# IHL, IHRL and Complementarity: A Feminist Approach

**Executive Summary**

The purpose of this report was to examine the link between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) from a critical feminist perspective. More specifically, the aim was to determine whether the complementarity approach to interpretation of these regimes could improve the lived experience of women in armed conflict (including occupied territories and post-conflict areas). In order to answer this research question a range of literature was reviewed, primarily in the area of feminist legal scholarship. Sources of IHL and IHRL as well as International Law generally were consulted, including the Geneva Conventions, SC Resolution 1325 and CEDAW, ILC fragmentation study and jurisprudence of the ICJ and Tribunals (ICTY, ICTR). The results showed that while the complementarity approach can help women, there are times where norms will conflict from both regimes, and IHL will be the applicable *lex specialis*. To secure better outcomes for women, reform of IHL is necessary to yield a more gender-sensitive approach. The findings suggest that further data needs to be collected from women in conflict zones on their experiences of war (especially Afghanistan) and determine to what extent a top-down legal interpretive approach can ameliorate the lives of women in conflict, as compared with grassroots campaigning or participation policies like including women in the peace building process. Analysis of the jurisprudence on the *lex specialis* principle specifically, and whether IHRL could be found to be the more specific law for women's rights issues in conflict should also be undertaken.

## I. Introduction

Feminist scholars have long recognised a division of public and private life that permeates societies domestically, whereby the lived experience of women is conducted in private.[1] This patriarchal structure extends into the international domain in the form of International Law (IL), a legal framework designed around the concept of state sovereignty and constructed upon the male experience.[2] While it is acknowledged in the literature that women's experiences are generally disregarded in the public domain of IL, this report will focus on the gender bias of IHRL and IHL instruments specifically, and how these legal regimes interact to protect, or fail to protect, women affected by armed conflict. The fluid nature of the international legal framework governing conflict means that pre-existing legal mechanisms, bodies and concepts may be moulded to yield better outcomes for women by challenging the gendered dichotomy of IL.[3]

This report relies on conclusions drawn from the literature regarding the status of women in conflict and IL generally. Firstly, it is agreed that women take on a complex role in armed conflict and its aftermath.[4] In international political studies, women are often portrayed as the more peaceful sex, less suited to the violence of war.[5] The nature of modern warfare is such that women no longer merely play the role of victim in need of protection, increasingly involved in all facets of the military in some states, while still denied the right to seek medical attention from war-related injuries in others.[6] The failure of IL to account for gender-based issues in

[1] Cynthia Enloe, 'The Mundane Matters' (2011) 5(4) *International Political Sociology* 447, 447-450.
[2] Hilary Charlesworth, 'The hidden gender of international law' (2002) 16(1) *Temple International and Comparative Law Journal* 93, 96.
[3] Ibid, 96; Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15(1) *Human Rights Quarterly* 63, 74.
[4] Women's International League for Peace and Freedom, *Proof: Impact & Cases*, PeaceWomen <http://peacewomen.org/why-WPS/impact>; Amber Cheri Paaso, *Recognizing Gender-Based Violence in Armed Conflict: Incorporating the Voices of Women in International Humanitarian Law* (Master of Art Thesis, Florida Atlantic University, 2004) 36; Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001) 7-8.
[5] Tsjeard Bouta, Georg Frerks and Ian Bannon, *Women, Gender and Conflict* 2005 The World Bank, 2005) 11.
[6] Ibid, 11-13; Charlotte Lindsay Curtet, 'Afghanistan: An ICRC perspective on bringing assistance and protection to women during the Taliban regime' (2002) 84(847) *International Review of the Red Cross* 643, 648.

modern conflict was acknowledged in the Beijing Declaration of 1995, where 'Women and armed conflict' was set out as one of 12 critical areas in the Platform for Action.[7] The outcome document of the Beijing +5 conference noted in its achievements:

"*There is a wider recognition that armed conflict has different destructive impacts on women and men and that a gender-sensitive approach to the application of international human rights law and international humanitarian law is important.*"

However, in citing further 'obstacles' to the situation for women in conflict the outcome document stated:

*"In situations of armed conflict, there are continued violations of human rights of women, which are violations of fundamental principles of international human rights law and international humanitarian law. There has been an increase in all forms of violence against women, including sexual slavery, rape, systematic rape, sexual abuse and forced pregnancies, in situations of armed conflict. Displacement compounded by loss of home and property, poverty, family disintegration and separation and other consequences of armed conflict are severely affecting the populations, especially women and children. Girls are also abducted or recruited, in violation of international law, into situations of armed conflict, including as combatants, sexual slaves or providers of domestic services."*[8]

The second main assumption this report makes is that IL matters. This proposition, while seemingly innocuous, has been widely debated with conclusions drawn either way. Some scholars (and officials) have argued IL isn't really law at all, but a moral framework.[9] Here, I will be accepting IL as a legal system, able to regulate the behaviour of states and other international actors, per dominant IL thought.[10] Feminist approaches have historically focussed on law as the institutionalisation of patriarchy. In this sense, is a top-down approach to reform valid when the desired outcome is the advancement of women, who the system was built to exclude? Law does not create the discrimination and power imbalance, but it certainly can uphold it, even where a law, at face value, appears gender-neutral.[11] IL can be compared to domestic law in that the impact of legal change is not always felt directly, but is necessary to 'close the gaps' and change society, in fact, it has been argued that changing people's behaviour is the point of a legal system to begin with.[12] Within IL, IHL and IHRL govern conflict, and thus are the relevant 'special regimes' for this study.[13] While originally conceived as two distinct bodies of law, they are becoming increasingly intertwined as the nature of conflict, and the IL system change.[14] How these two 'special regimes' interact during periods of armed conflict, occupation and post conflict, and how this interaction can be interpreted to provide a gender-sensitive approach to conflict, are the focus of this report.

