the Rights of Women) and CEDAW itself. African states are joining these two instruments and accepting their clearer implications for the relationship between IHRL and IHL during conflict. In both cases, however, unearthing these implications requires close analysis.

2.1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol came into effect on 25 November 2005 and has been ratified by 36 African states to date, with a further 12 signatories.[23] It sets out a range of rights-based protections for women, and follows Resolution 1325 (which it references explicitly) in providing for the role of women in responses to conflict.[24] It also, however, contains a specifically focused article 11, entitled 'Protection of Women in Armed Conflicts.' The article reads as follows:

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

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22 S/RES/1325 (note 20 above) ss 9–10.

23 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; for the ratification data, see http://au.int/en/sites/default/files/Rights%20of%20Women.pdf (accessed 27 August 2015).

24 Protocol (note 23 above) art 10. For the background and overviews, see Viljoen (note 12 above); F Banda 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal of African Law* 72; CG Ngwena 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

At first glance, the simple fact of a separate article on armed-conflict situations, as well as that article's references to IHL, may seem to imply the traditional view that IHL is the source of rules in conflict situations. A closer look belies that implication, but also does not find much support in article 11 for an expansive application of IHRL during armed conflict.

Article 11 does not require that, in times of armed conflict, we should turn away from rights and towards IHL. Even its first and second subsections, which specifically refer to IHL, do not stipulate that IHRL is inapplicable during times of conflict. They are naturally read to simply mean that states are obliged to uphold their IHL obligations in relation to women in times of conflict, rather than that this necessarily exhausts their obligations. The third and fourth subsections do not refer explicitly to IHL. Their content — rape, sexual violence and exploitation as well as child recruitment — in principle implicates both IHL and IHRL, and both subsections are of application whenever women and girls (and children in general) are in need of the protection to which they refer, however distant or proximate to combat they might be. If this is true of the latter two subsections, then there is a further interpretative argument that it must also be true of the first two. Article 11(3), which deals with protection against sexual violence, refers only to 'asylum-seeking women, refugees, returnees and internally displaced persons'. It is wholly implausible to think that the drafters' intention was to require protection against sexual violence for these groups only.[25] Article 11(3) must therefore be read instead as emphasising that these groups, often especially vulnerable, are entitled to the broader protection applicable to all women and girls, just as article 11(2) takes the trouble to emphasise that its protection applies to women 'irrespective of the population to which they belong'. Hence, if article 11(3) is emphasising a particular aspect of the broader obligations referred to earlier in article 11, rather than articulating something separate and additional to them, then it would be very odd to conclude that article 11(3)'s specific obligation was drawing on IHRL, while the more general obligations in articles 11(1) and (2) were not.

While the specific references to IHL in article 11, therefore, do not imply its exclusive application, they also do not necessarily imply more than a narrow, almost formal, role for IHRL. Articles 11(3) and (4) refer

[25] N Dyani 'Protocol on the Rights of Women in Africa: Protection of Women from Sexual Violence During Armed Conflict' (2006) 6 *African Human Rights Law Journal* 166 181, draws attention to this aspect of art 11(3), while arguing a different point.

to particularly serious violations, actions that are treated as war crimes, crimes against humanity or genocide, or actions akin to them. Legally, such violations are readily traced to both IHL and IHRL. The question of precisely which body of law applies, is therefore likely to be of only technical interest, with little or no implications for the substance of violations that are understood similarly by both bodies of law.[26] One can therefore argue plausibly that article 11 might stipulate or imply the application of IHRL during armed conflict only to the uncontroversial extent of its links to these most serious crimes. Seen this way, the explicit mentions of IHL in articles 11(1) and 11(2) may, after all, be suggestive the other way, implying that insofar as we are not talking about gross breaches — where it does not matter much to insist that IHRL applies — the law to be applied during conflict is IHL.

Article 11 is therefore not fertile ground for arguments seeking a broader application of IHRL in times of armed conflict. Further arguments, however, appear if we look at the Protocol as a whole. While the drafting of article 11 may suggest some quite traditional *lex specialis* thinking about IHL's status, the broader construction of the document recalls the split consciousness that the sources on the AU's peace-and-security architecture display. The Protocol installs a specialised armed conflict-section alongside other, more general, rights-based sections that have apparently considerable application to armed-conflict situations, without considering the relationship between them. Violence against women is specific concern to article 3, on the right to dignity; to article 4, on the rights to life, integrity and security of the person; and to article 5, on the elimination of harmful practices 'which negatively affect the human rights of women'. These obligations, in turn, must be read with the definition of 'violence against women' in article 1 of the Protocol, which provides that

> "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war (own emphasis).

