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The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict

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Introduction

International human rights academics and activists rarely have a great deal to celebrate. Compared to their colleagues in private international law or domestic law, they are faced with creating a convincing account of "real" law. They often work on the most horrifying atrocities committed against individuals around the world, struggling to draw the world's and the international community's attention to the plight of subjugated and silenced masses. Like their colleagues who work in the field of international humanitarian law (IHL, or law of armed conflict), they focus on history's darkest moments, when humanity seems lost or forgotten.

Yet, in the last decade, human rights scholars and advocates working at the cutting edges of academia and litigation have led a tremendous amount of innovation in the literature and in courtrooms and UN committees around the world. They have managed to transform a long-accepted truism of international law, and to

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challenge States and their militaries to fundamentally reconsider the nature and scope of their obligations on the battlefield.

Indeed, the idea of co-application of international humanitarian law[1] and human rights law has drawn a tremendous amount of academic attention and a huge amount of innovation in international and domestic jurisprudence. This transformation, this much-touted shift in the field of international law, is often referred to as the "humanization of humanitarian law"[2] and, more technically, the "convergence"[3] of international human rights law (IHRL) and international humanitarian law. Yet in the current headlong approach into convergence, rights and rights institutions may carry risks to the very goals many humanitarian-minded international lawyers seek to achieve.

The current debates around the applicability of human rights during conflict, the extraterritorial applicability of human rights and the *post facto* enforcement of human rights claims against military personnel engaged in armed combat appear to avoid the central question of whether adding human rights to the legal terrain of war is good—good for civilians, good for the longevity of legal constraints on conduct during conflict and good for the promotion of human rights. Underlying the huge number of scholarly papers on the issue of parallel application of IHRL and IHL,[4] as well as the increasingly pro-convergence jurisprudence of key international courts, is an assumption that more human rights (in a formal sense) always equal more *enjoyment* of basic rights. To the extent that a major scholarly project seems to be intent on demonstrating that human rights law was always meant to apply during armed conflict and that the main challenge before us is the specific and detailed enforcement of discrete rules of IHRL, we need an honest assessment of what we want human rights law to *do* for us and how the pragmatic and tactical deployment of human rights arguments will affect the overall fate of rights discourse in war.

The goal of this article is not to delve into the legal complexities of various courts' interpretations of the details of the application of human rights law in war, but rather to take a bird's-eye view of the debate and to question whether it is a good thing to insist on the extraterritorial applicability of human rights to armed conflict situations. The tone of the many articles and commentaries on the topic of "convergence" suggests that if only the views of various UN treaty bodies and forward-thinking courts were applied fully by the military, it is obvious that the experience of civilians caught up in armed conflict would be improved, that detention would be more humane, that accountability for violations would be increased—that, in short, outcomes would be more *humanitarian*. I aim to question that assumption, and to raise questions about whether even the full realization of the aspirations of human rights scholars and advocates would actually be better for civilians in war.

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The real desired impact of insisting on the co-application of human rights law with IHL is far more limited than a frank reading of most of this scholarship would suggest. Indeed, it seems that rather than transforming the very legal framework within which armed conflict occurs the main upshot of promoting parallel application is to increase the available legal forums and accountability measures to which States can be subject *after* alleged violations occur. This article questions whether promotion of full parallel application, with the intent of only changing the framework of *post facto* accountability, actually harms the capacity for law to protect civilians in war. This paper argues that the formalist machinations currently employed to argue that violations of IHL should come within the jurisdictional ambit of human rights instruments and courts may be harmful to the very aims liberal international lawyers seek to achieve. My argument is that parallel application is equally as bad for the Iraqi civilian as it is for the American soldier. As we pull back the layers of legalistic argumentation, the real role of rights discourse and the real function of human rights law on the battlefield seem much less thought-out than leading scholars suggest, and the implications for this new approach to international law seem much more problematic than the current debate on the issue presents.

For the civilian and the soldier, the vague overlap of these two bodies of law is at best incoherent, and at worst raises expectations that cannot be met. The civilian in Basra during the occupation would be told that he might have some human rights claims against the British (in the event that they have a certain kind of control over him), no human rights claims against US forces (because they refuse to recognize the applicability of the law), full human rights claims vis-à-vis the Iraqi transitional government (depending on what stage of the Iraqi transitional government we would be looking at, and depending on the interpretation of what it would mean for human rights obligations to continue to apply to Iraq even after the invasion toppled its pre-existing government), and moderate human rights claims vis-à-vis any European States party to the European Convention on Human Rights that would happen to have any control over an individual Iraqi in the south. Contrary to IHL, where the civilian (or prisoner of war or enemy combatant) is not a rights-holder but a person to whom obligations are owed by a party to the conflict (and therefore where we would look to the behavior of the party to the conflict in order to determine whether there has been a violation of the rules), IHRL raises the expectation that there is a clear duty-bearer who is capable of responding to the rights claim held by any individual on a given territory.

From the perspective of the commander seeking to provide regulations to the soldier based on the State's relevant obligations under international law, rules of warfare and doctrine on the battlefield must be whittled down to clear and brief rules of engagement. While senior commanders, military policymakers and

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military lawyers advising high-ranking officers may (and often do) take policy, politics and additional bodies of law into account, the rules that ultimately govern conduct and determine whether soldiers are subject to criminal liability must be those that are clearly recognized by the State in question as applicable to a particular conflict.

Part I sketches the background of the development of IHL and IHRL, and provides an overview of the stakes in the debate over extraterritorial applicability of IHRL in armed conflict. Part II presents a list of ten concerns one might have about the current accepted consensus toward convergence. Part III concludes with a view toward possible pathways forward.

Part I: Background to the Relationship between IHL and IHRL

In this section, I hope to lay out the key signposts in the debate on convergence, pointing out the actors in each salient aspect of the discussion on convergence. My purpose is not to go into the detailed and complex questions involved in each aspect of the debate, but to provide a bird's-eye view of the key questions and the practical implications of a given position. In particular, I want to draw attention to the increasingly common reference in the scholarly literature to a "consensus" or "settled issue" on the first-order questions relating to the applicability of human rights law in conflict.

It may be useful before delving into the key signposts of the debate to review the generic narrative of the question of convergence, one that seems to be accepted by all sides. In presenting this narrative, I am hoping to foreshadow some of the seemingly innocuous assumptions within it that will come back to be important in our critique of contemporary positions on the convergence question.

The first question in the debate over convergence, one that is largely treated in the past tense in contemporary scholarly literature, is whether human rights law applies *at all* during armed conflict. Here, there is usually a reference to the "traditional" or "classical" position of international law, in which human rights was the "law of peace," and IHL the "law of war," with a clear and unquestioned separation between the two. In the "good/bad old days" (depending on who is presenting the intellectual history) of international law, it was clear that the law of peace could not apply during armed conflict because the law of peace addressed the relationship between the State and the citizen/territorial subject during the normal conditions of peace, whereas IHL was a highly specialized legal regime created in close consultation with military personnel for the purposes of regulating the state of exception from day-to-day governance that characterizes warfare. This traditional understanding of the clean separation between the law of peace (human rights) and the

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law of war (IHL) accepts that when we are talking about a situation of armed conflict, we will necessarily be in a context where human rights will be impossible to apply, and where there will be little to no accountability for human rights violations. In addition, underlying this "traditional" position seems to be an understanding that those who must deal with the law, enforce it on the ground and be accountable for compliance are very different.

So, if we imagine that the line below is the overall span of a human life, from birth to death,

human rights law addresses every possible way in which this human life might encounter the State, and even how the individual might encounter other private actors *within* the State: the right to education,[5] the right to basic health care,[6] the right to shelter,[7] the right to marry the person of one's choosing,[8] the right to parent according to one's values,[9] regulation of encounters with police and the courts,[10] regulation of one's encounter with imprisonment, structuring of paid labor and equality of labor,[11] political participation,[12] and religious participation,[13] among others. The historic singularity of human rights law, and its revolutionary transformation of traditional Westphalian sovereignty, is the notion that the individual has rights on the international stage—that international law can reach into the State and regulate the relationship between the individual and her government. In vesting the individual with rights by virtue of her personhood, IHRL empowers the individual to imagine and pursue a full, rich, emancipated, politically vital existence. IHRL is unlimited in its scope and potential; it quickly moves beyond the basic necessities of bare human sustenance and provides the constitution for a society built on individual choice and engagement. So, we might see our individual's lifetime as legally covered by IHRL in this manner,

where the scope of IHRL's influence on the individual's relationship with the State and public life is limited only by the development and expansion of IHRL itself.

The traditional model conceives that if, in the span of this individual's life, her State should enter into armed conflict, it is at this very moment that IHRL ceases to

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be relevant to her relationship to the State and, instead, IHL alone regulates her relationship to belligerent actors until the end of hostilities.

Again, in this model, IHRL is merely suspended for the duration of armed conflict and is immediately "reactivated" once the State returns to a normal state of governance of its own territory.

At its most basic level, the concept of convergence suggests that because IHRL always applies to individuals in their relationships to the State (except in the limited cases of derogation as allowed under the International Covenant on Civil and Political Rights (ICCPR) but not under a number of other IHRL treaties), it continues to apply during armed conflict, but may be limited or refined by IHL as the *lex specialis*. Convergence argues that IHRL cannot be arbitrarily suspended simply because an armed conflict has broken out on the territory of a State with international obligations under human rights law, but that it may be *limited* in its application by IHL. So, in our individual's timeline,

IHRL continues to apply *in parallel* to IHL for the duration of the armed conflict, and as before IHL ceases to apply once the armed conflict is over. Theoretically, this would apply for any and all discrete human rights obligations of the State in question: so if a State has ratified the ICCPR; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture (CAT) and Convention on the Rights of Children (CRC), then that State would remain responsible for its obligations within those treaties (and vis-à-vis the relevant treaty bodies) during the armed conflict, except insofar as particular obligations are altered or limited by the function of IHL. As a result, in the event that our individual's State finds itself fighting off an invasion from a neighboring enemy, the State would continue to be responsible for the human rights of individuals on its territory for the duration of the armed conflict, while both the State *and* the invading nation would be responsible for IHL vis-à-vis the population.

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The first-order question of the convergence debate is whether IHRL and IHL should apply side by side during armed conflict, and how that parallel application can be articulated in theoretical terms and put into practice. As we will see, while the theoretical or principled position for parallel application seems to be dominant (and even wholly uncontroversial at this stage), the question of *how* these bodies of law should apply in tandem, what provisions of human rights law continue to apply to the State and what additional obligations are created by the operation of human rights law are hotly contested.

Assuming the theoretical applicability of human rights law is accepted, the second major question in the debate focuses on extraterritorial applicability of human rights law during armed conflict. This asks whether a given State *carries* its human rights obligations abroad on the backs of its military forces. IHL is by its nature extraterritorial: IHL follows fighting forces and its applicability in a given situation is generally determined by a factual assessment of the circumstances at a given time. For its part, human rights law has traditionally been closely tied to the particular institutions and systems of governance of the State that brings human rights regulations upon itself. The broad question of extraterritorial application of human rights law (within which armed conflict is but a particular instance) concerns whether a State can ever have obligations under its various human rights treaty (or customary law) obligations that extend beyond its territorial borders, its territorial jurisdiction and some limited understanding of foreign territories in which it enforces jurisdiction (such as embassies abroad).

We could imagine this question as having an impact on all sorts of contemporary situations: States could be held responsible for the human rights violations committed by multinational corporations acting abroad, and they could be responsible for violations committed by international financial institutions of which they are members. Here the debate goes beyond whether human rights law continues to apply during armed conflict and its concomitant concerns: whether a State would be responsible to control the human rights violations of an armed group carrying out violations on its territories in a non-international armed conflict; whether a State would be responsible for violations of various civil and political rights while defending itself against an invasion; and whether a State would have obligations to provide humanitarian access under the right to food or other provisions of ICESCR. The question then becomes whether IHRL obligations of a particular State *travel with* that State when it is engaged in military actions abroad. If they do, do they carry the full scope of human rights obligations, or some minimal "core" of rights? Is the State responsible for the institutional context in which individuals enjoy their rights in foreign lands, or only for those encounters between foreign individuals and the State's representatives? And what is the reach of

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national or regional human rights bodies in determining whether States have complied with their human rights obligations in the course of armed conflict?