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[7] *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20 (15 September 1995) para 44.
[8] *Further actions and initiatives to implement the Beijing Declaration and platform for Action*, GA Res S-23/3, UN GAOR, 23rd sess, 10th plen mtg, Agenda Item 10, UN Doc A/RES/S-23/3 (10 June 2000) para 19 (*'Beijing +5 Outcome Doc'*).
[9] John R Bolton, 'Is there Really "Law" in International Affairs' (2000) 10 *Transnational Law and Contemporary Problems* 1.
[10] Ian Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations' (1995) 255 *Recueil des Cours* 29, 22-26; HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) Chapter X.
[11] Aaron Xavier Fellmeth, 'Questioning Civilian Immunity' (2008) 43 *Tex. Int'l L.J.* 453, 477.
[12] See proponents of the classic 'deterrence' argument, including: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1789).
[13] See the use of terminology 'special regimes' in: International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law-Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 Apr 2006 (*'ILC Fragmentation Study'*), as opposed to 'self-contained' regimes as used in *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgement)* [1980] ICJ Rep 3. (*'Tehran Hostages Case'*)
[14] Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Israel Law Review* 310, 311.

**II. Feminist views on IHL: where are the gaps?**

The starting point for any definition of IHL is traditionally that it provides for the regulation of armed conflict.[15] The basis for modern IHL principles are the Geneva Rules (the four Geneva Conventions of 1949 and two Additional Protocols of 1977), which deal with the obligations owed by parties to armed conflict for the purposes of protecting all persons involved, directly or indirectly, in the conflict.[16] Historically, IHL is primarily motivated by a principle of humanity, not a principle of rights.[17] The International Committee of the Red Cross (ICRC) is recognised as the enforcer of the Geneva Rules, and as such its legal opinions and writings on IHL carry great weight.[18] The most important aspect of IHL according to the ICRC is neutrality. Humanitarian lawyers argue that given the nature of warfare, the doctrine is only effective where it retains its neutrality, allowing parties to a conflict to still gain tactical advantages through the use of force, and thus ensuring reciprocity.[19] In this sense, IHL gains legitimacy from providing base level protections to parties involved in conflict by characterising certain acts as 'criminal' in nature.[20] Setting the bar low means that parties to a conflict are incentivised to follow them, rather than creating such a burden that their interests in the conflict would be better served by disregarding IHL altogether.[21] Retaining the principle of neutrality is also important because, unlike other areas of IL where treaties only bind states that have agreed to be bound, it is fairly well recognised that many aspects of IHL form part of customary international law, with some principles acknowledged as *jus cogens*.[22] Custom is binding on all states,[23] and as such the rules must reflect universal humanitarian values rather than 'Western' human rights norms.

Feminist critiques often note that the principle of neutrality has been used to defend IHL for its lack of gender-sensitive provisions. Evaluations of the doctrine generally fall into two groups: the enforcement school, which views the current law as sufficient but failing women for lack of being universally enforced through effective mechanisms; and the revisionist school, which argues for reform of the legal framework itself.[24] Enforcement is an issue that permeates all areas of international law, and there has been much written on the subject. It is more an argument regarding sovereignty, and does not provide for a substantial feminist critique of IHL.[25] This position is exemplified by paragraph 9 of Security Council Resolution 1325, which:

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[15] That is to say, *ius in bello* (laws in war) rather than *ius ad bellum* (the laws to war). IHL constitutes one part of the laws in war, along with customary rules of belligerency and neutrality and the Hague Conventions of 1899 and 1907.
[16] See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[17] Droege, above n 14, 313.
[18] *Statute of the International Court of Justice* s38(1); Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action' (2011) 93(881) *International Review of the Red Cross* 173, 174.
[19] Droege, above n 14, 313.
[20] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 1 *('Rome Statute')*.
[21] Christian Tomuschat, 'Human Rights Law and International Humanitarian Law' (2010) 21(1) *The European Journal of International Law* 15, 17; Terry above n 18, 186.
[22] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, 2006); See for example Torture as *jus cogens*: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgement)* [2012] ICJ Rep 422, 457 [99].
[23] Save for 'persistent objectors' to customary rules.
[24] Valerie Oosterveld, 'Feminist Debates on Civilian Women and International Humanitarian Law' (2009) 27 *Windsor Yearbook of Access to Justice* 385, 386.
[25] Ibid.

*"Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977…"*[26]

Conversely, the revisionists magnify the gaps in the Geneva Rules and other IHL conventions that the women's experience falls through, namely that 'there are no provisions of IHL that truly address the female experience.'[27] The revisionists form IHL-specific arguments based on the views of Charlesworth et al. on international law generally. They see current IHL as a 'reflection of masculine assumptions that do not take into account global systematic gender inequality.'[28] The main areas targeted by both schools are IHL's general non-discrimination provisions (encompassing the neutrality principle) and the specific protections for civilian women against sexual violence. The 'no adverse distinction' rule found in the 1949 Geneva Conventions (but has arguably now entered customary status)[29] prevents IHL from giving priority to those in most urgent need of care, in other words, making an 'adverse distinction.'[30] While this provides structural equality for women under the regime, female-specific vulnerabilities are left out of the equation.[31] The IHL norms themselves are gendered in conception and gender-biased in practice. Created by white men in 1949, modern IHL operates under the assumption that the female role in armed conflict is that of the civilian mother, or the victim of sexual violence. Without any explicit recognition of the gendered nature of IHL and armed conflict, supposedly 'neutral' conventions cannot address women's lived experience of conflict and thus improve their situation. The ICRC defends the neutrality approach as 'not homogenising' women because all women experience war in a variety of ways. Refusing to take a detailed, 'more integrated' analysis of gender-specific vulnerabilities pushes women's issues to the private sphere.

The provisions against sexual violence are argued against based mainly on language. Certain articles define sexual violence in terms of honour and dignity, rather than an offence against the person (male or female).[32] This reinforces dated stereotypes that a raped woman is dishonoured, representing her as male property. The ICRC argues that 'honour' of women is often targeted deliberately during armed conflict when sexual violence is perpetrated.[33] This view fails to understand that proper recognition of such offences as against a person (akin to murder and other acts) rather than honour can eventually take away such motives, and rather, dishonour the perpetrator.[34] The revisionists also argue that where articles relate directly to women, they do so in a manner that furthers the 'protector/protected' dichotomy between men and women, obscuring the circumstances in which sexual violence is prohibited.[35] While IHL does prohibit sexual violence, the language used in doing so is a problem: it is doubtful that sexual violence is 'properly understood as an extremely serious crime.'[36] More recent developments in IHL such as the Rome Statute have continued to relegate women's experience of such crimes to the private realm.[37] The requirement that a crime against humanity be 'widespread or systematic' is accepted, but to require further proof of a policy being implemented has been

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[26] SC Res 1325, UN SCOR, 4213rd mtg, UN DOC S/RES/1325 (31 October 2000) para 9 *('RES 1325'*) continues to list the relevant IHL conventions: '*…the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court.'*

[27] Oosterveld, above n 24, 387.