The definition is not free of complexities, but it is hard to read except as intending that the obligations to protect women against violence do not end when armed conflict begins, and that, instead, the reverse should be true. Read with the rights-based obligations in articles 3 to 5, the Protocol contemplates the application of obligations grounded in IHRL during armed conflict, far beyond what is implied by article 11.

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[26] Cassimatis (note 4 above) 630.

This does not, of course, mean that IHL is inapplicable at these times. One can make a case that modern IHL has sufficiently extensive application to gender-based violence that it could cover whatever these rights-based provisions might require during armed conflict. Dyani, for example, has indeed argued that IHL rules can, and should, be read this broadly, especially in the wake of the work of the Rwandan and Yugoslavian tribunals.[27] This is a debatable matter: considerable developments have occurred in IHL in this regard, but it can certainly be disputed that existing provisions of IHL on civilian protection are adequate to the needs and position of women during armed conflicts.[28] However, for the purposes of this article, such moves would not represent a real counter-argument (and Dyani is simply concerned with articulating IHL obligations, not making claims about IHL's relationship to IHRL). If IHL is broadly read, then resort to IHRL might become technically unnecessary to achieve the results required by the Protocol. With a broad reading, IHL would then not preclude or weaken IHRL obligations during armed conflict. If IHL is narrowly read, then the Protocol implies it should be supplemented by a set of potentially far-reaching IHRL obligations. Either way, the Protocol resists the traditional idea that IHL is a specialised regime for armed conflict during which standard IHRL rules are modified or precluded.

Finally, the Protocol grounds a further argument, because its rights-based provisions in relation to gender-based and sexual violence can be read as establishing a specialised regime for abuses that notoriously arise in the context of armed conflict. The Protocol thus seems to contemplate the idea of specialised IHRL-based regimes to respond to particular situations, eroding traditional habits of thinking in which IHL is the specialised body of law in this context. As we will now see, such arguments can be mounted even more strongly on the basis of CEDAW.

2.2 *The Convention on the Elimination of all Forms of Discrimination Against Women*

While, to date, only 36 African states have ratified the Protocol on the Rights of Women, 52 have ratified CEDAW.[29] CEDAW is therefore in itself

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27 See, generally, Dyani (note 25 above).

28 See, eg, J Gardam & H Charlesworth 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 148 esp 151–152. See, generally, C Chinkin 'Gender and Armed Conflict' in Clapham & Gaeta (note 4 above); B Meyersfeld 'A Gender Perspective on the Relationship between Human Rights Law and International Humanitarian Law' in De Wet & Kleffner (note 1 above).

29 For ratification data regarding CEDAW, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed

of central importance in the African context. It is also important as a supplementary source to the Protocol. The Protocol contains a standard clause that its protection does not detract from greater protection in other instruments, and, for purposes of this article, CEDAW is the most important such instrument. While the Protocol is generally the more specific, detailed and expansive instrument of the two,[30] the authoritative interpretations of CEDAW are important here.

Unlike the Protocol, the text of CEDAW does not specify that it is applicable during armed conflict. However, its content, once again, implies pervasive application to conflict situations. Article 6 of CEDAW obliges state parties to 'take all appropriate measures…to suppress all forms of traffic in women and exploitation of prostitution of women', a notorious feature of conflict situations in Africa, as elsewhere. CEDAW's general equality provisions also find extensive application to gendered patterns of violence, abuse and exploitation. Conversely, although the text itself does not insist on the application of rights to conflict situations, nothing in CEDAW implies the view that IHL takes precedence at such times. The treaty does not have a dedicated section on armed conflict like the Protocol's article 11.[31]

The authoritative interpretation of CEDAW, however, takes a firmer position on this point. The landmark General Recommendation 19 articulates a broad understanding of gender-based violence and links it to an array of CEDAW provisions. It does not mention armed conflict, though some of the forms of violence it discusses commonly arise in situations of armed conflict.[32] However, the recent General Recommendation 30 settles this point decisively. It holds that '[s]tates parties' obligations

31 March 2016). The disparity in accession is not necessarily surprising: CEDAW is both an older and a more limited treaty, and given that states often join rights treaties for reputational reasons, it is not unusual to find a higher rate of ratification of the global instrument than the corresponding African one. On this latter argument, see, also, T Maluwa 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *Melbourne Journal of International Law* 636 esp 668–69 on issues surrounding ratification of the Protocol.