For the growing number of international bodies, courts and States that argue that, at least in principle, human rights law does travel with the obligated State, the bulk of the legal debate turns to the question of what *level of control* or military involvement is required before the application of human rights law is triggered. Is mere presence enough? Is effective control rising to the level of occupation required? Is the level of control required more constraining than the standard for occupation? Must an individual be in the custody of a State before that State's human rights obligations extend to that individual on foreign soil? These questions—whether human rights law applies extraterritorially to some extent, and, if so, what jurisdictional reach is provided—are at the core of the debate over convergence.[14] Current human rights scholarship and lawyering strongly support the extraterritorial application of human rights law in armed conflict, a position slowly gaining recognition in key domestic and international jurisprudence.[15]

Having provided a narrative summary of the development of these areas of law, it may be useful to now provide an overview of the ways that the two bodies of law function. IHL is, if nothing else, grounded in and justified on the basis of its practicality, its intimate connection to military professionals and what they are asked to do in the heat of battle. The defense of IHL against the charge that it is not protective enough, or that it skews the calculus of life and death toward the needs and entitlements of the military, is that this state of affairs is the only way to maintain the legitimacy of the law in the eyes of commanders, that we must be modest in our aims for complex legal restraints during the most brutal and unregulated fog of war. As such, IHL offers three key moments for the law to act: *prior to conflict*, IHL is the basis for military doctrine and training on protection of civilians, proportionality, distinction and other key restraints on warfare; *during conflict*, its provisions allow commanders and instructors to create simple, concrete rules for conduct, and the battle-relevant aspects of IHL provide commanders with the limits on what military personnel may do in the pursuit of their objectives, and clear provisions for the treatment of various categories of individuals; *after hostilities*, IHL provides the grounds for disciplining troops who violate the rules according to national military law grounded in international norms, as well as creates the legal framework for accountability of military personnel and others in the command structure in other legal forums (such as international tribunals, national high courts, the International Criminal Court, etc.).

In practical terms, it is in the first two areas that IHL is most impactful: it has often been noted that *post facto* accountability for IHL is extremely difficult to establish.[16] Liability for violations of provisions related to proportionality, distinction and

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other obligations under IHL that involve balancing or a reasonable-commander standard is, in practical terms, usually established only in the most extreme cases of violation.[17] In this sense, the rules of IHL emphasize *a priori* prevention of violations, and focus on the basic protections owed to those individuals *hors de combat* as well as a pragmatic set of detailed rules for treatment of prisoners of war and others detained by parties to the armed conflict. The provisions of IHL are ideally suited for being diluted and distributed in simple terms to military professionals in the battlefield: indeed, the interpretation of IHL rules is often based in the practicality of application in the heat of battle.[18]

IHRL is based on a different set of assumptions about the way that States act, and the capacity of the international community to regulate that behavior. Human rights law functions as an agreement by States with other States ratifying not only a set of obligations vis-à-vis those they govern, but also laying out a specific and detailed set of rights claims that can be activated by the population of the ratifying State. Whereas IHL focuses on the obligations of the high contracting parties, focusing on the statuses of those who enjoy particular protections or are owed specific levels of care (with no reference to rights-holders or individuals in a position to make claims against legal obligations), IHRL identifies a broad scope of rights spanning civil and political life; economic, social and cultural rights; and a series of more specific individual rights where the State is expected to take positive action as well as refrain from certain behavior.[19] IHRL sees the greatest potential for achievement of human rights in national implementation of international norms by encouraging domestic absorption of treaty provisions and amendment of domestic laws and practices that potentially violate human rights obligations. Unlike IHL, human rights law very rarely sets out a balancing equation between the entitlements of the State and the rights of the individual: while there are specific arenas in which the interests of the State are weighed against the enjoyment of the right (such as when the government seeks to limit rights during a state of emergency under the derogation provisions of the ICCPR or when States are entitled to limit free expression for public morals or public order reasons), IHRL strictly regulates the actions of the State and insists on the consistent provision of judicial and due process protections for individuals. Perhaps most significantly, international human rights law imagines its arena of application as that of a State in full control of its systems of governance, constantly negotiating—through domestic institutions—its role within the environment of a particular culture and approach to citizenship. Unlike IHL, which assumes the tragic and destructive backdrop of war and is thus modest in its ambition, human rights law lays out the full vision for a future community of the governed endowed with increasingly substantial claims against those in power.

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Part II: A Preliminary List of Critiques: Is More Human Rights Law Always a Good Thing?

A common theme in writing and debate on the subject of the parallel application of IHRL and IHL in wartime, particularly regarding extraterritorial applicability of human rights obligations, is the notion that we are witnessing a now-inevitable trend of progress toward more human rights, that the question of convergence is no longer a question of "whether" as much as "how far." As one author notes, in summarizing a range of articles on the debate, "With respect to the differing opinions, it is submitted here that the continued applicability of IHRL during armed conflict is by now firmly determined."[20] Another leading commentator concludes, albeit with apparent hesitation,

> How these two bodies of law, which were not originally meant to come into such close contact, will live in harmony in the broader framework of international law remains to be seen over time. But one thing is clear: there is no going back to a complete separation of the two realms. Potentially, a coherent approach to the interpretation of human rights and humanitarian law—maintaining their distinct features—can only contribute to greater protection of individuals in armed conflict.[21]

One striking aspect of the huge volume of scholarship celebrating and analyzing the co-applicability of IHL and IHRL in armed conflict is the lack of critique of the concepts and assumptions underlying this new legal order. While a number of scholars do seem to recognize the *technical* challenges posed to those responsible for enforcing human rights in battle, the field has not been subject to critical thinking on the possible costs of bringing human rights discourse and human rights frameworks into the realm of war. Given that the very few examples of scholarship rejecting or limiting the applicability of human rights law in war are drafted by those sympathetic to States that object to extraterritorial application of their human rights obligations,[22] it is appealing to dismiss critics of convergence as either seeking to avoid regulation of conduct or seeking to maintain the most permissive legal regime possible for troops. Indeed, most scholars and practitioners working on this issue—whether in human rights litigation or those taking a strong academic position favoring convergence—seem to assume that the only possible stance against convergence could be either from States protecting their own interests and the entitlements of the military (read the United States and Israel),[23] or from those military commanders who fear that it will be practically impossible to implement human rights law on the ground. For those engaged in this debate, the very appeal of this rapidly growing genre of scholarship may well be the seemingly clear fault lines: it seems rather intuitive that the "good guys," the liberal, pro–human

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rights lawyers and scholars concerned with States that justify their behavior in the framework of permanent war, would be in favor of the expansion of the human rights regime by any means possible, and through any legal contortions necessary. Equally, it seems clear that the "bad guys," States that reject these very laws because they are overly restraining or expose them to liability for horrific violations, or conservative scholars and lawyers sympathetic to the military, would be against the application of human rights in the battlefield and would engage in anachronistic arguments about the glorious past of international law when things were clear and laws stayed in their appropriate spaces. Given these alternatives, one would want to be on the side of progress, the future, the best use of the international legal system for the increasing realm of human rights application.

In this sense, the debate over extraterritoriality and convergence, when mapped onto debates over the "war on terror," and treatment of detainees in the wars of Afghanistan and Iraq, has taken on a politicized tone: it seems natural that those in favor of human rights, humane treatment of individuals in detention and increased regulation of warfare would be on the side of more convergence, while those on the side of powerful States, limitation of individual rights in favor of national security and protection of the entitlements of the military against the involvement of the international community are on the side of discrete application and strong use of the *lex specialis* principle to privilege IHL over IHRL during armed conflict.

In the rest of this section, I would like to unpack these assumptions and take a step back from the overwhelming tone of victory and inevitability that seems to characterize the bulk of scholarship and litigation on the topic of parallel application. I want to ask whether there are reasons why those in favor of human rights law, strengthening enforcement and legitimacy of international law in armed conflict, and holding States accountable for their obligations when they act militarily ought to question the enthusiastic embrace of convergence. Rather than suggesting a particular posture such scholars or lawyers ought to take on the issue, I hope to argue that there must be more principled debate over the issue of whether convergence is a good thing for human rights, for IHL and for the role of international law in armed conflict. It is possible that the remarkably limited amount of critical scholarship on this topic (other than papers drafted by those who take a clear contra-convergence position) reflects the fact that there is nothing concerning here, that indeed there is no aspect of convergence that should raise critical questions. It may be that, when we look at the weight of evidence and legal analysis on the topic, there are no real costs to convergence, and only benefits to be gained—but maybe not.

Below, I present a partial list of concerns I think we ought to have about the move toward extraterritorial application of human rights law in armed conflict, in the form of ten critiques of and questions on the currently dominant approach.

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The list is not meant to be exhaustive, nor does every critique apply to every possible instance of parallel application on the ground. Rather, the purpose of the list is to open up space for a pro-rights, pro-civilian protection objection to full-scale convergence, and to encourage a more critical approach to the issue by lawyers and scholars engaged in these two fields.

Rights at the End of a Gun: Do Divergent Foundations Matter?

As though referring to long-lost cousins who have recently become friendly, many scholars and courts discussing the question of convergent application begin or end their analyses by noting that IHRL and IHL have very different backgrounds.[24] The common approach to this issue is to articulate that at one time (in the early days of both bodies of law) it was thought that the two were completely distinct, and that they indeed have very different "upbringings" in the context of international law, but that, throughout the 1970s and beyond, this foundational difference has come to matter less and less as IHL and IHRL first were recognized as "complementary" in armed conflict and are now increasingly recognized as "convergent." This common story of progress acknowledges that there are important normative distinctions between the bodies of law,[25] but that as key UN bodies and international courts have come to recognize co-application, these original differences have been surpassed by the recognition that both generally serve to protect "humanity."[26]

The debate here tends to focus on two key issues: first, some authors and jurists look to the detailed pedigree of each body of law to determine whether drafters and early commentators in fact envisioned any future convergence. Such authors look to *travaux préparatoires*, early conferences on human rights law, and commentaries on the Geneva Conventions and Additional Protocols in order to argue either that the two bodies of law were never intended to commingle and that convergence is a dangerous departure from foundational intent, or (more commonly) to argue that the seeds of harmonization were present both from the very early days of post–World War II IHL and in the intent of drafters and key commentators alike. This latter group argues that while foundational differences were present, and normative differences persist, early drafters imagined a future where both bodies of law could be utilized to enhance the overall humanitarian goals of international law.[27] The second aspect of the debate looks to institutions, on the one hand, pointing out that the early institutional history of the two legal regimes kept them separate and encouraged the creation of two distinct professional fields (often turning to early institutional history of human rights law within the UN and of IHL within the International Committee of the Red Cross (ICRC) and in State conferences), and, on the other, looking to the claims of contemporary institutions about the increased capacity for human rights bodies to engage with IHL.[28]

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For strict separationists, such as those supporting the US position, the foundations of the laws and their differing origins support the sentiment that IHL displaces IHRL and that human rights obligations were certainly not meant to be applied when States act militarily outside of their territories.[29] In mining the foundations and historical origins of the two bodies of law from this perspective, the widely acknowledged difference in the spirit and purpose of the laws informs their initial codification as well as their normative and institutional development, pointing to the intent that they be kept separate as the laws of war and the laws of peace. For pro-convergence commentators, the origins of the law, particularly the *travaux préparatoires* of the two Additional Protocols to the 1949 Geneva Conventions, as well as the text of various UN conferences (often noting the 1968 Tehran Conference as a key turning point toward convergence), and the progressive movement of human rights treaties away from any notion of strictly territorial jurisdiction, point to early support for the eventual merging or co-applicability of IHRL and IHL for States when acting outside of their territorial jurisdictions.

To this point, we can see how the profoundly different roots and early articulations of IHRL and IHL could play into the conclusions of either side: either the origins clearly should show us the intended walls between the two bodies of law or the historic and normative differences were only a point on a spectrum toward a more humane and rights-oriented approach to international law in general. Here, I want to suggest that we step back from this perspective of origins and foundations and instead question to what extent the extremely divergent underpinnings and moral philosophies of IHRL and IHL ought to compel critical thinking about supporting the extraterritorial applicability of human rights treaties in armed conflict. That is, rather than pointing to origins as an argument for or against the drafters' *intent* that States should incorporate human rights law into their legal frameworks when fighting or detaining or occupying abroad, I wonder if we should look to origins and foundations to question whether today we *should* promote this type of human rights enforcement.