[28] Ibid.

[29] Henckaerts and Doswald-Beck, above n 22, 308-309; Oosterveld, above n 24, 388.

[30] Oosterveld, above n 24, 388.

[31] Curtet, above n 6, 644; Charlotte Lindsey, *Women Facing War* (International Committee of the Red Cross, 2001) 63; Gardam and Jarvis, above n 4, 93.

[32] See for example, Additional Protocol II to the Geneva Conventions, Art 4; Convention (IV) relative to the Protection of Civilian Persons in Time of War, art 27.

[33] Lindsey, above n 31, 55.

[34]Oosterveld, above n 24, 394.

[35] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 314.

[36] Oosterveldt, above n 24, 395.

[37] Ibid; Women's Caucus for Gender Justice, 'Summary of Recommendations' Recommendations to the Preparatory Commission of the ICC, March 1998.

found to be unrealistic in many conflict situations, and placing too high of a burden on victims in proving sexual violence.[38] While sexual violence has previously been found to fit the definition of torture, the Torture Convention requires state action to be present and that the victim must demonstrate that rape was committed for a deliberate purpose, for example, to elicit information, making the convention an ineffective alternate protection for many victims of sexual violence perpetrated in conflict.[39] The requirement that a public official carry out the act again exemplifies how the public-private dichotomy permeates IHL, and how the female experience can simply fall through the gaps.

**III. Feminist critiques of IHRL**

Where IHL may be categorised as a kind of international criminal law, IHRL can be seen as akin to the domestic domain of public law, dealing with the relationship between states and the individuals that depend on them. On this basis, IHRL protections adopted by a particular state apply not only to citizens or those within a territorial jurisdiction. Such groups as refugees and displaced persons and individuals living in an occupied territory retain protections under IHRL.[40] The focus on individual rights has only emerged since WWII, with the UDHR in 1948 providing the underlying principles of the regime. Human Rights treaties are now some of the most prevalent, if not the most publicised of the regimes, especially in the body of UN-made treaty law. Unlike IHL, IHRL only applies in jurisdictions that have agreed to be bound by the various treaties – the customary status of some HR norms have been ruled on by the ICJ,[41] however women's rights remain within the law of treaties. Being a treaty-based regime creates issues with consistency, as there are an innumerable amount of ways a treaty may take effect for each state: some states may sign and ratify the entire treaty, some may fail to ratify; other state parties may make certain reservations to the treaty, be it by an objection to one article or such a large part of the treat that ratification is rendered meaningless. Due to its complex (often confusing) nature, IHRL is seen as 'much more politicised than IHL,'[42] and often becomes an arena of political struggle rather than its intended purpose of setting minimum standards of protection for the human dignity of individuals.[43] In this sense, IHRL is often characterised as 'aspirational' rather than law proper. The frequently cited 'Asian Values' critique, that conceptualises IHRL as a political creation of the West, is the primary political argument made against many IHRL standards.[44] Where IHL may be characterised as 'agreeable' to almost every nation, IHRL is often labelled 'controversial.'[45] It seems to be cut from the same cloth as feminist analysis: that IHRL as a regime is biased given its formulation by white men after the atrocities of WWII, with norms defined by what these men feared would happen to them.[46] Despite this, the Asian Values standpoint is generally used to argue against the furthering of women's rights through a

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[38] Women's Caucus for Gender Justice, above n 37.

[39] *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987) art 1 (*'The Torture Convention'*); Julie A. Mertus, *War's Offensive on Women* (Kumarian Press, 2000) 79.

[40] See *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgement)* [2005] ICJ Rep 168, 231 [179] (*'Congo v Uganda'*).

[41] IHRL with customary status is listed in American Law Institute, *Restatement (Third) Foreign Relations Law of the United States*, Volume 2, St Paul 1987, §702:

(a) genocide,
(b) slavery or slave trade;
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination,

[42] Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56(3) *The International and Comparative Law Quarterly* 623, 629.

[43] *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 71 (10 December 1948) (*'UDHR'*).

[44] See Bilahari Kausikan, 'Asia's Different Standard' (1993) 10(92) *Foreign Policy* 24.

[45] Éric David, *Principes de droit des conflits armés*, (1994, Bruylant) 48ff.

[46] Charlesworth and Chinkin above n 3, 69.

more gender and culturally sensitive approach, given the 'traditional' status of women in many eastern cultures.[47]

IHRL is also often subject to similar criticism as IHL and public law generally in terms of its gendered nature. The arbitrary primacy awarded to civil and political rights by western IL lawyers displays the public-private divide that persists in IHRL, where the same importance has not been placed on economic and social rights that govern life in the private sphere, and the world of women.[48] The enforcement arguments also ring true in IHRL, with CEDAW labelled by feminist author Sally Engle-Merry as 'law without sanctions,' threatened by the gap between the right and remedy.[49] Despite continuing criticisms of the overall structure and implementation of IHRL as a special regime, it must be recognised that women-specific, gender-sensitive norms exist within the framework. CEDAW is a primary example of IHRL that has been widely ratified by states (including Afghanistan) and is now monitored by a committee. It is now one of the 6 major conventions that form the basis of the IHRL system.[50] While this treaty is criticised for taking a 'male-comparative' approach of feminism of the 1950s, it focuses on both legal and substantive equality by proscribing discrimination and also necessitating positive steps to be taken by states in order to achieve real gender equality, for example, the elimination of sex-role stereotypes in media and educational materials.[51] The fact that the treaty has led to more gender-sensitive constructions of other issues in the UN system (including women in conflict) shows the capacity of the IHRL regime (though not perfect) to affect women's lived experiences and in so doing, capture what IHL is missing.