30 Viljoen (note 12 above) 21–23; Banda (note 24 above) 73–74.

31 See, further, eg R Manjoo & C McRaith 'Gender-based Violence and Justice in Conflict and Post-conflict Areas' (2011) 44 *Cornell International Law Journal* 11 19–20; C Farhoumand-Sims 'CEDAW and Afghanistan' (2009) 11 *Journal of International Women's Studies* 136 140–41, noting that an 'important weakness is [CEDAW's] silence on violence against women in conflict and post conflict contexts where human rights violations generally intensify'.

32 Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 19 regarding violence against women (1992). Chinkin (note 28 above) 451 links elements of General Recommendation 19 to IHL, among other sources.

continue to apply during the conflict or states of emergency' and takes a very broad view of CEDAW's application. It states that

> The general recommendation covers the application of the Convention to conflict prevention, international and non-international armed conflicts, situations of foreign occupation and other forms of occupation and the post-conflict phase. In addition, the recommendation covers other situations of concern, such as internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime, which may not necessarily be classified as armed conflict under international humanitarian law and which result in serious violations of women's rights.[33]

General Recommendation 30 goes on to state that the protection of 'the Convention and international humanitarian, refugee and criminal law' is a complementary and 'not mutually exclusive' regime for the protection of women's rights.[34] CEDAW is thus a source of IHRL-based obligations, authoritatively understood to apply alongside IHL during conflicts of all kinds.[35] This offers an important legal reason to read the Protocol on the Rights of Women the same way. It also offers a pragmatic one: AU organs, heavily dependent on international funding, desire to harmonise their position with the international legal regime.[36] Given that the Protocol does not preclude more generous regimes, this authoritative interpretation of a treaty that most African states have ratified, is a strong argument that extensive IHRL-based obligations apply during conflict in Africa, however one interprets the Protocol.

The conclusion, that these instruments contemplate the extensive application of their rights-based provisions in armed-conflict situations, will not startle most international lawyers, as I noted at the outset. From an internal African perspective, however, it is important to see how extensively the legal regime on women's rights, applicable in Africa, rejects a paradigm in which IHL takes over during conflict, though traces of that paradigm can still be detected. I return in the final section to consider specific implications this has for the AU Peace-and-Security Architecture and how African states understand their obligations in that regard.

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33 Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No 30 regarding women in conflict prevention, conflict and post-conflict situations (2013) ss 2 and 4.

34 Id ss 19–24.

35 See, also, Chinkin (note 28 above) 461–462, 474 and the sources cited there.

36 See De Wet (note 7 above) and further sources cited in Fowkes (note 2 above) 6–7.

3 Children's Rights

The discussion of women's rights offers a useful backdrop against which to discuss African developments in children's rights. The features of the 1999 African Charter on the Rights and Welfare of the Child, relevant to the present argument, recall those of the Protocol on the Rights of Women. The surrounding materials are currently somewhat less hospitable than those in the women's-rights context to arguments for IHRL's expansive application during armed conflict, though this may be changing. The more advanced developments in the women's-rights context are therefore both a useful guide to speculation and a potentially weighty precedent.