I want to suggest that the current debate on origins has shied away from the more difficult question of whether human rights law belongs on the battlefield, and whether the foundations of the law should constrain and limit scholars and jurists from moving forward too boldly in articulating the human rights obligations of States at war. In later sections I will ask whether human rights law translates into battle rules in the same way as IHL, but here I want to ask, do we want it to? What costs might be borne by human rights law and the human rights movement if extraterritorial applicability of human rights in armed conflict is taken seriously in the years to come?

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It is commonly noted that the history of international humanitarian law rests on a number of factors that explain and ensure its widely recognized universality and legitimacy within a diversity of States. The law, rooted in early notions of chivalry and professional military conduct, was drafted in close coordination with military experts and senior military personnel, and is promulgated with a close eye to the practical challenges faced by military forces. Part of this story of IHL is also about the morbid calculus of the rules, whether we rely on Colonel Draper's retelling of how cynics see the law of war, namely "how to kill your fellow human beings in a nice way,"[30] or look to the ways in which IHL allows the lawful killing of combatants and does not make illegal the killing of civilians and those *hors de combat* as long as their deaths are incidental to a lawful attack and not disproportionate to the military advantage anticipated. Despite the very legitimate criticisms of this aspect of IHL—its apparent *in*humanity, its willingness to allow (or at least not punish) horrific bloodshed of those not involved in hostilities, its blindness to the killing of combatants—it is clear in its objective and simple to understand in its compromises. It is a body of law specifically crafted to regulate moments in human history and relationships between States that have often been thought ungovernable, and it does not pretend to be anything other than the most plausible set of rules for an admittedly terrible context.

One of the differences between IHRL and IHL is that the latter only recognizes obligations of the State toward those who fit into a particular status: protection and rules regarding rights and responsibilities are purely status based, not deriving from one's basic humanity as in human rights law. This is often raised as a point of weakness of IHL, but one could also argue that this aspect of the law of war—the delimitation of a set of protections for the nationals of the enemy—is precise and intentionally limited in its understanding of the ugly nature of the relationship between an invading/attacking State and the enemy population.[31] There are obligations to those individuals, yes, but it is understood that those obligations are in an environment of duress, fear and belligerency. IHL does not pretend that this relationship, between the forces of the invading military and the civilians of the invaded territory, is anything other than tense and hostile. It does not allow us to assume or pay heed to the claims of the invading forces as to their purposes for invading or their intentions toward the civilian population. It simply sets out the baseline obligations of the enemy military to protect the civilian population and those *hors de combat,* both in active hostilities and under occupied control.

I want to suggest that once we introduce rights talk to this equation, we begin to reshape the relationship of the military forces to the enemy population, perhaps in ways that are not imagined by those who support the extraterritorial applicability of human rights law and its convergence with IHL.

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In the voluminous literature on when human rights law begins to apply extraterritorially, the most agreed-upon baseline for the initiation of human rights law obligations is the "effective control" test. The basic argument comes down to exactly at what point an enemy military force begins to have human rights obligations toward a foreign population on the territory of that population. Most scholars agree that under current law, that test—while still unclear and somewhat confusing—relies on a demonstration that the military has "effective control" over a person or territory (and possibly whether the State is responsible for a particular violation—the so-called "cause and effect" test of jurisdiction), which seems to be similar to (though not identical to) the test of occupation.

Again, rather than burrowing into the wide-ranging debates over appropriate activation of extraterritorial jurisdiction I want to argue that whatever our test for the control required for human rights jurisdiction (identical to occupation, capacity to exercise civil administration, physical presence, control over a territorial space analogous to an embassy),[32] such application of IHRL in armed conflict locates the moment when human rights start to oblige the State in question on the use of military force. Rather than focusing on the question of the type of control that is being used, or the type of administration that the foreign party can or cannot exercise, I am concerned that *no matter what formulation of extraterritorial jurisdiction is used*, the pro-convergence position bases the applicability of human rights law on the use of armed force in a foreign land.

Should those interested in the long-term development of human rights law encourage such a vision of rights? To what extent does this approach to human rights jurisdiction undermine the very foundations of human rights law, and open up its most basic tenets to being questioned? The relationship imagined between the soldier and the enemy civilian in IHL, and that between the government agent and the "citizen"[33] in IHRL are central to the way the law sets out both obligations and claims, in the ways that the bodies of law create accountability for violations and in the way they task ratifying States with ensuring compliance. In armed conflict, much of the determination of appropriate treatment lies in the mind of the reasonable commander in recognition of the necessity of creating rules that must be able to function and be considered legitimate during combat. In a regular governance context, the determination of rights-respecting conduct lies with a web of institutions, domestic judicial guarantees and international bodies.

A civilian who is made aware of the basic (and rather minimal) obligations of the armed forces of an enemy State for her protection clearly understands the purpose of IHL: to ensure that in the very worst imaginable context, she is guaranteed a basic level of protection—not to be directly targeted if she does not participate in hostilities, not to be tortured if she is detained, to have access to basic lifesaving

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humanitarian relief, etc. The logic behind the law is also apparent: this is not a long-term relationship, and the law does not provide the grounds for a good society or interactions based on trust and due process. Rather, this is a set of rules that restricts the military forces while they fight, while recognizing that they *will* fight, and that people (even those not involved in the fighting) will die in the process. The addition of human rights law to this clear and honest (albeit stark) framing of roles and relationships runs the risk of confusing all actors and (more important) raising expectations that can never be met.

It is worthwhile here to look at the language of the much discussed and often criticized UK House of Lords decision in *Al-Skeini*,[34] a case where many commentators felt that the Lords did not go far enough in recognizing extraterritorial responsibility, and were overly deferential to the ECtHR decision in *Bankovic* in construing jurisdiction.[35] The approach of Lord Brown of Eaton-under-Heywood is worth examining as an exemplar of what many commentators would see as an overly restrictive reading of jurisdiction (and one allowing the military to avoid responsibility for particular acts). Lord Brown begins by setting forth his reading of the *Bankovic* decision as to Article 1, noting the few "circumstances in which the Court has exceptionally recognized the extraterritorial exercise of jurisdiction by a State," which include

> [w]here the State "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]" (para 71) (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable "to fulfil the obligations it had undertaken under the Convention" (para 80) (as in Northern Cyprus[)].[36]

Based on this reading of *Bankovic*, and arguing that the appellants' approach to jurisdiction would "stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state's 'authority and control,'" Lord Brown concludes that

> except where a State really does have effective control of a territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in Southern Iraq and bound as such by Geneva IV and the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant "shall take all measures in his power to restore and ensure, as far as possible, public

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> order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect "the laws in force," not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention.[37]

My point here is that even if we apply the exact same jurisdictional test for extraterritorial application as we would apply for the application of occupation law (the factual test derived from a combination of Hague and Geneva law), doing away with a great deal of the confusion addressed by courts trying to work through this issue, we have not done away with the core problem of extraterritorial applicability during armed conflict. Military occupation is a situation of caretaker governance directly following an invasion or war in which the occupied population has been subjected to the control of the belligerent enemy force because its own government has lost the war. It is inherently temporary and has stringent limitations on the capacity for the State to govern precisely because the drafters of the Fourth Geneva Convention recognized that many occupying States would attempt to create the impression that the population welcomed their presence, that they had created a legitimate governing regime, that they were liberators. Occupation law reminds everyone involved that the relationship is fundamentally one of a dominant, victorious military force and a vanquished, unequal population of "protected persons." While these persons may hold discrete "rights" vis-à-vis the occupiers,[38] the law not only consistently recalls the security needs of the occupying military, it allows the use of force, arbitrary detention and other security measures.

This is not simply a technical *lex specialis* issue, where lawyers can parse out which human rights can be overlooked by the more specific function of a given provision of IHL (such as security detention or limitation of rights to trial). Rather, this is at the very heart of the difference—the critical and necessary difference—between IHRL and IHL. It seems that the pro-convergence argument would hold that occupation is exactly the situation in which human rights law applies extraterritorially (even courts that have restrained extraterritorial jurisdiction during armed conflict acknowledge that occupation may be the archetypal context for extraterritorial human rights obligations to hold). But life under occupation was never meant to be like life in one's country governed by one's own leader(s): occupation law secures the minimum protections of the occupied, but it also acts to prevent the occupying power from slipping into the position of the legitimate (read national, territorial) government. Its provisions ensure that the occupying power is *not* able to control the State lawmaking and governance infrastructure in such a

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way that would facilitate meaningful human rights compliance. Whatever the specific function of these restraints in a given occupation situation, the normative spirit of the law, the message that it communicates to the occupied population, is clear: the international community does not believe that the occupier is in your country for your good or benefit, and its stay is temporary, potentially difficult, violent and limited. Whatever criticism one has of occupation law, its advantage is that it does not allow us to forget that we are in armed conflict. It does not allow us to pretend that we are in peace, or that the population has consented to its situation.[39]

My point here is not that it is legally impossible to imagine that an occupying power could be in a position to apply human rights standards: obviously, for the majority of human rights provisions, the occupied territory would already be obliged to respect key rights under its own ratifications, and as the caretaker regime, the occupying power would have a pre-existing IHL obligation to respect those agreements. As Ralph Wilde argues, in criticizing the *Al-Skeini* decision's jurisdictional formula,

> In the first place, it is assumed that human rights law properly applied, with all the advantages of limitation clauses, derogations, and, for the ECHR [European Convention on Human Rights], the margin of appreciation, would actually oblige the State to exercise public authority both generally and in particular in a manner that would put it at odds with obligations under the law of occupation. . . . [T]hese assertions presuppose the validity of a particular approach to the relationship between different areas of international law, without having explained the basis for this validity. A clash between two areas of law is feared, and a solution to this clash offered by defining the applicability of one area of law so as to remove it from being in play, without explaining the basis for choosing this particular method of norm clash resolution.[40]

Wilde continues, arguing that the law does not make it clear that human rights law should be rendered inapplicable through the functioning of occupation law's limitation on the governing power of the occupier,

> An equally plausible scenario, of course, in light of both the ECHR itself and its relationship to other areas of law, is that a relatively modest set of substantive obligations would actually subsist, qualitatively and quantitatively different from those in play in the State's own territory, even if derived from the same legal source.[41]

This argument builds on the idea that those States (primarily the United States and the United Kingdom) who are worried about extraterritorial human rights jurisdiction have little reason to worry, because the actual law-added impact of human rights would be minimal. Wilde approvingly quotes the dictum of Lord Justice Sedley in the *Al-Skeini* decision at the Court of Appeal level, a quote that

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merits close reading, as it captures the message one encounters frequently in the convergence literature,

> If effective control in the jurisprudence of the [European Court of Human Rights] marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying State and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights; nor therefore does it demand sufficient control for all such purposes. What it does is place an obligation on the occupier to do all it can. If this is right, it is not an answer to say that the UK, because it is unable to do everything, is required to guarantee nothing.[42]

This argument seems like an appealing solution to the problems posed by convergence and extraterritorial applicability. It suggests that clearly the occupying power would not be required to apply the entirety of human rights norms, or *really* be obligated to respect and apply human rights law in the same way that it would at home, but rather to do its best. While this is of course a laudable principle, and we might wish that all occupiers would act in this manner, I question the legal argument and the plausibility of such a solution to the practical challenge of identifying what exactly is the function of human rights law on the battlefield. What rights do the people in this situation actually have against the occupying power? How can we know whether an occupier is doing "all it can"?

Before we enter into the pragmatic and practical problems raised by such a vague legal standard (and I believe there are many), it is worth considering whether one reason we find it so difficult to blend these two bodies of law in practice, even in such a narrow context as envisioned by the *Bankovic* or *Al-Skeini* courts, is that the true import of the genetic difference between IHRL and IHL was not properly heeded. That is, the issue of differing origins, differing foundational philosophies, and differing imagined communities of the law is not simply a historical artifact to be overcome by progress; it reflects the wisdom of not pretending that armed conflict is anything other than what it is: unpredictable, often cruel, bloody and unjust. In valuing foundations and origins in a different light, we are able to see that one reason that human rights law was not originally drafted to apply in extraterritorial exertions of military force and occupation is precisely because the relationship necessary for the spirit and letter of human rights law to hold does not exist between the invaders and the invaded. Nor should it.