## IV. Legal approaches to interpretation of the intersection between IHL and IHRL

The traditional view of the relationship between IHL and IHRL was that IHL constituted the laws of war, while IHRL was for peacetime.[52] As previously touched on, the two 'special regimes' developed separately, and grew into distinct disciplines, while both serving a humanitarian purpose providing legal protections for individuals, unlike other aspects of international law which deal solely with states.[53] Judge Greenwood of the ICJ recognises three relatively clear jurisprudential approaches to the issue of how IHL and IHRL overlap. Firstly, what may be categorised as an originalist approach, where IHL applies in wartime and IHRL applies in peacetime. A second approach, argued by HR lawyers and activists, is that IHRL governs state action in all circumstances including armed conflict. Greenwood described the approach as one where 'human rights trump everything.'[54] The final method of interpretation to be considered is the 'complementarity approach,' and is the most widely accepted: each regime applies simultaneously as part of IL, and can inform each other up to a point where there is clear conflict between norms. These three approaches to interpretation will be analysed from a feminist perspective in the proceeding section, focussing on if / how each approach can 'fill the gaps' to provide for lived experiences of women in conflict.

*Originalist approach*

The originalist approach to the interpretation of IHL and IHRL is taken by the enforcement school in seeing IHL, of itself, as the necessary regulator for women in conflict. It could also be argued that the revisionists, in

[47] Curtet above n 6, 644; Javed Bahri, 'Western Gender Policies in Afghanistan: Failing Women and Provoking Men' (2014) 18(2) *Gender Technology and Development* 163, 171.
[48] Charlesworth and Chinkin above n 3, 69.
[49] Sally Engle Merry, *Human Rights and Gender Violence; Translating International Law into Local Outcomes*, (2010, University of Chicago Press) 72.
[50] The other 5 basic conventions are: *ICCPR; ICESR; CERD*; *The Torture Convention*; *The Convention on the Rights of the Child*.
[51] Merry above n 49, 74; *Convention on the Elimination of all forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2 (*'CEDAW'*).
[52] Tomuschat above n 21, 16; Christopher Greenwood, 'Human Rights and Humanitarian Law: Conflict or Convergence?' (Speech delivered at the Klatsky Seminar in Human Rights, Western Reserve University, 7 April 2010) < https://www.youtube.com/watch?v=Uo_Rvy1AXV8>
[53] Greenwood, above n 52.
[54] Ibid.

taking the stance that IHL must be reformed to secure better outcomes for women, are also taking the view that only IHL applies in conflict. However, by advocating the need for reforms that take into account the gendered nature of war, the revisionist school is really arguing for women's rights, as put forward by the UN system, women's rights NGOs and civil society to form the basis of the new IHL. Problems with seeing IHL and IHRL as separate bodies of law have become more prominent as the nature of conflict changes, globalisation continues and IL becomes more interlinked, with regimes overlapping. For example, SC1325 explicitly relates to situations of 'conflict.'[55] There is no longer a clear line where war begins and ends, with non-international armed conflicts constituting the majority of today's wars, with international intervention in the form of occupation.[56] Furthermore, treaty law seems to preclude an originalist approach: the Vienna Convention on the Law of Treaties (VCLT) provides that, when interpreting any treaty, (including the Geneva Conventions) 'any relevant rules of international law applicable in the relations between the parties must be taken into account,'[57] enshrining the principle of systemic integration of IL. Derogation clauses in IHRL treaties for times of war further conflict with the originalist approach. For example, Article 15 of the ECHR allows parties to derogate from their HR obligations only to the extent 'strictly required' in wartime.[58] As will be analysed later, international courts and tribunals have not dealt with IHL and IHRL as separate regimes, incapable of overlap. It cannot be said that IHRL does not apply at all in conflict situations.

*IHRL 'trumps' approach*

It is easy, especially for HR organisations and IHRL lawyers to argue not only that IHRL applies to an extent in war time, but that being universal rights, apply to all persons in all situations. It is an important distinction to make in the HR field that there is a difference between IHRL and the aspirations of the HR sector. To overcome criticism and 'delegitimising' of IHRL by IHL lawyers, a realist approach must be taken to this issue. The fact is that war exists. The right to life[59] cannot be applied universally in an armed attack. The right to freedom of movement within borders is not always self-evident in a war-torn country.[60] For such rights to apply universally, all war would have to be abolished.[61] While this is a desirable outcome, the approach plays into the hands of 'aspirational' critiques. The main hurdle for HR orgs is to recognise that war is happening, and is not prevented from happening under IHRL – although it may be found to be illegal on other bases, the laws to war (*jus ad bello)*. The broad nature of IHRL means that it doesn't always apply clearly to certain factual scenarios: while the content of the Geneva Conventions and other laws of war fill entire books, IHRL is generally made up of sweeping statements deliberately formulated to encompass as many types of breaches as possible, but that can often fit on one page.[62] Courts have also drawn a line for the application of IHRL in conflict. In the *Bankovic* case, the families of victims of a deliberate NATO bombing of a Serbian television studio in Belgrade during the Kosovo conflict brought an action against Belgium (one of the participating NATO forces – and party to the ECHR) in the ECtHR for a violation of the right to life and freedom of expression under the ECHR.[63] A unanimous decision by the court found that the fact that Belgium was one of the parties to the bombing was not enough to bring the applicants under the jurisdiction of Belgium and thus its IHRL obligations did not apply.[64] Furthermore, previously discussed issues of state sovereignty, where parties to conflict are not necessarily parties to the same IHRL treaties also resonate: IHRL cannot be enforced where it is not already binding on states either by treaty or custom. The question then remains: how

[55] *RES 1325,* UN DOC S/RES/1325, para 1,2,8-10, 16.
[56] Greenwood, above n 52.
[57] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c) (*'VCLT'*).
[58] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 11 May 1994, ETC No 155 (entered into force 1 November 1998) art 15 (*'ECHR'*).
[59] *UDHR*, UN Doc A/810 71, art 3; *ECHR*, Art 2.
[60] *UDHR*, UN Doc A/810 71, art 13.
[61] Greenwood, above n 52.
[62] See for example, *CEDAW*'s 30 short articles.
[63] *Bankovic´ v Belgium*, admissibility decision, Application No 52207/99, 19 Dec 2001, para 28 (*'Bankovic'*); *ECHR*, arts 3, 10.
[64] *Bankovic* case paras 1,2, 82.

do you maintain the certainty and legitimacy of the rules regulating armed conflict, while still ensuring that IHRL is respected to the greatest possible extent?

*Complementarity approach*

Today, it is generally understood that IHRL is not displaced by IHL in times of armed conflict.[65] Both doctrines are part of IL as a whole, neither is a 'self-contained' entity, to be interpreted exclusively from the other.[66] This 'complementarity' approach has been established through the jurisprudence and workings of the IL community, especially the International Law Committee (ILC) fragmentation study.