3.1 The African Charter on the Rights and Welfare of the Child

As with the Protocol on the Rights of Women, the Charter has a special article on armed conflict. However, it too does not expressly entail that IHL prevails at such times, nor does it tie all of its obligations during armed conflict to IHL. Article 22 of the Charter provides that

> 1. State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflict which affect the child.
> 2. State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.
> 3. State Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Each different subsection treats IHL differently. Article 22(1), similar to articles 11(1) and (2) of the Protocol on the Rights of Women, confirms a state's IHL obligations in times of armed conflict without necessarily implying that those obligations exhaust its duties at those times. Article 22(2), dealing with child soldiers, is similar to articles 11(3) and (4) of the Protocol in that it makes no explicit reference to IHL, while dealing with serious violations that are clear breaches of IHL and IHRL alike. Article 22(3) offers its own special puzzle. It refers to IHL, and its inclusion of the phrase 'in accordance with their obligations under international humanitarian law' can easily be read to mean that all the duties to which the article refers, are IHL duties. However, it also stipulates that the 'rules' it refers to will apply 'to children in situations of internal armed

conflicts, tension and strife'. This application appears to be broader than situations of international and non-international armed conflict, and so article 22(3) apparently purports to extend IHL obligations outside their ordinary sphere of application. Whether that is possible, is not an issue that needs to be settled here in an article focused on the legal regime applicable in armed-conflict situations.[37] For present purposes, article 22(3) constitutes an important reason why the children's-rights regime in Africa is somewhat less hospitable to arguments for IHRL's application during armed conflict than the women's-rights regime. One might read the article as obliging states to protect civilians, while asserting that this duty is the same as their duty in terms of IHL — thus tacitly rejecting the idea that the obligations created by the Charter are at variance with the existing IHL regime. One might further read the reference to situations of mere tension and strife to mean that the state's duties towards children at those times, when IHRL is the only applicable legal regime, are substantively the same as those that apply during armed conflict when the section seems to think IHL applies — thus, in turn, tacitly rejecting the idea that IHL requires less of states with regard to children than IHRL does. This would then take us to the same point that we reached in analysing the women's-rights instruments, where the *lex specialis* debate ceases to have substantive stakes, because it is claimed that the legal result is the same either way. That, however, involves making similarly arguable claims about whether IHL's protection really is the same as IHRL's. In addition, with all that said, article 22(3)'s wording nevertheless offers stronger textual evidence than existed in the women's-rights context for the claim that, to understand an African state's civilian-protection duties during conflict, one should look to that state's IHL obligations.

Once again, because of the significance of other provisions of the Charter, this is not the end of the enquiry. However, these arguments are weaker than they were in the women's-rights context. If one looks outside article 22, many of the other rights-based provisions of the Charter would find application in times of armed conflict, including provisions on child labour, abuse and torture, juvenile detention, refugee and internally displaced children, children separated from their parents, sexual

[37] During the drafting of the 2002 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, discussed below, the view was expressed that since the obligation in the main Convention on the Rights of the Child to prevent persons under the age of fifteen from taking part in hostilities did not mention IHL specifically, it might be possible to invoke that obligation outside situations of armed conflict. See C Breen 'The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2003) 25 *Human Rights Quarterly* 453 464. A similar impulse may be at work in art 22(3).

exploitation, drug abuse as well as the sale, trafficking and abduction of children.[38] State parties are obliged to 'ensure to the maximum extent possible, the survival, protection and development of the child' and the Charter further provides for the best-interests-of-the-child principle in all matters affecting the child.[39] All these obligations notionally arise during conflicts. Moreover, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the authoritative body associated with the Charter, has applied a number of these rights in an armed-conflict situation, as will be discussed below.[40]

The Charter's general rights-based provisions therefore extend into the sphere of armed conflict. In addition, as we saw in the women's-rights context, the degree of specificity of some of these provisions challenges easy arguments that IHL is the specialised body of law at such times. However, there is no counterpart in the Charter to the general definition of violence in the women's-rights context and, as we have seen, the surrounding text offers somewhat less support for rights-based obligations.

3.2 Sources Outside the Charter

As with the Protocol on the Rights of Women, the Charter also contains a standard provision that it does not detract from greater protection elsewhere, but this route adds less to the argument than in the women's-rights context.[41] The most directly relevant external instrument here is the 2002 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which has, to date, been ratified by 42 African countries and signed by a further 7.[42] This Optional Protocol is especially focused on child soldiers, a regular feature of conflict in Africa. Its preamble notes that 'observance of applicable human rights instruments are [sic] indispensable for the full protection of children, in particular during armed conflict and foreign occupation'. The preamble, however, also stresses

38 1999 African Charter on the Rights and Welfare of the Child, arts 15, 16, 17(2), 23, 25, 27, 28 and 29.