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Dismissing Dilemmas as "Technical": Leaving the Hard Cases Untheorized

It is striking how many scholarly articles on convergence and court decisions on the issue of extraterritorial applicability of human rights in armed conflict reference the challenge of practically applying this body of law on top of, through or in addition to IHL. An oft-referenced paragraph from the International Court of Justice's (ICJ) *Wall* advisory opinion serves as a useful starting point:

> 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.[43]

Many commentators have noted that this paragraph, and the Court's subsequent reliance on the *lex specialis* principle to determine which body of law will hold on a particular set of facts, is an unsatisfying and confusing way to approach the actual application of human rights law during armed conflict. The Court does not go on to provide any examples of such a division of applicable law, and its subsequent decision on the issue does little to build on this paragraph's language. As one scholar has argued, the actual functioning of the *lex specialis* principle is notoriously elusive and provides little in the way of concrete interpretive guidance for solving conflict of laws problems in this arena.[44]

While many scholars and jurists acknowledge the tremendous current confusion on how the convergence principle applies in practice (while reiterating that the current law is indeed that both bodies of law apply in all armed conflicts), few tackle *how* human rights law will actually be applied in the day-to-day military operations that characterize armed action abroad.[45] These questions are often referred to in an offhand manner as technical matters to be dealt with by those who will be made responsible for applying the vague principles of convergence.[46] In this section, I want to ask whether this leaves the job of courts and theorists half done: to what extent must human rights law theory be transformed in order to make convergence a coherent reality? To what extent do the possible changes to human rights law that would be wrought by true extraterritorial application have implications for how we think about and theorize human rights norms today? If soldiers become human rights enforcers, if military commanders acting outside the territory of the State party to the human rights treaty are put on the front lines of interpreting human rights provisions, how do these technical and pragmatic choices impact our understanding of rights?

Once again, long-standing differences between IHRL and IHL should inform our understanding of this issue. IHL theory treats the practical realm as sacrosanct:

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most serious scholarship or jurisprudence on the laws of war supplements any theoretical argument or model with a claim for why the posited theory is practicable, pragmatically sound, and capable of being applied by the military and to soldiers. For most IHL scholars putting forth theoretical or normative arguments, plausibility to the military planner, the reasonable commander and the military lawyer is almost as important as acceptance by fellow scholars and policymakers.[47] Human rights scholars, with their focus on a State's obligations to control and shape its own institutions in its own seat of power (its government, its means of coercion, its courts, its police, its school system, its national budget and financial decisions), are not so constrained.

Avoiding the difficult question of practice and operations seems like more than an oversight or a decision to leave those matters to future scholarship and jurisprudence.[48] While a number of scholars seem to recognize the significant problems posed by convergence to actual military practice during armed conflict, referencing in particular the dilemmas faced by coalition forces that may have different interpretations of the applicability of human rights law (as was the case in Iraq), as well as the means by which the military would be asked to make human rights–based decisions, few present a coherent theory of *how* their ideas can be realized. My sense is that this derives from two underlying problems with the current debate. First, due to the sense that those arguing for convergence are clearly on the "right" side of the debate and that they are obviously making arguments for more humanity and more protection, there is little pressure for those making convergence arguments to normatively justify their positions and ground these normative claims in an understanding of how convergence will actually improve the status of civilians caught up in armed conflict. The operating assumption of pro-convergence scholarship is that more human rights obligations on the battlefield will mean more human rights enjoyment for the affected population. Second, the ubiquitous claim that the main legal battle has been won, that with the three key ICJ decisions (the *Nuclear Weapons* and *Wall* advisory opinions and the *Congo* decision) international law today simply *demands* convergence, makes it easier to avoid the hard cases of how these vague opinions can be translated into operational guidelines for soldiers.[49]

I question whether this reliance on hyper-positivism is enough to solve the problem. While article after article analyzes the same judicial and quasi-judicial material (the *Loizidou* line of cases at the ECtHR, leading through *Issa*; the key decisions of the IACHR; the ICJ decisions; and the Human Rights Committee's relevant views and General Comment 31) in an effort to meticulously demonstrate exactly how well-founded is the claim that convergence is in fact law, these analyses rarely move into exactly which human rights provisions would converge with

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which international humanitarian law norms, how detention operations on the ground would materially change, how commanders would embed human rights interpretation into their orders, how decisions around targeting would be impacted, and how the balance between security of forces and civilians would be struck.[50] It is worth considering that the reason we see so little of this type of discussion in the voluminous debate on convergence is that the main contribution to battlefield regulation envisioned by those who advocate convergence actually has very little to do with the key areas that IHL regulates. Perhaps advocates of convergence have spent so little time theorizing what exactly will converge—how military lawyers should incorporate human rights law into their advice to commanders, how military planners should use human rights law in their preplanned targeting and how occupation authorities should consider human rights in detention operations—not because these are insignificant concerns, but because they actually imagine that the payoff of activating extraterritorial obligations of human rights will be in the aftermath of war. It is worth remembering that the clear texts of the oft-cited decisions of the ICJ, the ECtHR and the Human Rights Committee certainly do not limit convergence in this manner: the formalist reading of the current majority position seems right—human rights law *does* apply, and it applies extraterritorially.

I would argue that now that advocates of convergence seem to have won the formalist legal battle, they have a responsibility to begin work on the hard cases that have been left to footnotes and marginalia. They must begin to articulate a theory of exactly how human rights go to war, and make a link between vague declarations of applicability and detailed recommendations for practice and operations. Foreshadowing some of the critiques that will follow, I would argue that this work will be fraught with tensions and difficult choices that have not been properly considered and weighed by advocates thus far.

Lowest-Common-Denominator Governance: Creating a False Sense of Rule of Law

Much of the jurisprudence and literature on extraterritorial application and convergence focuses on the level of effective control required in order for human rights obligations to apply to the State engaging militarily beyond its borders.[51] The upshot of the current approach seems to lie between the "cause and effect" doctrine (rejected in *Bankovic*, but revived in other cases and still promoted by a number of scholars) and the idea that a State acting extraterritorially during armed conflict would have human rights obligations consequent to its degree of control of the territory and population of the invaded State. While the current law is far from

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clear, most of it seems to agree that the degree of obligation would increase as a State asserted more control, culminating in detention of persons as the clearest example of control for human rights applicability purposes.

Assuming that this interpretation of contemporary international law is correct, it seems to me that this encourages us to take a lowest-common-denominator approach to governance, and the ways in which human rights are respected in a real place with an actual population.[52] It is important to note here that IHL is not a legal regime that is concerned with governance: while of course there are provisions in occupation law about how an occupying power should engage in the act of administering a territory that it controls, those rules do not purport to promote a good governance agenda, or to lay the foundations for democratic or rights-respecting statecraft.

When we make the move to add human rights law (and, its important corollary, the *expectation* and *reliance* of the members of the population that they have legitimate human rights claims against various foreign State entities as represented through their militaries) in concert with increasing degrees of effective control, it strikes me that we treat governance as something that can be parceled out, diminished to some set of basics, and diluted to a generic palette of tasks that could be equally borne and applied by any actor who happens to be part of the invading/occupying forces. The reliance on control as the central mechanism by which human rights law applies extraterritorially during armed conflict seems to threaten the very core of human rights principles: that they are intimately tied to the way in which a State governs, the ways in which it communicates its system of governance to its people, and the means by which it demonstrates its accountability to their rights claims and rights enjoyment over time. How can enemy soldiers step into this governance function? What is lost when we minimize the act of governing to the levers of control that may or may not be in place at a given time? Unlike targeting decisions, orders regarding proportionality assessments or civil-military cooperation in humanitarian assistance operations, rights do not function in minute-by-minute decisions taken by commanders and soldiers; they are based on a relationship, a two-way exchange between the rights-holder and the duty-bearer. How can building a prison, erecting a checkpoint or detaining a group of young men provide the appropriate foundations for human rights to function?[53]

It seems worth considering that this approach to human rights applicability encourages us to see governance as synonymous with control: whoever happens to be able to exert brute force over the civilians at a given moment in the conflict such that they have some sliding degree of control will have some sliding degree of human rights obligations. I am not making a pragmatic argument here (see the above critique for that point), though there are clearly many ways in which this

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system seems patently unworkable in actual conflict. Rather, I want to put forward the argument that such an approach to human rights obligations *and* human rights claims (meaning what the civilians hold in their hand, what they are able to understand, who they are able to turn to in real time) harms human rights law in ways that are not currently being measured by proponents of convergence.

Lowest-common-denominator governance has costs in the ways I have discussed above, but I think the inclusion of rights talk in effective military control also allows us to avoid the ways in which armed conflict actually impacts how people caught in its chaos experience justice. As documented extensively elsewhere, efforts to foster and sustain the rule of law in Iraq have not proved effective.[54] To the extent that any semblance of rule of law existed prior to the 2003 invasion, the war, subsequent occupation and conflict between armed groups have devastated the ability of Iraqi citizens to access and rely upon the legal system. Human rights law is at the core of the concept of rule of law, especially in the sense that it grounds this often-nebulous concept to a set of treaties and mechanisms. Human rights imagine the full human being living her day-to-day life and interacting with organs of the state in a myriad of ways.

The legal claim that human rights law now applies extraterritorially to States in armed conflict, and the increasing embrace of convergence in the practice of international non-governmental organizations (INGOs),[55] humanitarian organizations, UN agencies[56] and other key actors on the ground, allows us to feel that we are doing something to improve the experience of rule of law in countries like Iraq, or that we are increasing the capacity of the population to raise claims against the invading or occupying army. While we know that the actual legal system of Iraq has been decimated by years of conflict, sanctions, and now occupation and internal conflict, the use of rights talk—and the constant reference to the human rights obligations of coalition actors—masks the real cost that this has on the capacity of Iraqis to enjoy human rights by emphasizing international obligations and fancy legal argumentation. But replacing the domestic legal system with "the international community" or with the legal system of another country (the domestically accepted human rights obligations of the Netherlands, United Kingdom, Canada, etc.) does not necessarily improve the experience of law or the accountability of actors vis-à-vis the Iraqi civilian.

International rights mean little without local law and order. Pretending otherwise, or focusing energies on supporting rare "impact litigation" connecting a handful of victims with prominent human rights lawyers in Europe or civil rights organizations in the United States, does not change that. Such litigation, and findings of individual liability of soldiers for human rights violations, may improve the Dutch, British or Canadian legal order and it may over time improve the behavior

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of these States' militaries in actions around the world, but it does not necessarily increase the rights enjoyment of Iraqis.

My point here is not to say that such cases are unimportant or that we should not value their potential for positive transformation of military behavior and public attitudes back home toward the actions of their States abroad. My concern is that the increasing sense among human rights lawyers and scholars that there is "no difference" between IHL and IHRL is disconnected from reality as experienced by civilians in the countries most affected by these debates.[57] Furthermore, the increasingly legalistic insistence on convergence allows us to pretend that international law is doing more for civilians in armed conflict than it actually does (or can). IHL, which renders discussions of governance and rule of law as (at best) out of place and (at worst) insulting, prohibits us from making such a slide, and forces us to properly ascertain the horrible impact of war on affected populations' experience of day-to-day justice.

Can the Moral Force of Human Rights Withstand Their Formal Application in Armed Conflict? Setting Human Rights Up to Fail

The current focus on legalistic convergence (as opposed to actual operational practice and concrete examples of parallel application) undermines the moral power of human rights law, and threatens to diminish the hard-fought gains of human rights norms and rights discourse in the past several decades. To put it simply, we all know at an intuitive level that an Iraqi in Iraq under occupation cannot possibly enjoy the same human rights as I can as an American citizen in the United States. Yet, there is no way (so far) to translate that basic commonsense idea in discussions of international legal application. If the Iraqi cannot have the same rights during conflict or occupation as I do during peacetime in my home State, but human rights lawyers want to argue that he "has human rights," what rights should he have? What does human rights mean if we strip it down this way, if we pick at which rights can be enforced in which circumstances by particular armies at particular times?