In the ICJ *Nuclear Weapons Advisory Opinion,* the court considered whether the general indiscriminate effect of nuclear arms violated the right to life under the ICCPR. Objections from certain governments based on the originalist approach were answered when the court observed that IHRL continues to apply in times of war.[67] This approach was confirmed by the ICJ in the *Israeli Wall* case, where it ruled that the Israeli authorities had an obligation to respect Article 2(1) ICCPR, as well as IHL obligations in armed conflict situations.[68] In terms of anti-discrimination specific IHRL applying in armed conflict, it was found by the ICJ in an urgent provisional measure[69] that CERD applied even if alleged acts in breach of IHRL obligations were also covered by other rules of IL, including IHL.[70] On the face of it, CERD and CEDAW are not unlike each other, however, CERD does list individual rights more specifically in Article 5.[71] There has not been any decision of the ICJ or CEDAW (Committee) that confirms that it applies in wartime, however it could be argued that SC Res 1325 confirms this approach in relation to CEDAW.[72] Other cases in the ECtHR have all found that the right to life in Article 2 of the ECHR applied in times of war.[73]

Problems with the complementarity approach arise where conflict exists between two overlapping regimes. Substantial interaction between regimes (as occurs between IHRL and IHL) creates greater opportunity for norms from both regimes to apply in one set of circumstances, and thus a greater scope for conflict.[74] Both ICJ decisions of the *Nuclear Weapons* case and *Israeli Wall* case were fairly confused on this issue. While the court in both instances agreed that IHRL did apply in wartime, the language used did not clearly indicate whether or not IHL and IHRL were to be interpreted together where norm conflict arose. *Congo v Uganda* reconfirmed the opinion of the court in *Israeli Wall* that norms could belong to one of three categories. Some situations may be exclusively matters of IHL; others exclusively IHRL; yet others may be matters of both branches.[75] For example, Uganda, as an occupying power, had a duty to "secure respect for the applicable rules of international human rights law and international humanitarian law" in the Congo, where its armed forces were found to have violated both obligations of IHRL and IHL with atrocities committed by troops against the Congolese people and their property, citing the UDHR, ICCPR as well as Geneva Conventions.[76] In this third set of circumstances where both regimes apply, but applicable norms are in conflict with one another, the ILC has indicated that the general legal principle of *lex specialis* applies.[77] The principle was

[65] Tomuschat, above n 21, 15; Greenwood, above n 52.
[66] Greenwood, above n 52; *VCLT*, art 31(3)(c).
[67] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25] (*'Nuclear Weapons Advisory Opinion'*).
[68] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 178 [106] (*'Israeli Wall'*).
[69] Not an Advisory Opinion or regular case between two parties – an emergency advice that can only be taken with a grain of salt.
[70] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Application Instituting Proceedings)* [2008] 4.
[71] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 211 (entered into force 4 January 1969) art 5 (*'CERD'*).
[72] See the introductory statements in *RES 1325*.
[73] See for example: *Isayeva v Russia*, judgement Application No 57950/00, 24 Feb 2005, para 201
[74] Cassimatis, above n 42, 628.
[75] *Congo v Uganda*, 243 [216] citing *Israeli Wall*, 178 [106].
[76] *Congo v Uganda*, 231 [178].
[77] *ILC Fragmentation Study*, UN Doc A/CN.4/L.682, 56-59.

ultimately used in *Nuclear Weapons Ad Op* to obtain the ultimate outcome that the relevant regime to apply was IHL, rather than IHRL.[78] The principle encompasses the idea that while both IHRL and IHL apply in times of conflict, and should be interpreted as complementing each other, where conflict arises between two norms, *lex specialis derogat lex generalis* – that is, the specific law overrides the law which is more general.[79] In many conflict situations, the *lex specialis* will (or may be found to, depending on the political persuasion of the analysis) constitute IHL, not IHRL.[80] It should be remembered that while the complementarity approach may be used for IHRL to 'trump' IHL in a conflict scenario, where on its face, IHL should apply, the sidestepping of the *lex specialis* principle is detrimental to the long-term systemic integrity of international law, including the human rights regimes themselves.[81]

## V. Complementarity and Women in Conflict

Given that IHRL contains more gender-specific content than IHL, can it 'fill in the gaps' already identified in IHL to provide greater protection for women? An example of the complementarity approach being utilised (in uncontroversial circumstances) to secure better outcomes for women in conflict is a 1990 UNHCR statement whereby CEDAW helped to define the concept of 'persecution' under the Refugee Convention.[82] The implication is that severe discrimination as prohibited by CEDAW can now form the basis for the granting of refugee status to an individual. This includes discrimination both in public (political) and private (social, cultural, civil or any other) aspects of society. A more recent example of CEDAW and other IHRL being interpreted as applying in conflict lies in the text of SCRes 1325. As a resolution binding on all states in the UN, 1325 may be the most authoritative statement on the importance of IHRL to the protection of women in conflict. The Security Council:

*"Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court…"*[83]

The wording of the resolution may be broad, and easily distinguishable scenarios where IHRL obligations must be respected non-existent, but its inception supports the proposition that the complementarity approach can be applied to bring women's rights to fore in armed conflict.

Jurisprudence is virtually non-existent on this particular point. Considering only the decisions of international courts when considering how the approach can help women is detrimental. Firstly, it is well recognised that IL consists of more than just judicial decisions.[84] Secondly, to reach the adjudication stage, a dispute must have emerged within pre-existing IL and as previously discussed, IL itself is gendered, with many women's rights issues occurring outside the common areas of litigation, where often at least one party must be a state. However, the Ad Hoc Tribunals for Yugoslavia and Rwanda created by the UN are often cited as important in

[78] *Nuclear Weapons Advisory Opinion*, 240 [25].
[79] *ILC Fragmentation study*, UN Doc A/CN.4/L.682, 56-59.
[80] Compare the *Nuclear Weapons Advisory Opinion*, with ECtHR cases favouring IHRL over UNSC Resolutions through the interpretation of article 103 of the UN Charter, including: *Nada v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 10593/08, 12 September 2012).
[81] Auke Willems, 'The European Court of Human Rights on the UN Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in Nada v Switzerland, (2014) 83(1) *Nordic Journal of International Law* 39, 59.
[82] Mertus, above n 39, 86 citing UNHCR Executive Committee, *Note on Refugee Women and International Protection*, UN DOC EC/SCP/59 (28 August 1990) para 5.
[83] *RES 1325,* UN DOC S/RES/13255.
[84] *Statute of the International Court of Justice*, article 38(1).

the recognition of gender in IHL. Both tribunals have rape explicitly incorporated in their statutes as a crime against humanity, and have acted on this – issuing several indictments and convictions (both of rape specifically, and in the ground-breaking case of *Mucic et al*., as torture) as a result of sexual violence.[85] The UN attributes these gains in IHL to the steps taken by the international community post Beijing Conference.[86] While not strictly a complementarity approach, rather a reform to IHL (the *lex specialis*) being made based on such an approach, the work of the tribunals in indicting and convicting perpetrators of sexual violence shows how IHRL can have an influence on future IHL.