39 Id arts 4(1) and 5(2).

40 See ACERWC's decision on the communication submitted by Michelo Hunsungule and others (on behalf of children in northern Uganda) against the government of Uganda (Communication No 1/2005, 21st Ordinary Session, 15–19 April 2013).

41 Charter (note 38 above) art 1(2).

42 Ratification data available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (accessed 31 March 2016).

> that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law.

It is therefore true that, on the one hand, the Optional Protocol provides a basis for applying IHRL to children during conflict. Furthermore, it certainly does this to the extent of creating obligations that are more stringent than those provided for in IHL: one of the main aims of the Optional Protocol is to raise the minimum age of compulsory recruitment to eighteen years of age, rather than the threshold of fifteen years as provided for in terms of the 1978 Additional Protocol I to the Geneva Conventions, and the 1990 Convention on the Rights of the Child itself.[43] On the other hand, it apparently explicitly confirms that insofar as there are legal tensions, these IHRL obligations remain subject, during armed conflict, to at least the broad norms of IHL.

This, in turn, casts at least some interpretative shadow over the other relevant UN instruments. Article 19 of the Convention on the Rights of the Child itself creates extensive obligations to protect children from violence. The authoritative interpretation of article 19 offers some basis for resisting the conclusion that the Convention's rights are subject to IHL, but nevertheless takes a weaker stance than that which prevails in the context of women's rights. The Committee on the Rights of the Child's General Comment 13 on freedom from violence recognises no exceptions of any kind to the article 19-obligation and evidently contemplates its application in times of armed conflict.[44] However, the General Comment does not engage with the relationship between the Convention and IHL, nor does it do anything specific to displace the weighty evidence provided by the more specific Optional Protocol to the Convention and its textual emphasis that IHRL obligations are 'without prejudice' to IHL norms. This must at least render uncertain those arguments, that in times of armed conflict, the Convention grounds IHRL obligations that are at odds with the general norms of IHL.

Another relevant instrument is the 2002 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which, as its title reflects, deals with

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43 See, eg, Breen (note 37 above); G Waschefort *International Law and Child Soldiers* (2014) 89–97; W Vandenhole, S Parmentier & I Derluyn 'International Law on Children and Armed Conflict: The Interface between Various Normative Frameworks' (2011) 5 *Human Rights and International Legal Discourse* 2 3; S Vité 'Protecting Children During Armed Conflict: International Humanitarian Law' (2011) 5 *Human Rights and International Legal Discourse* 2 14, 24–28.

44 Committee on the Rights of the Child's General Comment 13 regarding the right of the child to freedom from all forms of violence (2011) esp ss 17 and 72(g).

abuses that frequently occur during armed conflicts or are connected with them. This is recognised in its preamble, which lists armed conflict among the factors contributing to the practices targeted by the Protocol (although the term 'armed conflict' is omitted from the later list of 'root causes' mentioned in the main body of its text.)[45] This instrument, therefore, also apparently contemplates the application of its provisions during armed conflict, but like the main Convention, does not address the relationship between its rights-based provisions and IHL. In the absence of this, the use of the phrase 'without prejudice' in the preamble of the Optional Protocol (on children in armed conflict) again casts a shadow. In sum, then, these external sources might strengthen or supplement particular IHL provisions, but they do not firmly dislodge the idea that the IHL framework is what defines the general legal picture during armed conflict.

Lastly, it should not be forgotten that strong arguments for the application of IHRL in times of armed conflict arise from the sources on women's rights already considered. The provisions on child soldiers in the Protocol on the Rights of Women apply to all children, with an emphasis on girls.[46] As noted earlier, the third commitment of the Solemn Declaration on Gender Equality in Africa, linked to human rights, called for

> a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves in violation of their Rights as enshrined in the African Charter on Rights of the Child.

These arguments for IHRL's application also square with the 2007 Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, also known as the Paris Principles.[47] The AU Gender Policy includes the stipulation to '[u]se the Paris Principles…for planned interventions in Africa'. The Principles are, in any event, an important international statement of norms that speaks explicitly to peacekeepers and 'are designed to guide interventions for the protection and well-being' of children in conflict situations.[48] They offer an important statement of the argument that armed children involved in hostilities

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45 The 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, preamble, art 10(3).