As I have noted above in a different context, claiming that international law now recognizes the (full) applicability of IHRL to States fighting outside of their own borders creates expectations among the civilian population (as well it should). If I am told I have a bundle of rights, who has the duties? How do I claim them? Where do I go? This is a very different matter from explaining to the civilian population that the armed forces or the occupying power have an obligation to minimize civilian harm, to provide adequate access to basic lifesaving goods and not to attack civilians. Human rights is a set of negative *and* positive obligations, but more than that it is a manner of relating, one that is anathema to the relationship between

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soldiers and enemy civilians. The call for extraterritorial human rights application in armed conflict implicates human rights language and the promise of human rights in the very ugly business of control by an enemy military. Can this be expressed to the civilian population in a way that does not permanently pervert that population's appreciation for human rights law? After the conflict is over, and the enemy forces are gone, will the civilians—now again citizens, no longer categorized by their status—be able to see human rights law in the same light? If convergence fails to deliver in any meaningful way in terms of material changes to the experience of civilians in armed conflict (and, given the lack of development of concrete operational rules for how military lawyers, planners and commanders might change their behavior as a result of adding human rights law to IHL, we have good reason to believe this might be the case), will human rights law and rights discourse suffer lasting damage?

It is worth noting that the international community has invested tremendous resources in increasing the awareness of and respect for human rights among populations in the developing world—particularly in the Middle East[58]—against significant cultural and religious objections to universal rights. Human rights law has a long way to go before it is accepted as the framework for the relationship between the governed and the governors: how is this regime affected by the declaration that any military force that happens to act on the territory has human rights obligations equivalent to those held by the home State?

This is another way in which the distinction between IHL and IHRL reflects a serious and deep difference. As reflected in emerging scholarship, IHL has not historically had a "culture problem": one finds very few debates in the post–World War II writing on IHL discussing cultural relativism versus universalism, multiple or plural interpretations of proportionality and distinction based on local norms, or different approaches to detention based on custom.[59] Whether well-founded or not, IHL has generally been able to comfortably claim universal adherence and acceptance based on its practical credentials, its lack of the "name and shame" approach to enforcement and monitoring, and its profound respect for the sovereign. IHL focuses (with some important exceptions) on the behavior of the professional military, and relies on its very limited scope of application and limited relevance to how States govern people's daily lives to assert its relatively unchallenged dominance over the norms regulating armed conflict.

In this light, if we consider the objections of the United Kingdom to full extraterritorial application of the CAT, arguing that it "could not have taken legislative or judicial measures of the kind required by Article 2 of the CAT in Iraq since legislative authority was in the hands of the Coalition Provisional Authority and judicial authority was in the hands of the Iraqi courts,"[60] it seems that the current

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pro-convergence position would ask us to respond by accusing the British of seeking to maximize their military entitlements as an occupying power (including the power to interrogate security detainees or keep individuals in administrative detention with very minimal fair trial guarantees), while actively trying to avoid the increased protective and rights-based regulations of the CAT. However, one could also argue that there would be valid concern on the part of an Iraqi that the British ability to craft and make decisions based on human rights *ought to be* limited, precisely because we would not want the British—as a military occupier—to have the kind of influence over Iraqi institutions that would arguably be necessary to fully respect human rights law vis-à-vis Iraqi individuals who find themselves before the courts. IHL keeps the British position limited: they have responsibility over their own actions vis-à-vis enemy civilians when they are taken into custody, when they are on the opposite end of a gun and when they are within the range of a bomb.

Human rights law asks that the State with obligations to an individual takes real steps to permanently transform institutions that structurally violate rights. How will the still-fragile worldwide acceptance of human rights law and rights discourse fare as military forces are encouraged to take the helm of such transformations? Do we want to encourage foreign invading States to promote a human rights agenda vis-à-vis the population under attack? Can human rights law be respected in this manner, and would the population accept such an articulation of human rights? To put it another way, while I understand the short-term gains of demanding that the British respect human rights law in their actions in Iraq (one could perhaps argue that it would result in better trials, or less torture, though again this has yet to be convincingly demonstrated by any argument about *how* human rights law would materially change the current panoply of rules under IHL), I do not *want* an occupying power that has invaded my State to be recognized by the international community as having a "rights-based" relationship with my population. I do not want that State to be in a position to argue that it has to engage in certain institutional changes in order to be able to comply with its human rights obligations back home. I do not want a State that has no relationship to civil society in my country, has no long-term understanding of my population, its history, its religious values, etc., to have a hand in shaping its human rights framework simply by virtue of its choice to invade.

Seen in this light, the aggressive promotion of full convergence by some human rights bodies and human rights lawyers seems to flip the legitimacy of the rights regime. One might argue that the current interpretation of extraterritorial applicability of IHRL in armed conflict is much more limited than I am suggesting—that human rights really apply only when the invading/attacking/belligerent State is in a quasi-governing stance vis-à-vis my population. But, given that there are no

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coherent legal grounds for this limitation, the concerns raised here should give pause to the march toward convergence. If convergence applies to detention today, how can we know whether it will be said to apply to speech, religion, education and elections tomorrow? What if it is argued (as one could well imagine in Iraq) that the invading or occupying State is in fact far better suited and experienced to enforce human rights law in these sectors than the host State?

In this sense, in a context where human rights norms are currently under attack in much of the world for representing the wish of Western States to change developing countries, and where human rights discourse has recently had to defend itself after being marshaled by those who used human rights arguments to support the invasion of Iraq, the dilemmas of convergence raised here ought to be considered as serious threats to the legitimacy of the human rights project. The pro-convergence position imagines a world in which the duty-bearers of rights held by individuals have an exchangeable responsibility that can be shifted between States, coalitions of States and even international organizations that happen to be acting upon a civilian population at any given time during armed conflict. Today, my human rights might be owed by the armed forces that happen to be transferring through my village, tomorrow by my own State, the next day by the coalition forces that will occupy for several months. Something is lost in this shift, in this exchange. The governor-governed relationship that is central to the corpus of human rights, and central to rights talk and rights advocacy, is not only about who is held responsible before an international court, or what State holds the *duty*. It also empowers the rights-holder, and provides the central logic for the legitimacy of human rights law in gaining State consent and popular universality: the bonds of trust, geography, home, kinship, culture, refuge and family that create the context in which the governor-governed relationship takes shape mean that the rights-holder has a clear sense of *who* owes him respect of his rights, and *why*. It gives the rights-holder the agency to *change* and *impact* the duty-bearer. IHL not only has no such provisions; it is inherently opposed to such a conception of relations.[61] The admixture of what makes IHL legitimate and what makes IHRL legitimate may delegitimize both bodies of law, and impact the ways in which the law is able to regulate.

The Call for "Basic" Rights: Reintroducing a Hierarchy of Rights?

A survey of the scholarly literature on the parallel application of IHRL and IHL, as well as the key judicial and quasi-judicial documents on this fiercely debated topic, reveals the repeated use of phrases such as "basic" rights, "hard-core" rights or "core" provisions of human rights law.[62] This language seems appealing, in that it appears to refer to some previously agreed-upon, truly vital subset of human rights provisions, and to argue that we must simply take that agreed-upon set of

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"super-rights" and insist that they apply extraterritorially to States engaged in armed conflict. However, this language, and this frequent invocation of "basic" rights, is deeply problematic, and goes against the dominant (and, until now, victorious) trend in human rights law and scholarship to insist that human rights are indivisible and cannot be picked apart or prioritized on the basis of which rights are more "serious" or "urgent" than others.[63] Indeed, it is often noted that part of the reason that the derogation clause of the ICCPR was not replicated in subsequent human rights treaties is for the precise reason that it seemed to encourage a sense that there were some rights that were considered more important by the international community than others. It is surprising to see human rights proponents referencing a return to some vague conception of basic or fluid rights, insofar as the human rights movement spent many years convincing States that such an approach to their obligations was unacceptable and went against the spirit of key treaties.

From a legal interpretation perspective, the problem of how to respond to the human rights lawyers who claim that only some rights must be applied by States acting abroad has been recognized by a number of courts. As the much-criticized *Bankovic* court points out in rejecting the "cause and effect" theory of extraterritorial IHRL applicability, the obligations of the ECHR should not be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in question."[64] The *Al-Skeini* decision (also disputed by proponents of convergence for not going far enough in recognizing extraterritorial obligations in armed conflict) references this language of the ECtHR and states,

> In other words, the whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction. If that is so, then it suggests that the obligation under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in Section 1 of the Convention.[65]

Similarly, the recent Canada Federal Court of Appeal decision rejecting extraterritorial application of the Canadian Charter of Rights and Freedoms to Canadian Forces in Afghanistan states,

> Surely, Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does not. It cannot be that the Charter will not apply where the

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> breach of a detainee's purported Charter rights is of a minor or technical nature, but will apply where the breach puts the detainee's fundamental rights at risk.
>
> That is, it cannot be that it is the nature or quality of the Charter breach that creates extraterritorial jurisdiction, where it does not otherwise exist. This would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction.[66]

Yet, from a practical and strategic perspective, convergence (in the extraterritorial application sense) makes it virtually impossible *not* to prioritize rights or reintroduce the long-dead notion of a hierarchy of rights. As the Court of Appeal in *Al-Skeini* notes, "No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this."[67] Indeed, the argument for parallel application would be incredibly difficult to make to States (and their militaries) without some degree of limitation on the entire scope of rights provided in the relevant treaties (particularly when advocates of extraterritorial application argue that rights would increase with the level of control, suggesting that some minimal rights would apply with minimal control or during active hostilities). This reference to some inherent limitation to which human rights would actually oblige States acting militarily abroad (which has a very weak legal basis outside of the non-derogable provisions of the ICCPR) seems directed to those States (mainly the United States and United Kingdom) concerned about extraterritorial jurisdiction, assuring them that there is no actual expectation that they would be required to apply many of the relevant treaty obligations.

This may be a good strategic approach for arguing that extraterritorial application of IHRL in armed conflict is a reasonable expectation, or one that we can imagine taking hold in practice, but it is exceptionally difficult to uphold from both a legal *and* principled perspective. What would it look like to actually determine which rights apply with a given level of control? Who would determine which are "core" rights and which are those rights that could be left out of the equation? The military? The UN treaty body? Again, some seem to argue that States would be required to apply only the non-derogable provisions of the ICCPR, but what about the many other treaties implicated when courts speak of the applicability of "international human rights law"?[68] More important perhaps, to what extent do these arguments—once put into practice—threaten the indivisibility principle of human rights law? Do we open the door for States to argue that *other* situations would justify applying rights obligations on a sliding scale? This seems like a difficult conundrum to escape from: once advocates argue for the parallel applicability of international human rights law in armed conflict, once courts recognize that

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these rights apply according to some degree of control, the temptation to pick and choose rights is almost unavoidable. Such a move comes with real risks for the coherence of human rights law and its stability.

***Lex Specialis* as Everything and Nothing: Diluting the Clarity of IHL?**

One response to the above critique is to rely on the *lex specialis* principle to determine when IHRL will fill gaps in IHL, on using IHRL as a supplementary legal regime that is often overridden by the laws of war.[69] While the principle presents an appealing mechanism, it seems to be utilized by scholars and jurists across the spectrum of views on convergence to advocate for their approach to the dilemma. As one author notes, "[E]ven more worrying is the fact that the broadness of this principle allows manipulation of the law, a maneuvering of the law that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of international humanitarian law and international human rights law."[70]

Some would argue that the actual impact of convergence and extraterritorial applicability as recognized by courts is strongly limited by this principle—that when we seek to actually make sense of how rules and behavior would be impacted by the decisions of the ICJ the changes in rules that apply in combat would be minimal. Proponents of this view would argue that, for example, in developing rules of engagement for a particular theater, military planners and lawyers would almost always find themselves in a situation where IHL addresses the behavior they seek to address. In this way, *lex specialis* functions to render relatively meaningless the legal principle of convergence: yes, the laws may formally apply simultaneously during armed conflict, but in any given factual situation the relevant human rights norm (freedom of movement, freedom from torture, the right to life, freedom from arbitrary detention) would be trumped by the more specific or more clearly applicable IHL rule (military necessity, proportionality, distinction, prohibition on torture, treatment of prisoners).[71]

Such an approach might serve to address the lack of clarity and minimal operational guidance provided by current legal interpretations of convergence and extraterritorial applicability, and might allow States to continue to craft rules that are seen as compliant with the law while the norms are still being figured out. However, as a long-term approach to the question of parallel application, particularly for States and military professionals seeking to comply with changing norms, as well as for the coherence of both legal systems, this way of looking at the problem seems lacking in a number of ways. First, such an approach would seem to gut the very notion of convergence, and render the claim that both bodies of law apply somewhat incredulous. Second, there may well be situations of

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substantive law where a human rights claim could be made and not dismissed by the *lex specialis* of IHL. This might be the case where IHL is completely silent on a matter that is explicitly addressed by IHRL,[72] or where human rights law provides much richer detail on a given situation than the basic rule of IHL (such as in detention situations).[73]

As noted in the introduction to this article, however, the bulk of the power of IHL to regulate and to protect lies in the development of clear rules and clear guidance to commanders and soldiers *before* combat decisions are made.[74] To the extent that even the most sophisticated scholars of international law seem to find the principle of *lex specialis* difficult to work with and lacking in specifics, it seems unlikely that an approach that relies heavily on this principle will serve to protect rights *or* enhance the clarity of existing rules. Indeed, one risk of the current lack of practice-oriented theories for understanding and interpreting State obligations to apply and differentiate the two bodies of law is not only that human rights law will not actually be added to the rules in any meaningful way, but also that the clarity of IHL rules will be blurred in the process.