The Rome Statute, adopted in 1998, followed cues from the ICTY and ICTR statutes, with definitions of the crimes taking gender concerns into account, with rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization defined as crimes against humanity and war crimes. Genocide is defined to include measures intended to prevent births within a national, ethnical, racial or religious group. In the Beijing +5 outcome document, the UN also attributes the adoption of such crimes by the ICC to prior IHRL developments in women's rights.[87] In the document, the ICC statute is commended for evidencing

*'…greater recognition of the need to integrate a gender perspective in the planning, design and implementation of humanitarian assistance and to provide adequate resources.'*[88]

This is undoubtedly a positive step in recognition of such rights, but the ICC statute is not free from criticism. In the *Travaux Préparatoires* of the statute, a summary of recommendations made by Women's Caucus for Gender Justice during the drafting of the statute displays the way the drafters have paid 'lip service' to IHRL principles, but do not go so far as taking a gender-sensitive approach to the issue. Importantly, the recommendations are made in the context that the new statute (part of IHL) should be "consistent with the principles articulated in the 1993 World Conference on Human Rights in Vienna, the 1995 Fourth World Conference on Women in Beijing, and the CEDAW…'[89] The Women's Caucus argues that the statute should implement affirmative action principles for the selection/ election and assignment of individuals who will staff the various organs of the court, to ensure 'a balance between women and men,' as well as 'expertise in gender analysis and crimes of sexual and gender violence.'[90] In critiquing the substantive law of the draft statute, the caucus notes that Crimes Against Humanity are defined by whether the enumerated offenses are 'widespread or systematic,' and that they must be part of a broader state policy.[91]

*'To require proof of a policy is both unrealistic in many of the conflict situations potentially before the Court and will be an unnecessary obstacle to the proof of sexual violence as a crime against humanity.'*

Is there a crime against humanity when commanders allow combatants who win to take their 'prize' as has been common throughout history?[92] It appears that despite differing from the Torture Convention in lack of requirement of a 'public official' to carry out the act, the definition of 'attack' seems to fill this void. The

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[85] *Prosecutor v Mucic et al. (Appeals Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001); *Prosecutor v Tadic (Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997*)* (first trial for sexual violence against men); *Prosecutor v Anto Furundzija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/1-T, 10 December 1998) (defining rape as torture); *Prosecutor v Kunarac et al.(Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-23-T& IT-96-23/1-T, 22 February 2001) (sexual enslavement and rape as a crime against humanity); *Prosecutor v Radislav Krstic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-98-33-T, 2 August 2001) (linking rape to ethnic cleansing).

[86] Economic and Social Council, *Review and Appraisal of the Implementation of the Beijing Platform for Action: Report of the Secretary-General*, UN DOC E/CN.6/2000/PC/2 (19 January 2000) [332]-[335].

[87] *Beijing + 5 Outcome Doc*, UN Doc A/RES/S-23/3, para 15.

[88] Ibid.

[89] Women's Caucus for Gender Justice, above n 37.

[90] Ibid.

[91] Ibid; *Rome Statute*, arts 7(1), 7(2)(a).

[92] Mertus, above n 39,8.

Women's Caucus makes further mention of other elements that dictate 'public' requirements in the statute.[93] While these recommendations were not necessarily followed, the fact that they make up part of the preparatory works of the statute are an indicator that IHRL was considered in making it more gender-sensitive.

So, IHL may be interpreted in light of IHRL to lead to better protection of women's rights in conflict. The actual impact of such an approach can be seen through investigation into the situation in Afghanistan.

## VI. Regimes in practice: Afghanistan

*Legal Protections*

The latest 2014 country report of the ICC is at the admissibility phase for the prosecution of crimes under the ICC statute. It defines the current conflict in the country as an armed conflict of 'non-international character between the Afghan Government (supported by international forces) and non-state actors, especially the Taliban.'[94] Afghanistan ratified the Rome Statute in 2003, and has had jurisdiction over crimes committed since 1 May 2003.[95] Women's rights abuses have been noted frequently since then throughout the country, especially in the perpetration of violence against women.[96] The government does not/ is unable to enforce the concept of sexual violence as a crime, rather, perpetrators of 'honour crimes' are barely ever brought to justice, and such acts may be carried out by the judicial system as corporal punishment.[97] Where law is seen as a tool to change behaviour, reform of the language of the Geneva conventions may, rather than 'delegitimise' the conventions, 'legitimise' the view of rape and sexual violence as a crime against the person, rather than a quasi-property offence against a woman's family. The situation is not improving, with 2/3 more women killed and injured as a result of the armed conflict in first 6 months of 2014 compared to 2013.[98] The Office of the Prosecutor (OTP) of the ICC has found a 'reasonable basis' to believe that certain crimes against humanity have been committed, breaching the Rome Statute.[99] The only gender-specific crimes being pursued relate to the targeting of female students and girls' schools by the Taliban, pursuant to their policy that girls should stop attending school past puberty.[100] This falls under the war crime of intentionally directing attacks against

[93] War Crimes as well come under criticism: a mandatory link to armed conflict would exclude most official perpetrators of violence through repressive dictatorial regimes. The only requirement should be 'widespread or systematic,' taking care of the non-state actor issue. Discrimination of a particular group is a legal criteria for the persecution offences – this group based language should be removed. Language of article 7(1)(g) should be conformed to the sexual violence under article 80 (War Crimes); Persecution (article 7) should be recognised on the basis of gender or other similar grounds, but not require the connection with other crimes within the jurisdiction of the Court.