46 Id art 11(4).

47 Available at http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf (accessed 31 March 2016).

48 AU Gender Policy (n 14 above) 20; Paris Principles (n 47 above) s 1.11. See, also, the Paris Principles ss 6.2, 6.16 and 6.22.5 on the role of peacekeepers. See, eg, Vité (note 43 above) 23, treating the Principles as a source of further guidance on children's protection.

cannot straightforwardly be treated as combatants. The Principles also include language such as the following:

> The unlawful recruitment or use of children is a violation of their rights; therefore preventive activities must be carried out continuously...
>
> and
>
> In order to address the underlying causes of child recruitment, to address the fluid nature of most armed conflicts and to address the need to take action for children while conflict is still active, the preparation of an appropriate strategic response...is required urgently as soon as children's unlawful recruitment or use by armed forces or armed groups is identified as a possibility...[49]

These legal sources thus contemplate IHRL's application during and around armed conflict. However, they also concern only the most serious breaches where, as noted before, the debate on which body of law applies has much less practical relevance.

Seen in their entirety, then, the sources applicable to children in the African context are somewhat more ambiguous for the purposes of this article's enquiry. They create many rights-based duties with natural application in times of conflict and do not entail that only IHL applies in times of armed conflict. At the same time, the view that IHL norms take precedence when there is a conflict, still retains force. However, as we will now see in the next section, there is reason to anticipate that the African legal regime will take a stronger stand on this issue than the existing UN instruments do and that the children's-rights regime may evolve as the women's-rights regime has done.

3.3 Current Developments on Children's Rights

Specific duties towards child soldiers or child sex slaves naturally blur into more general duties to protect children from violence and abuse. The Paris Principles include the specific provisions on child soldiers quoted above, but they also include more general provisions such as the following:

> [a] child rights approach, meaning that all interventions are developed within a human rights framework, should underpin all interventions aimed at preventing recruitment or use, securing the release of, protecting, and reintegrating children who have been associated with an armed force or armed group.[50]

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49 Paris Principles (note 47 above) ss 3.11 and 1.8.

50 Id s 3.0.

Broader thinking of this nature has considerable potential to affect how a peacekeeping mission is structured and how its legal obligations are understood. Developments of this sort are already well under way in the context of the rights of women and girls, and there are signs of a similar trend in the African children's-rights context.

Recently, ACERWC released a major study on the impact of conflict on children in Africa. The study's concerns include the brute impact of violence on children, their recruitment and sexual trafficking, the fact that children impacted by violence 'are less likely to be in school or to be able to meet their basic needs for health care, clean water and sanitation', the more general emotional and social impact on their welfare and the opportunity costs of a lack of investment in their future.[51] The Committee's recently released 'Agenda for Children' reflects a broad understanding of the impact of factors contained in provisions on protecting children from violence, exploitation, neglect and abuse, including sexual violence and sex trafficking, and on keeping children 'free from the impact of armed conflicts.[52] Although the Committee has yet to issue a general comment on the issue of children's rights during conflict, this step is under serious consideration; its recent publications are firm indicators of the broad scope of its thinking on this topic.[53] Links to the AU Peace and Security Council (PSC) have also been established, where there are plans for a high-level conference and for the appointment of an AU Special Envoy on Children in Armed Conflict.[54]

Such moves represent a natural evolution for ACERWC, whose actions, for several years, have implied that it understands that its own rights jurisdiction extends to armed-conflict situations. It rendered a decision on child soldiers in northern Uganda during, what is explicitly described as, an armed-conflict situation, in which it found the Ugandan state to be in violation of the Charter's rights-based provisions in that context.[55] It has also issued resolutions and communiqués on children's rights in response to conflicts and has undertaken investigative and

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51 ACERWC 'Continental Study on the Impact of Conflict and Crises on Children in Africa' (2016) v–vii; see, also, ACERWC '27th Ordinary Session Report' ACERWC.RPT (XXVII) (2016) available at http://www.acerwc.org/download/27th-ordinary-session-report/?wpdmdl=9811 (accessed 10 July 2017) ss 67–69.

52 ACERWC 'Africa's Agenda for Children 2040: Fostering an Africa Fit for Children' (2016) available at http://www.acerwc.org (accessed 27 August 2016) aspirations 7 and 9.