One-Way Convergence? The Question of Distinct Professional Cultures and Languages

One needs only to attend any academic conference or panel on IHL and IHRL in order to observe the vast differences between the professions, academic cultures and approaches to theory, lawyering and practice. Without claiming that these are essential characteristics, or that there is never overlap between those who focus on either of these bodies of law, I want to argue there that these professional identities matter and have an impact on how we ought to understand the implications of convergence in practice as the field emerges.

Before the very recent trend toward seeing IHRL and IHL as subsets of the same legal field, the educational and professional choices leading to becoming a practitioner or specialist in either field were quite divergent. While both are, of course, fields of public international law and share affinities of background and training to some extent, the "typical" IHRL scholar/lawyer and IHL expert are two rather different characters. Traditionally, those interested in IHL have had professional experience in the military, in government or with the ICRC. Many scholars who have had such professional experience remain closely connected to the relatively small community of IHL practitioners and scholars, often meeting at the same academic conferences and relatively familiar with the range of perspectives within their ranks on the key debates. Many IHL scholars remain actively engaged in the application of principles, either through advising States or international tribunals, contributing to ICRC and other expert processes, or working closely with those who train

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military lawyers and humanitarian actors. While there have been significant efforts to increase the training and academic development of IHL in the developing world, most scholarship, commentary and expertise on this body of law continues to stem from the West.

Human rights lawyers, advocates and practitioners are a much less well-defined group, and represent a much larger body of professionals. Firstly, not all human rights practitioners are lawyers, and many have professional backgrounds in advocacy organizations, non-governmental groups, domestic civil rights and human rights organizations, and community-based organizations. Scholars of human rights law are also drawn not only from the legal discipline, but also from philosophy, political science and anthropology. There is no institution in human rights that matches the history, power and influence of the ICRC, and while there are some leading global non-governmental organizations (NGOs), they enjoy less of a direct link to State policymaking than their counterparts at the ICRC. While today there are a number of State-based human rights institutions and departments in ministries of foreign affairs, many human rights lawyers consider themselves to be advocates of victims against the State and its machinery. As human rights law has enjoyed tremendous popularity as a field of study in the global south, its lawyers, scholars and experts represent a diverse group of leading thinkers and practitioners around the world.

The above caricatures are just that, caricatures, but they serve to emphasize that as these two fields merge more and more, and as convergence begins to trickle through to lawyering, scholarship, training and implementation, there may be real differences of approach, engagement and professional styles that are under-appreciated in the current debate. As more and more prominent human rights organizations (such as Human Rights Watch and Amnesty International) take on IHL in their monitoring, reporting and advocacy,[75] it remains to be seen whether a third professional community of those who work specifically on convergence will emerge. Alternatively IHL may have to expand its ranks to include human rights lawyers that may have wildly different perceptions of the laws of armed conflict, how its rules are and should be interpreted and applied, and how practitioners concerned with either or both bodies of law should engage with State actors and the military.

One might argue that there is real value in the two professions remaining distinct and maintaining their divergent internal cultures. To the extent that human rights lawyers and advocates come to speak in the language of IHL, with its acceptance of civilian deaths that are not excessive in relation to the military advantage anticipated, its recognition of the massive destruction to military objects waged in war, its constant balancing of humanity against the powerful argument of military

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necessity, and its faith in the decision making of the reasonable commander, will something be lost in the advocacy for the rights of individuals? Will the moral core of human rights lawyering, and its insistence on the promise of aspirational goals, be lost as these lawyers and scholars immerse themselves in the technicalities of warfighting? Do we want to maintain a space in international law and policy for the voice of human rights advocates that speak purely in the language of human rights and do not need to acquiesce to military entitlements in the same way that IHL lawyers and scholars must? In the sense that convergence focuses on how human rights law comes into the realm controlled by IHL, will the conversation and conversion go only one way, without demanding the IHL lawyers and scholars also become conversant with human rights law and its tremendous history of internal theoretical debates?

To some extent, the substance of human rights claims, as well as the style of human rights argumentation and advocacy, currently seems incongruous with the substance and approach of IHL. Today, the human rights advocate would stick out at a meeting of IHL experts. The human rights lawyer would probably make awkward references to peace, bring up questions of *jus ad bellum,*[76] passionately emphasize the rights of individuals to their claims, and stress the obligation of States to investigate and punish every act of State-sponsored killing. Most IHL lawyers would likely be polite, but see little opportunity to engage on the technicalities of targeting, on the number of civilians who could be killed in an otherwise legal attack without giving rise to liability or on the highly detailed debate over when civilians can be said to be directly participating in hostilities.[77] The convergence of the two bodies of law could dramatically change this conversation: it could foster a new group of professionals who would be wholly comfortable with such language, and who could easily discuss which human rights rules would be trumped during an air campaign. This might ease the integration of the two bodies of law, it might even lead to solutions to some of the critiques I have listed here. But it might also diminish the capacity of the human rights movement to speak with a clear voice and to advocate on behalf of individuals against States. Both professions are vital to the protection of civilians in armed conflict *and* to the lives those civilians are able to lead once armed conflict has ended. My argument is not that one is morally superior to the other, but rather that their distinction, even their distaste for one another's approach to the key issues, to States and to the military, is vital to the functioning of the separate bodies of law, and to their capacity to marshal future lawyers and professionals to their ranks.

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Human Rights Bodies in the Chain of Command: Incompatible Systems of Accountability?

To the extent that convergence suggests that IHRL applies during armed conflict and side by side with IHL, how can we understand the ways in which human rights bodies will come to address States engaged in armed conflict, and how might the military enforcement structure incorporate human rights law?

IHL relies on its own internal governance and enforcement structures: the reason that it travels so well is that it relies on the training, command structure and disciplinary machinery of the military. Theoretically at least, IHL should apply just as efficiently and effectively in a jungle war with little to no judicial mechanisms as in a prolonged air war over an enemy capital. IHRL, on the other hand, is rooted in institutions, in the particular infrastructure of a State's approach to governance, in the transformation—over time—of a State into a more human rights–respecting and rights-enforcing space. This transformative goal is geographically bound. It relates to shifts in culture, to alterations in domestic law that reflect the incorporation of human rights norms into the national system, and to the development of a long-term relationship between the State and international treaty bodies and other human rights mechanisms.

As the two merge, and as the conception of human rights jurisdiction expands, various (and perhaps all) human rights bodies will be in a position to consider the application of their particular treaties to situations of armed conflict, perhaps simultaneously addressing a State's compliance with human rights norms on its own territory, as well as its behavior in a far-off conflict. To the extent that the function of human rights law during armed conflict opens up the conflict to the inquiry and interpretation of human rights bodies, the more those bodies will be in a position to pass judgment not only on a State's compliance with a given human rights treaty, but also on that State's compliance with IHL *as interpreted through the lens of human rights law*. That is, in order to determine exactly *how* a given human rights treaty applies in a situation of armed conflict outside the territory of the obligated State, a given treaty body would need to first assess that there is in fact an armed conflict, use either *lex specialis* or some other mechanism in order to determine which body of rules applies to the situation before it, determine whether human rights law applies to those areas where IHL is (supposedly) silent, and then determine what level of violation of a human rights provision has occurred and what remedy should be made available to the claimant.

Such a scenario involves a number of significant steps. First, it suggests that human rights bodies will increasingly be getting involved in the notoriously difficult task of classification of conflict. Second, they would need to—at the very least—engage in enough analysis of IHL in order to determine which facts and legal issues

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are relevant and within their scope of review (in individual complaint cases, in court cases and in assessing State party reports). And finally, depending on their answers to these questions, the human rights bodies would be in a position to interpret, reflect upon and judge military behavior that falls within both categories of law, or where IHL is (supposedly) silent (targeting of civilians taking a direct part in hostilities, curfew regulations, treatment of women in detention, judicial due process of administrative detainees, etc.).[78]

This might be something to celebrate: one might argue that this opens up the traditionally insular field of IHL to a much broader scope of interrogation and analysis, and that it extends the conversation on IHL compliance beyond military tribunals or special courts. However, as such jurisprudence and quasi-jurisprudence develops in the Human Rights Committee; the Committee against Torture; the Committee on Economic, Social and Cultural Rights; the ECtHR; the IACHR; and other venues, we might ask whether such varied analysis and feedback to States on detailed issues of IHL is in fact *good* for the protection of civilians in armed conflict. Depending on the State, they may be subject to the views of a range of treaty bodies, which may have wide-ranging assessments of the critical issues listed above. How should States respond to this? At what level would we measure compliance?

The cost is not just in the possibility for a cacophony of conflicting or incoherent views on issues such as classification or direct participation in hostilities. It is also the possibility that these bodies would not be seen as legitimate to provide detailed analysis of legal issues seen as the province of military professionals. Would all human rights bodies begin to seek out IHL experts to bring specialization on these issues to their ranks? How would their views be weighed against domestic State interpretations of IHL? The more we move away from broad, vague generalities ("human rights law applies during armed conflict") and toward specific assessments of military conduct in conflict, the more we must ask whether human rights bodies are the appropriate or competent organs to address issues of IHL. What are the risks to the legitimacy of both these bodies *and* human rights law if States disregard much of their analysis (as has arguably been the case with the Human Rights Committee's General Comment No. 31)?

Undermining Sovereignty and Long-Term Rights Development

While scholars and human rights bodies have explored the obligations of non-State or private actors, ultimately human rights law centers on the sovereign State as the only entity with legal obligations under the law. This is more than a legalistic matter of jurisdiction or obligation; it is also critical to how human rights law develops, and its long-term vision for transforming those States that subject themselves to the human rights regime. It recognizes that as States open themselves to

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the scrutiny of human rights bodies, as they engage with NGOs and other human rights actors, as their domestic courts and internal State regulations come to absorb human rights norms, the relationship between the governor and the governed improves by becoming more transparent, accountable and democratic. For many States, their compliance with human rights law has been linked to their economic development, their good relations with other States and their reputations on the international stage.

One dilemma that has received little or no attention in the literature on convergence and in the work of human rights lawyers encouraging an expansion of extraterritorial applicability of human rights law is how these developments endanger the sovereignty of those States on which foreign militaries act, and how in turn this impacts the long-term development and growth of human rights enjoyment. While there has been so much focus on chastising those powerful States that reject or severely limit extraterritorial applicability, there seems to have been very little attention paid to those States that have been or will be invaded, occupied, bombed and otherwise subjected to the possibility of extraterritorial application of *other States' human rights obligations.* I imagine that part of the reason for this is that the sovereignty argument is easily manipulable by States such as the United States that reject extraterritorial applicability or like the United Kingdom, which is seeking to limit the contexts in which human rights principles would apply to the military. Another reason may be that thus far specially impacted States (almost uniformly in the developing world) have not verbalized a concern about this matter.