[94] The Office of the Prosecutor, *Report on Preliminary Examination Activities*, (2014, International Criminal Court)18-24 ('*Preliminary Report*').

[95] Ibid.

[96] See for examples of failure of government to provide adequate protection for women in the Afghan conflict: Janet Walsh, *A year of progress in eliminating violence against women* (24 November 2012) Human Rights Watch <https://www.hrw.org/news/2012/11/24/year-progress-eliminating-violence-against-women> ; Heather Barr, *A Court-Sanctioned Lashing in Afghanistan* (2 September 2015) Human Rights Watch <https://www.hrw.org/news/2015/09/02/dispatches-court-sanctioned-lashing-afghanistan>; *Afghanistan: Keep Promises to Afghan Women* (6 December 2009) Human Rights Watch <https://www.hrw.org/news/2009/12/06/afghanistan-keep-promises-afghan-women>.

[97] Barr, above n 96.

[98] *Preliminary Report*, above n 94, para 83.

[99] Ibid, para 80. Potential crimes include: Murder under article 7(1)(a), and imprisonment or other severe deprivation of physical liberty under article 7(1)(e); murder under article 8(2)(c)(i); cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); and treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix).

[100] Ibid, para 87.

buildings dedicated to education, cultural objects, places of worship and similar institutions, noting that these attacks also indicate a possible case of the crime against humanity of persecution on gender grounds.[101] However, there is difficulty proving the element of 'organisational policy,' just as the Women's Caucus on Gender Justice submitted to the drafters nearly 20 years ago. The report exemplifies how IHL is lacking in terms of protecting women, whether it is through an enforcement or revisionist argument: the only way to protect girls was to argue the importance of a building.[102] In the same report, at least 109 accounts of Rape and other forms of violence were attributed to the Guinean government, under military rule. In Columbia's report as well sexual violence and rape rated mention. Inadvertently it seems, the 'public official' element for women's crimes still exists, due to evidentiary burdens or the nature of IL as regulating a 'public' domain.[103]

IHRL has a large role to play in post-conflict society, especially for the protection of women's rights.[104] In foresight of the withdrawal of international forces, Afghan women jurists called for the integration of IHRL treaties and CEDAW into the constitution, among other women's issues.[105] Resolution 1325 and CEDAW are now integrated into the Afghanistan National Action Plan, and the constitution recognises women as equal citizens signalling a step forward, but invariably found to have little impact given a lack of funding and implementation.[106] The fact that legally, these treaties seem to have the greatest influence in terms of women's rights leads one to the conclusion that in the field, IHRL appears to be the '*lex specialis*,' despite its often broad nature, and failure to be implemented effectively by the government. There is no reason that in such a post-conflict scenario, IHRL should be in conflict with IHL, and if there were such a conflict to be found (for example in the area of sexual violence perpetrated by non-state actors that goes unpunished), it should be argued that IHRL really is the *lex specialis* for women's issues, whereby the government consistently fails to give adequate protection. Reform of IHL by removal of the 'organisational policy' element under the Rome Statute could also yield better results.

*NGO Activities*

As the above analysis of the legal protections for women in conflict show why IHRL must be interpreted with, and sometimes overrule IHL in conflict situations, the work of NGOs show how the two regimes guide the work of certain organisations in different directions. The work of organisations can generally be described as focussed on Human Rights or Humanitarian principles, and it is often difficult to reconcile the separate approaches.[107] Critics of both the ICRC and the UN argue that throughout the conflict period, Afghan women's rights have come second to ensuring the organisations retained their presence, maintaining

[101] Ibid, para 88.
[102] Note that the ICC is often criticized for not yielding results, especially against western countries. For example, the US is not a party to the Rome Statute.
[103] See the *Preliminary Report,* para 102 for the ICC' next steps on Afghanistan: '*The Office will continue to analyse allegations of crimes committed in Afghanistan, and to assess the admissibility of the potential cases identified above in order to reach a decision on whether to seek authorization from the Pre-Trial Chamber to open an investigation of the situation in Afghanistan pursuant to article 15(3) of the Statute.'*
[104] Bouta, Frerks and Bannon, above n 5.
[105]WHRnet, Interview with Ariane Brunet (online, February 2003) < http://peacewomen.org/e-news/womens-human-rights-post-conflict-afghanistan>. Other arguments made by jurists were to: include a progressive and feminist interpretation of the Shari'a in the constitution based on human rights principles, Ensure that implementation and enforcement articles are included in the constitution, Ensure that an article is included in the constitution that addresses the discriminatory nature of customary law, Integrate issues relating to violence against women in the main part of the constitution.
[106]*Afghanistan's National Action Plan on UNSCR 1325-Women, Peace and Security* (Afghanistan) [Ministry of Foreign Affairs, Directorate of Human Rights and Women's International Affairs trans, <http://mfa.gov.af/en/news/afghanistans-national-action-plan-on-unscr-1325-women-peace-and-security>; Ahmad Shuja, 'Human Rights in Afghanistan' (Speech delivered at the Australian Institute of International Affairs, Queensland Branch, 1 October 2015); WHRnet, above n 105.
[107] Mertus, above n 39, 60-61.

operations and continuing dialogue with the Taliban.[108] ICRC operations especially can be seen as an implementation of IHL at the local level. Respecting their principle of neutrality, the organisation provides health services for persons irrespective of location or political affiliation, as well as food aid and monitoring prison conditions of all parties.[109] The ICRC also limits the amount of public criticism of the parties that it engages in, avoiding any 'conditions' in the provision of aid. For example, the Taliban edicts on segregated health facilities did not affect the support of the ICRC to their wounded.[110] Conversely, HR NGOs are able to issue restrictions where women's IHRL is not being respected, 'drawing a line' for aid provision. UNICEF refused to support schools for boys as long as girls were forbidden from attending classes, and more funding is offered for girls-only schools.[111] The ability of individual HR NGOs to adjust policy with the political dynamics means that they are more innovative than the IHL and IHRL legal mechanisms in terms of women's rights.[112] HR organisations have been the ones to 'soften' the views of Afghanis in relation to the role of women, through promotion of the principles of CEDAW and 1325.[113] While advocating IHRL as 'universal' is contentious, Afghanistan has ratified CEDAW and incorporated Res1325 into its NAP, so 'cultural' objections are quite rightly no defence to breaches from a legal standpoint. The work of NGOs operating under IHL and IHRL principles further indicates the necessity of IHRL in armed conflict in securing better outcomes for women involved.