53 See ACERWC '24th Ordinary Session Report' ACERWC.RPT (XXIV) (2014) available at http://acerwc.org/?wpdmdl=8724 (accessed 15 September 2016) ss 54 and 74–77 for the Committee's most recent comments on this issue.

54 Id ss 28, 60 and 69. On earlier steps in this direction, see, also, Viljoen (note 1 above) 302–303.

55 ACERWC's decision on children in northern Uganda (note 40 above).

advocacy missions.[56] Furthermore, although personal academic positions are naturally an imperfect guide to official ones, support for the kind of pervasive approach seen in the Paris Principles' child rights-based approach may be found in the recent work of Julia Sloth-Nielsen, a former member of the Committee. In her personal scholarly capacity, she has supported the more general duty of 'child safeguarding' as a principle around which institutions should structure their affairs.[57] Sloth-Nielsen has emphasised that article 22 of the Charter sets a much higher standard than the Convention on the Rights of the Child in this context, because it contains such a broad duty to ensure that children take no part in hostilities. She also sees 'considerable guidance' in General Comment 13 on the Convention of the Rights of the Child, which, as discussed, takes a broader view of the rights concerned and envisions their application during armed conflict.[58] The signs to date, therefore, point firmly away from a future general comment by ACERWC being framed narrowly and, instead, towards it being informed by a more all-embracing conception of children's rights.

Of course, the degree to which such an approach will command support from African countries remains to be seen, but it would also represent a natural evolution for the AU itself. For one thing, it would produce anomalies if the AU's expansive approach to gender rights were matched with a restrictive approach to children's rights, since girls fall into both groups. For another, although there has to date been less AU activity on children's rights than in the gender context, its different organs in these areas are starting to interact more closely. Among these interactions was a recent open session on the theme 'Vulnerability of Women and Children in Conflict Situations in Africa', held on 9 March 2015. While the session predictably devoted attention to the specific issues of child soldiers and sexual exploitation of children, it also expressed concern about broader issues of violence against children in conflict situations.[59]

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56 ACERWC 2014 Resolution on the Situations of Children in the Central African Republic and Republic of South Sudan (23rd session); ACERWC's decision on children in northern Uganda (note 40 above) para 17; ACERWC 'Communiqué of the African Committee of Experts on the Rights and Welfare of the Child on the Situation of Children in the States Parties to the African Charter in Crises' 18th session (1 December 2011); ACERWC 'Press Release' (30 July 2014) available at http://acerwc.org/2014/07/advocacy-mission-of-the-acerwc-on-the-situation-of-children-in-south-sudan/ (accessed 15 September 2015).

57 J Sloth-Nielsen 'Regional Frameworks for Safeguarding Children: The Role of the African Committee of Experts on the Rights and Welfare of the Child' (2014) 3 *Social Sciences* 948 949–951.

58 Id 952 and 957.

59 PSC 'Press Statement' 491st Meeting (9 March 2015, Addis Ababa, Ethiopia) PSC/PR/BR(CDXCI) available at http://www.peaceau.org/uploads/psc-491-

A prior PSC communiqué of 14 October 2014 similarly combined specific concerns about sexual exploitation with recognition of a broader 'need for continued mobilization to prevent and combat all forms of violence against women and children'.[60] Both documents emphasise the need for training before and during peacekeeping missions with goals of this nature in mind. These are not the most formal of sources, but it is nevertheless apparent that the thinking of African institutions is moving towards a more expansive vision on this point. The somewhat qualified conclusions drawn from the current formal legal sources can, with some confidence, be viewed in that light.

4 Conclusion: Implications for the Emerging AU Position

Several features of the picture that emerges from this discussion of IHRL instruments are interesting in light of the emerging framework on peacekeeping in the AU Peace-and-Security Architecture. I draw two main conclusions about this larger legal picture.