The *Al-Skeini* court touches on this issue with language that has been widely criticized by scholars. First, in approvingly citing the *Bankovic* court's finding that the ECHR is "essentially regional," and deeply rooted in the notion of the cultural and legal space of the Council of Europe, the House of Lords notes,

> The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes of the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd. Hence, as noted in *Bankovic* [citation omitted], the court had "so far" recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court

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> would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.[79]

In the latter part of the decision, again in language that seems to have been dismissed by scholars,[80] Lord Brown, in citing the Article 43 Hague constraints on transformation of the territory by an occupying power, notes,

> The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect "the laws in force," not to introduce laws and means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.[81]

Lord Brown later refers to the reasoning behind the general limitation on extraterritorial application of domestic laws: "The essential rationale underlying the presumption against extraterritoriality is that ordinarily it is inappropriate for one sovereign legislature to intrude upon the preserve of another."[82]

Ralph Wilde may well be correct that these positions represent "crude chauvinism,"[83] or "orientalist positioning of Islam and Europe as normative opposites."[84] He might even be right that "subjecting the UK presence in Iraq to the regulation of human rights law would have the effect of mitigating, not exacerbating, the colonial nature of the occupation."[85] I am not seeking to defend the actual position of either the Lord Justice, or to comment on the possible conflicts between Shari'a (or any other domestic or regional set of norms) and international human rights law.[86] Rather, I want to argue that human rights lawyers and those seeking to expand extraterritorial applicability of human rights law have been surprisingly silent on this issue. It seems that, taken from the perspective of a State (and its population) on which extraterritorial application of human rights would play out, the risk of human rights imperialism, or colonialism and transformation buttressed with the language of human rights (and imposed through the means of military control), may be neither preposterous nor ill founded.

This is one of the ways in which the lack of rigor and clarity in the arguments for extraterritoriality has a cost in understanding the risks posed by its increasing application. It is important to be very clear here about what is actually envisioned when we speak of extraterritorial applicability of human rights law in armed conflict. I raise this because it is very common to dismiss the above concern by noting that "most of the rights" would apply regardless of extraterritorial applicability due

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to the legal obligations of the invaded or occupied State. This is a faulty argument, and it slides over the more transformative and radical implications of extraterritoriality. Of course an occupying power would be responsible to apply the human rights norms that the occupied State has consented to, as well as all *jus cogens* and customary norms that the State would equally be obliged to respect. But that is *not* the grounds for triggering human rights obligations as imagined by proponents of convergence. Rather, the strong convergence argument suggests that an invading State brings with it its own human rights obligations, as well as its own *domestic* interpretations of how those human rights apply. Any other conclusion would go against the very purpose of extraterritorial jurisdiction.

This is less a claim about culture than it is one of the dangerous potential for undermining not only the sovereignty of invaded States, but more specifically their own domestic understandings of the interpretation and application of international human rights law. If we take extraterritoriality seriously, if we assume that advocates of convergence are being honest when they suggest that the full range of human rights obligations should apply in armed conflict, then how can this problem be avoided? Here, those who favor extraterritoriality tend to make an appealing and emotional argument that one sees repeated in both the literature and recent court decisions. In the widely cited language from the ECtHR's *Issa* decision (which many convergence scholars see as moving away from *Bankovic*), the Court states,

> Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State [citations omitted]. Accountability in such situations stems from *the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory*.[87]

A scholarly assessment of this language in *Issa* adds, "It is a strange idea, indeed, to suggest that a country's law cannot apply to criminal conduct of its nationals, to say nothing of its very agents, just because they are abroad when they violate the law."[88] One can see why this is such a compelling argument, and why it urges us to rally around the applicability of the law. It seems to say, "If extraterritoriality is not enforced, it would make a mockery of human rights, it would allow States to run rampant simply because they acted outside of their own territories." This is, however, a deeply flawed argument, and it takes our attention away from the real costs at stake here. First, we must clearly distinguish extraterritorial application of human rights law from State responsibility for the acts of its agents, which is regulated

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through rules on State responsibility, attribution and domestic criminal law. We do not need the extraterritorial application of human rights law in armed conflict to create criminal liability for agents of the State that commit crimes abroad while acting with the color of State authority. Second, and this point is often lost in the discussion, extraterritorial application of full human rights treaties in armed conflict makes a significant jump from existing narrow exceptions to territorial jurisdiction by addressing the conduct of the State and its agents vis-à-vis the nationals of *another* State, a State with its own human rights relationship to individuals on its territory. And finally, of course, it is not as though States acting abroad in armed conflict would be engaging in unregulated mayhem were it not for the extraterritorial application of human rights law, would be free to commit wanton crimes against the population of another State by virtue of their border-crossing. Indeed, the bulk of the entire field of international humanitarian law is dedicated to the regulation of exactly the moment when one State crosses the border of another State and engages in armed conflict there.

If extraterritorial applicability of human rights law in armed conflict grows and expands in the ways promoted by convergence advocates, these dilemmas go beyond the level of the abstract, and position weak States at a tremendous disadvantage in understanding and consenting to the laws that would be in force on their territories to their peoples. In an important recent Canadian case regarding detention and transfer of detainees in Afghanistan, we see this argument playing out in greater detail than anywhere else. The human rights lawyers arguing for the applicability of the Canadian Charter of Human Rights and Freedoms to Canadian detention operations make a curious argument to overcome the sovereignty problem, claiming, as Justice Mactavish states,

> [t]hat the Government of Afghanistan has implicitly consented to an extension of Canadian jurisdiction to its soil. As evidence of this, the applicants point to the fact that Afghanistan has surrendered significant powers to Canada, including, most importantly, the usual State monopoly over the use of coercive power within its territory.[89]

I can understand that as a tactical maneuver this approach may have extended the applicability of the law. However, from a principled perspective, I wonder how many human rights advocates would want to share with their colleagues in Afghanistan (or Iraq or Pakistan) that due to their State's "consent" to the presence of foreign military forces on their territory, they had in fact ceded sovereignty over the laws applicable to their own citizens to the governments controlling those foreign militaries? Relying on Canadian precedent on the question of extraterritorial

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jurisdiction generally, Justice Mactavish rejects this aspect of the argument, noting that "there has been no consent by the Government of Afghanistan to having Canadian Charter rights conferred on its citizens, within its territory."[90]

It may be that human rights advocates have shied away from acknowledging this critique, or engaging seriously with the costs posed to human rights law and third-world sovereignty by the extraterritoriality argument, because some of the claims I have posed above (the local laws problem, the sovereignty problem, and the colonialism problem) seem to be (perhaps disingenuously) cited by those who oppose extraterritoriality from the posture of defending the US or Israeli positions.[91] It may well be that opposing or questioning extraterritorial application of human rights law in armed conflict makes for strange or distasteful bedfellows in some cases. However, this is no reason to avoid critical inquiries into the implications of the arguments currently posed before courts and human rights bodies and in scholarship promoting a more robust application of one State's legal obligations and interpretations on the territory of another, particularly in light of contemporary politics around the misappropriation of human rights discourse by military interventionists.

Once human rights lawyers in the West go down this road, it may be very difficult to pull back and limit the sweeping legal arguments that are currently being made. One could imagine that beyond the dilemmas raised above, this could pose real risks to the long-term development of human rights law in countries that experience this type of extraterritorial jurisdiction being claimed and played out on their territories—though, significantly, not actually litigated on their territories or by their courts or judges.

Bad Lawyering? Asking IHRL to Do the Hard Work of Transforming IHL and Global Politics

A final concern relates to some of the issues raised immediately above, but goes to the heart of what proponents of convergence claim in legal argumentation, and what they actually seem to be seeking in terms of outcomes.

A first critique focuses on the gap between the legal claim that the full scope of human rights law applies once extraterritorial jurisdiction is activated in armed conflict, and the actual cases and examples we see brought forward by human rights lawyers and scholars. As I have noted above, as a matter of legal interpretation, it is difficult to identify any intrinsic limitation on the scope of human rights obligations that would apply to a State once we determine that extraterritoriality applies. That is, while scholars seem to want to argue that we should not worry, that the actual scope of human rights law implied in convergence is narrow or reasonable, this goes against the principle of indivisibility and leaves open the

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determination of which rights apply when (allowing States to pick and choose, to argue that "positive" obligations do not apply, or that only certain "negative" obligations are truly binding).

As I have argued above, in order for extraterritoriality to mean anything, and in order for *lex specialis* to be able to function as between two bodies of law, then human rights law must substantively add something to the current set of obligations and protections laid out in IHL. This seems only logical. If scholars and advocates are vigorously fighting for human rights law, arguing that the lack of application of this law would allow States to commit violations they would otherwise be prevented from committing at home, or that the true spirit of human rights law means that it must be applicable to an obliged State wherever it chooses to extend its authority, then surely they must believe that there are real, material aspects from the corpus of human rights law that will add to, transform, enhance or build upon the existing obligations of IHL. Yet, curiously, very few scholars or advocates have put forward such concrete proposals or examples of the substantive, normative contribution of human rights law application.

Instead, in the range of cases where advocates have sought to hold States accountable for their domestic human rights obligations in military action abroad, they seem to focus on substantive rules of human rights that have their exact corollaries in the protections of IHL. Most of the cases focus on torture or death in detention, transfer of detainees to custody where there is a risk of torture, targeting of civilians alleged to be participating in hostilities and killing of civilians. There is an excellent tactical reason for this: of all the differences between IHL and IHRL, perhaps the most important in this arena is that human rights law provides standing for individuals to claim their rights under international law, and to seek redress and remedy for violations against them. IHL, on the contrary, provides no such standing, and currently provides no avenues for individual complaints of violation under international humanitarian law or any obligation for violating States to provide redress or remedy to those against whom war crimes or grave breaches have been perpetrated.

Thus, the convergence of IHRL and IHL, and the extraterritorial application of human rights law in armed conflict, provides a crucially important and potentially revolutionary ability for individuals and their advocates to bring cases against States for violations. Because of the way that *lex specialis* functions, the procedural opening—the granting of standing to individuals—allows courts to assess and provide remedy for violations that are simultaneously contrary to a State's obligations both under IHRL *and* under IHL. Looking at the current cases, it may well be that the most important takeaway of all of this technical, lengthy debate over extraterritoriality, formal applicability of human rights law and parallel obligations comes

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down to, in practical terms, the possibility to bring individual claims against the State for damages or other remedy.

One might argue that this will have incredibly powerful implications for the protection of civilians in armed conflict. The more States are on alert that they may be subject to liability and findings for remedy in human rights bodies or under their domestic human rights law, the more they will improve their standards, limit violations of IHL, and take greater care with proportionality and distinction. Yet, it seems to me that such a position involves making tremendous sacrifices and ignoring considerable risks in order to gain the rare opportunity to bring such cases before courts. If human rights advocates are claiming that the true vision of extraterritorial applicability of human rights in armed conflict is that States will now be bound by the full panoply of human rights in their relationships with individuals on the territories they invade, but with the real intention of using these arguments to open up the opportunity to bring individual cases that involve violations of IHL, these advocates risk being blind to how the full force of their arguments will impact human rights law and practice in the long term.

In this light, the actual practice of convergence and extraterritoriality (as opposed to the soaring claims of its proponents) seems to be the best attempt at a workable solution to the problem of the lack of serious enforcement of IHL, and the lack of any capacity for individuals to demand that States recompense them for the damages wrought during war. While instrumentalizing human rights in this manner may provide short-term payoffs (one victim may receive compensation, one family may ensure that its son is not transferred to brutal detention conditions), it leaves unaddressed and untheorized the broader implications for how law functions in war. Also, this approach seems to make a promise that human rights lawyers do not intend to keep: it signals to individuals on the territory of an invaded State that those military forces who invade, occupy or detain have a qualitatively different relationship with them than that provided by IHL; it suggests that these individuals ought to expect a different type of behavior by these forces. Part of the reason we do not see much discussion of how this vision of the law will work in practice may be that there is actually little intent to develop rules for battlefield lawyering or training of soldiers, but only to create a mechanism for accountability *after* violations have taken place. This abdicates the responsibility set up by speaking in the language of human rights. Ultimately, having human rights *claims* means being able to know whom to go to to get the water turned on, to get food for your children, and to complain to when the police harass you or when your political party is shut down.

The paltry literature on what exactly a war imbued with human rights looks like *for the people living through it* leaves us wondering whether convergence can ever

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live up to its formalist promise that the law will be there, that the parties must apply all (or some?) of their human rights obligations in addition to their international humanitarian law responsibilities. What claims will people have in the midst of conflict? To whom should they take these claims? In coalition situations, which party is responsible to answer to the valid (at least legally) rights claims that convergence seems to encourage? Inviting reliance by civilians can be good for their human rights enjoyment only if we have some sense of the way in which the system will work. If the only purpose is to create claims after violations have occurred in a far-off land, it is not clear how this actually respects the human rights that convergence seeks to identify and demand.