## VII. Conclusion

The Complementarity approach is the recognised method of interpretation for interaction between IHRL and IHL. Both special regimes apply simultaneously in conflict situations as part of IL generally. Using this method of interpretation, IHRL can provide definitions and gender-sensitivity to IHL provisions that do not account for women's lived experiences (e.g. 'persecution' under the Refugee Convention). The approach has also been used previously to secure better outcomes for women, by guiding reform in the development of IHL treaty law, including the ICC statute. In circumstances where IHRL and IHL cannot be interpreted together, the *lex specialis* principle applies, and generally in armed conflict situations, this means that IHL applies instead of IHRL. Using the complementarity approach to 'interpret out' of an unjust or gendered outcome by using IHRL to overcome the *lex specialis* principle is detrimental to the legitimacy of the system as a whole. In this regard, reform of IHL is necessary to provide a more gender-sensitive understanding of how conflict is played out today. Women's lives are not improving, with instances of IHRL abuses (especially sexual violence) increasing in contexts such as Afghanistan.[114] All international actors have the responsibility to ensure better outcomes for women in conflict, and it is their duty 'to prevent, and offer redress for, such wrongs wherever they occur – in public or in private, in wartime or in peacetime.'[115]

[108] Ibid, 62-63; S Wali, E Gould and P Fitzgerald, 'The impact of Political Conflict on Women: The Case of Afghanistan' (1999) 89(10) *American Journal of Public Health 1474*, 1174-1476.
[109] Terry, above n 18, 174, 186; Curtet, above n 6, 649; Mertus, above n 39, 62-63.
[110] Mertus, above n 39, 64-63.
[111] Ibid, 64; Shuja, above n 106.
[112] Mertus, above n 39, 65.
[113] Shuja, above n 106.
[114] Shuja, above n 106.
[115] Mertus, above n 39, 71.

*Appendix A*
***Glossary***

***Beijing Declaration and Platform for Action***
The outcome document of the Fourth World Conference on Women held in Beijing, September 1995. It is 'soft law' but regarded as the primary document pertaining to gender equality and agenda-setting for the UN institutions and state parties.

***CEDAW***
Convention on the Elimination of All Forms of Discrimination Against Women. This convention is a treaty and thus is binding on all state parties. The substantial number of state parties (189 as of 26/10/15) may support arguments that at least some parts of the convention encompass customary international law.

***CERD***
Convention on the Elimination of All Forms of Racial Discrimination.

***Customary International Law***
Created by the fulfilment of two elements: state practice and *opinio juris* (mental element that the state practice occurs because the state is legally bound by some rule of international law – not by any other treaty obligation etc.) State practice must be general and consistent.

***ECHR / ECtHR***
European Convention on Human Rights / European Court of Human Rights (relevant judicial body for applications under the convention, where remedies at a municipal level have been exhausted.

***ICC***
International Criminal Court. Set up by the Rome Statute of the International Criminal Court. (Sometimes referred to as the ***Rome Statute*** or ***ICC Statute***).

***ICCPR***
International Covenant on Civil and Political Rights.

***ICESCR***
International Covenant on Economic, Social and Cultural Rights.

***ICJ***
International Court of Justice. Relevant statute is the Statute of the International Court of Justice.

***ICRC***
International Committee of the Red Cross.

***ICTY & ICTR***
International Criminal Tribunal(s) for the Former Yugoslavia / Rwanda.

***IHL***
International Humanitarian Law.

***IHRL***
International Human Rights Law.

***ILC***
International Law Commission.

***Jus Cogens***
Customary international law, so fundamental in nature that it constitutes a 'peremptory norm.' Norms of jus cogens cannot be derogated from by any state, arguably even if they are a 'persistent objector.' Torture is one such norm.

***Lex Specialis***
The *lex specialis* principle, or '*lex specialis derogat lex generalis*' stands for 'the more specific law overrules the more general law.'

***NGO***
Non-Government Organisation.

***UNSC / SC Res***
The UN Security Council / Security Council Resolution.

***Travaux Préparatoires***
Literally 'Preparatory Works,' pertaining to the preparatory documents of a treaty, used by committees or states before the final text is settled. Such documents hold significance akin to a 2nd reading speech of a Bill of Parliament in that it can assist with interpretation of the final text.

***UDHR***
The Universal Declaration of Human Rights.

*Appendix B*
***Resource List***

### *A. Articles / Books / Reports*

Aaron Xavier Fellmeth, 'Questioning Civilian Immunity' (2008) 43 *Tex. Int'l L.J.* 453.

Amber Cheri Paaso, *Recognizing Gender-Based Violence in Armed Conflict: Incorporating the Voices of Women in International Humanitarian Law* (Master of Art Thesis, Florida Atlantic University, 2004)

Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56(3) *The International and Comparative Law Quarterly* 623.

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Javed Bahri, 'Western Gender Policies in Afghanistan: Failing Women and Provoking Men' (2014) 18(2) *Gender Technology and Development* 163.

Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, 2006).

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John R Bolton, 'Is there Really "Law" in International Affairs' (2000) 10 *Transnational Law and Contemporary Problems* 1.

Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001).

Julie A. Mertus, *War's Offensive on Women* (Kumarian Press, 2000).

Sally Engle Merry, *Human Rights and Gender Violence; Translating International Law into Local Outcomes*, (2010, University of Chicago Press).

S Wali, E Gould and P Fitzgerald, 'The impact of Political Conflict on Women: The Case of Afghanistan' (1999) 89(10) *American Journal of Public Health 1474*.

Tsjeard Bouta, Georg Frerks and Ian Bannon, *Women, Gender and Conflict* 2005 The World Bank, 2005) 11.

Valerie Oosterveld, 'Feminist Debates on Civilian Women and International Humanitarian Law' (2009) 27 *Windsor Yearbook of Access to Justice* 385.

***B. Cases***

*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Application Instituting Proceedings)* [2008].

*Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgement)* [2005] ICJ Rep 168.

*Bankovic´ v Belgium*, admissibility decision, Application No 52207/99, 19 Dec 2001.

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