First, I noted at the outset that sources in the peace-and-security context frequently understand AU peacekeeping missions to be informed by rights in several ways, while, at the same time, seeking to retain a hold on the idea that there is a sphere of activity where IHL takes over — in particular, when peacekeeping forces use more robust military force during an armed conflict.[61] We have seen fainter traces of similar thinking in the rights instruments analysed in this paper. Their focus on expanding rights coverage is naturally greater; however, signs remain of the traditional idea that at some point, during armed conflict, IHL takes over. This is not surprising: it is a time-worn groove in the law in this area. Global international law may have accepted that there is a substantial place for IHRL during armed conflict, but nobody pretends the details are clear; it is generally accepted that armed conflict is still, to some degree, a time when IHL's special rules apply. This position is confirmed by the ICJ's statement in the *Wall* case referred to above.[62] It is therefore not surprising to see this position informing the way that African states are drafting their legal instruments.

That said, however, when the rights instruments considered in this paper are viewed in their entirety, they make it increasingly difficult to

draft-press-statement-psc-chair-en.pdf (accessed 2 June 2015).

60 PSC 'Communiqué' 461st Meeting (14 October 2014, Addis Ababa, Ethiopia) PSC/PR/COMM.(CDLXI) available at http://www.peaceau.org/uploads/psc.461.com.sexual-violence.14.10.2014.pdf (accessed 2 June 2015).

61 Fowkes (note 2 above) esp 15–18.

62 See note 3 above This more nuanced version of *lex specialis* arguments may also be found in global debates on these issues: see id 7.

sustain the strategy of sectioning off parts of a peacekeeping mission to which IHL alone applies.

One reason, as we have seen, is that IHRL instruments include increasingly specialised provisions. In the African context, this is of particular significance, because most African armed conflicts are non-international in nature, and IHL offers a less extensive and specialised regime.[63]

The most important reason, however, is not so much the specialisation of the human-rights framework, as its sheer pervasiveness. The emerging human-rights framework in Africa simply applies too expansively to too many situations that arise during armed conflict for the separation strategy to work. As I argued in the earlier article, AU peacekeeping doctrines sometimes suggest that the drafters have in mind roving bands of combatants preying on civilians, implying that the civilians can be protected by one part of the mission in one place, while the combatants are engaged by another part of the mission elsewhere, or that the mission can at least tackle the two tasks at different times. This scenario naturally suggests a similar division between the parts in respect of which IHRL and IHL, respectively, take precedence.[64] However, reality is seldom this neat. The common presence of non-combatant women mixed in with armed groups, for example, means that the specific rights-based duties to respond to sexual slavery, exploitation and abuse and to protect women from violence, may well apply in relation to the same broader group as the mandate for forceful engagement. Armed groups living off or arising from the civilian population will naturally often be near them and intermingle with them. The fact that armed groups in Africa often include child soldiers is another obvious case. The claim is not to insist that soldiers in the heat of combat must necessarily hold their fire if a woman might be a collateral victim or if the target might be a child soldier (although, as noted, the Paris Principles provide that child soldiers may not be engaged simply as combatants). The reality is seldom that neat, either.[65] The point is only that the attempt to keep a military, IHL-regulated sphere separate from the subjects of rights-based concerns will frequently be untenable, and will, therefore, be the strategy of keeping the IHL-governed part of the mission separate from the rights-

63 See, eg, JG Stewart 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *International Review of the Red Cross* 313 esp 319–23; Scobbie (note 4 above) 8–13.

64 Fowkes (note 2 above) 16 and 18–21.

65 Sassòli & Olson (note 4 above) 613.

driven part in order to finesse difficult debates about the relationship between IHL and IHRL.

This is a particular form of the general problem: everyone involved in modern peacekeeping is still coming to grips with its challenges, of which the application of IHL and IHRL is only one.[66] The emerging African position and it limitations deserve to be studied as one attempt to grapple with this problem. Although fragmentation is inevitable and can be useful while law is changing and engaging fresh problems,[67] the various African commitments that are emerging need to confront their own implications for each other. What remains to be seen is how far IHRL will affect IHL rules in the African context, especially in relation to peacekeeping. The position with regard to children's rights illustrates both the uncertainty and the potential room for development. The rising arc of women's rights developments, several years ahead of the children's rights curve, reflects a possible course for the legal future — a future in which IHRL-based concerns become progressively more important in the standards that African peacekeeping sets for itself, and thus a future in which the need to squarely confront the role of IHL will become progressively more pressing.

66 See the sources cited in note 8 above.
67 Cassimatis (note 4 above) 638.