Using human rights law, and the broad legal claim of extraterritoriality for this much narrower purpose, avoids doing the hard work of actually transforming and re-envisioning IHL in the way that most advocates would want. It allows lawyers to turn to the legalistic machinations of jurisdiction instead of advocating for the wholesale reconsideration of accountability in the laws of war. This is an important debate, one that must be had and one that is surely influenced by the ways that human rights law has transformed our global legal culture. As long as we pretend that the debate is about the full application of human rights law, when it is primarily about accountability mechanisms and remedies for victims of IHL violations, I would argue that we are not having the challenging and critical political battles that need to be fought in order to achieve the deeper ends of extraterritoriality. In this way, extraterritoriality takes energy away from the efforts to strengthen IHL and to make States more accountable for their actions in armed conflict.

A similar critique, and one that will likely be popular with those who oppose extraterritoriality on grounds of protecting military entitlements, is that the arguments for convergence and extraterritorial application can sometimes shade into backdoor pacifism. That is, to the extent that over-regulating the battlespace is not actually meant to develop a robust set of actual human rights obligations and their interpretations when taken to war, but instead meant to change the calculus for States when entering into armed conflict, joining coalitions or contributing troops to peace enforcement operations, this strikes me also as a misuse of human rights law and language. If advocates believe that human rights law (standing on its own, as applied to States on their own territories and through traditional mechanisms of human rights monitoring and enforcement) should in fact *prevent* States from going to war, or that it adds serious considerations to the *jus ad bellum* questions of the legality of war, then they should say so, and they should expand the provisions of human rights law that seem to support such an outcome.[92] Advocating for an unclear, vague, confusing admixture of human rights and IHL on the battlefield with the ultimate goal of influencing *jus ad bellum* encourages bad lawyering and

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avoids the much more compelling debates that could be taking place within human rights law about the costs of war itself.

Part III. Looking Ahead

If scholars and practitioners weigh the costs and risks I have discussed above, they should consider new approaches that address these dilemmas honestly and rigorously. With the goal of increasing protection of civilians in armed conflict, securing the human rights of all individuals, and enhancing the clarity and effectiveness of the regulations of parties to armed conflict, how might the field react to some of the above critiques? In this section, I want to propose some possible ways forward, not necessarily as pragmatic solutions to knotty legal problems, but to recast the question of how human rights law impacts the role of law in armed conflict.

There is no question that the interplay between international human rights law and international humanitarian law is here to stay. There is no going back to a clean separation between the two fields, if such a separation ever existed. More and more the key actors in armed conflict (militaries, State policymakers, humanitarian organizations, human rights groups) are merging the two discourses and identifying tools that draw on rules and mechanisms from both fields. How might we imagine paths ahead that recast the question of convergence? These four paths forward are not actually meant to be a practical list of approaches that I am necessarily advocating, or a list that does not entail dilemmas of its own. But, given the critiques above, and assuming we want to be more honest and rigorous about what we are doing in this area of law and policy, these possibilities suggest some ways that we might rethink the entire question of extraterritorial application of human rights in armed conflict.

Create New, Leaner Body of "Human Rights at War"

One possibility is that human rights scholars and practitioners, rather than focusing on the rules of international humanitarian law or how human rights law can directly interact with those rules, develop and expand a new field of "human rights at war." Such a project might take a number of forms. The central feature would be that it would focus on building consensus around the key aspects of human rights law that could practically apply during armed conflict, and focus on the ways in which human rights bodies and mechanisms could interpret and enhance such tools.

At the most ambitious level, this would involve strengthening or redrafting those aspects of human rights law that would severely limit the capacity of States to enter into armed conflict, and would develop the rules of IHRL to take a strong

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position on *jus ad bellum* determinations. As some scholars have suggested, there is much in the corpus and drafting background of human rights law that suggests a strongly contra-conflict posture. Here, lawyers and policymakers would identify and build upon those trends within the law, working with States to highlight the ways in which their human rights obligations bind them to limit their engagement in armed action altogether.

Such a human rights law of war, unhindered by the constraints of IHL, might even be proposed as a direct challenge to IHL—rethinking central assumptions and concepts that structure our contemporary thinking on justice in war. A law of human rights at war might directly question current understandings of proportionality, distinction, precautionary measures, occupation and treatment of detainees, using the drastically different language and approach of human rights law to rethink these categories in a far more civilian-protective mode. One could imagine that such a development of human rights would blend legal understandings of *jus ad bellum*, *jus in bello*, and post-conflict and stability operations to create an overall set of obligations for States that fight.[93]

While such an approach would certainly face a profound challenge in implementing a transformation of this scale, efforts in this direction would sharpen arguments *between* IHL and IHRL, and would insist on keeping in the foreground the serious (and I would argue, necessary) tensions between the two fields. Indeed, debates between States and scholars on such an approach could illuminate the ways in which human rights law and practice, outside of the well-defined and narrow discourse of IHL, might reshape our understanding of the normative constraints on armed conflict and the duties owed to civilians.

A less ambitious approach within this category would be a project among State parties to human rights treaties, human rights bodies and scholars to actively identify a subset of human rights provisions that create the toolkit of "human rights at war." Here, human rights advocates and scholars would have to be honest in acknowledging that they do not foresee the entirety of human rights law applying in armed conflict. Rather, they would identify the key provisions of human rights law that, different from protections and obligations already enshrined in IHL, would substantively add to what civilians could expect from State parties to armed conflict, and what civilians could demand under human rights law. This might involve a gathering of States to clarify consensus around key provisions, moving away from the current confusion of multiple layers of litigation, regional human rights bodies and domestic interpretations of convergence, providing support for this leaner, thinner body of human rights law.

Such an approach would provide an opportunity for the development of a new cadre of professionals: individuals with experience, background and influence in

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both IHL and IHRL, equipped with the tools of fact-finding and advocacy common to human rights, but also able to engage with military professionals and State policymakers in discussing the difficult choices that must be made during armed conflict. State involvement, buy-in and consent would be critical to such an enterprise, mitigating some of the legitimacy challenges discussed above.

While perhaps more pragmatic than the current approach, such a step would involve the risk of diminishing and narrowing human rights protections, and conceding that indivisibility would have to give way to the desire to introduce at least some robust human rights protections that all States understand must be operationalized and applied throughout their military planning and practice. Further, such an approach might lead to new engagements between human rights advocates and military professionals, focusing on those legal provisions that—through negotiation—are seen as applying in parallel to IHL provisions.

Develop and Strengthen Accountability Mechanisms in IHL

A second possible approach to the dilemmas discussed above might focus entirely on innovating around accountability mechanisms in IHL. Perhaps inspired by the ICJ's vague call for parallel application of the two bodies of law, such an approach might involve efforts to enhance existing accountability mechanisms within IHL (most existing Geneva Convention mechanisms are currently moribund) or to introduce some of the monitoring and accountability mechanisms present in the human rights system to IHL.[94]

At the strongest level, this could involve introducing a mechanism for individual complaints or individual standing under IHL at the international level. Examples might include creating mechanisms for individuals to make claims against the State domestically, or a centrally located international body that would hear claims, interpret the rules of IHL according to specific fact situations, and provide decisions, remedies and redress. Such a development would be outside of, and in addition to, existing mechanisms for internal military discipline, domestic war crimes legislation and international criminal law. Rather, such a body would focus solely on individual complaints against the State for violations of IHL in armed conflict (because this would not involve substantive human rights law, the mechanism would by nature have extraterritorial reach, applicable to any States engaging in the armed conflict at issue in the case).[95] In addition to hearing complaints and adjudicating cases, one could imagine that such a mechanism could also have a body that would oversee and interpret the rules of IHL in the same vein as many of the UN human rights treaty bodies.

Such an approach would involve a new drafting process, perhaps similar to the optional protocols created subsequent to a number of human rights treaties,

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seeking the consent of States to such a mechanism and creating new procedures for individual complaints cognizant of the particular needs of the IHL system, and calibrated to the realities of armed conflict. Given the deep dilemmas present in making the current legal interpretations of convergence a reality, one might argue that such an approach, while requiring major efforts at bringing together States and initiating a new process, holds a greater promise of long-term success and real results for victims than the divergent and often conflicting approaches of individual States to extraterritorial application of human rights in armed conflict.

This approach would have the advantage of creating a standardized mechanism for monitoring and accountability. Rather than relying on rare cases brought on behalf of individuals in foreign courts, States would be required to implement the necessary procedures within their armed forces to monitor compliance, investigate violations and alter behavior in response to findings of the new accountability mechanism. Because the military would necessarily be involved in such a process, the incentives to comply and participate would also be higher than the current approach of extraterritorial human rights application.

Finally, such an approach would have an additional advantage compared to the jurisdiction of human rights bodies: because it would be working with IHL, which binds non-State actors, it may also be in a position to hear individual claims against armed groups. While seeking redress or compensation from such groups would provide a major obstacle, the legal framework would exist to explore ways in which non-State parties to an armed conflict could also be brought into the accountability system.

Strengthen Territorial-State Mechanisms for Holding Actors Accountable for Violations

A third approach would indeed look to convergence, but a different breed of this argument than I have challenged in this paper. This possibility would seek to strengthen and embolden domestic human rights obligations and mechanisms during armed conflict (whether non-international or international). That is, this approach would focus on the continued parallel application of human rights law during armed conflict per the current dominant legal consensus, but *not* extraterritorial application of these rules.

As human rights advocates have pointed out in arguing for extraterritorial application of human rights law as a means (the only means) for accountability, we see contemporary cases where the United States and other States deny that they are engaged in an international armed conflict in countries such as Iraq, creating a gap in protective rules. As many have pointed out, the rules of non-international armed conflict are ill-suited to these contemporary situations, where major States

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are involved in massive combat, stability and State-building operations on the territory of another State, but without the rule framework of international armed conflict or occupation. In such a situation, it is less clear that IHL by itself is able to cover adequately the encounters between troops and Iraqis, or provide a clear set of roles and responsibilities for all actors involved. At first glance, it *does* appear that extraterritoriality, applied through the home State of the military forces, is the only available answer. Yet here it seems that advocates of extraterritoriality forget the role of the territorial State.

One approach to increasing protection in these contexts would be to insist that host States harness their power to hold all parties on their territory accountable for compliance with IHRL. In Iraq today, it is the Iraqi government that has the clearest and most well understood human rights obligations vis-à-vis the Iraqi people. This obligation to protect the rights of the people extends not only to the acts of the Iraqi State, but also implies that the government will protect Iraqis from any threats to their human rights that occur in Iraq.

In this model, human rights advocates and scholars would focus their energies not on extraterritorial application of human rights law in armed conflict, but rather on the ways that parallel application and convergence strengthen the hand of invaded States to insist that all actors comply with the *territorial State's* human rights obligations. Here, one could imagine that advocates could work with territorial-State courts and human rights bodies, strengthen their power to monitor and investigate abuses, and monitor closely the bilateral agreements and immunity clauses entered into by the territorial State with foreign States and their troops.

Of course, the reality is that the legal systems in many countries in the midst of or recovering from armed conflict are not well equipped to monitor and enforce human rights law. And for most Iraqis, the foreign military forces on their territory are not seen as accountable to Iraq, its government or its people. I am not suggesting that turning to Iraqi institutions to enforce and investigate human rights violations by those on its territory or within its jurisdiction would necessarily provide better results in the short term. It probably would not. Not only do Iraqi human rights organs and courts lack the capacity to adequately investigate alleged human rights violations by military forces or private military contractors, but they are faced with various immunity agreements, as well as the political impossibility of taking on a tremendous power imbalance. However, such efforts would allow the citizens and civilians in the State to understand what human rights law can actually promise them, and would provide a much more clear-eyed understanding of the current state of how human rights law applies in armed conflict.

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Rather than drawing our attention to impractical legal claims for extraterritorial application, or emphasizing legal formality with no real intention of altering the substantive rules affecting invading State behavior, such an approach would build on human rights obligations where they are strongest, and empower the affected State to enhance accountability and transparency in the long term. Even if efforts to investigate and hold accountable foreign States fail, such a process, and such a public debate within the country itself, would make real the true promise of what human rights law and human rights discourse can do in a situation of conflict. To the extent that the current insistence on extraterritoriality is a tactical attempt to take advantage of more sophisticated and better understood courts in Europe, the United States and Canada in order to litigate complex human rights issues, it denies those who hold the rights in question the power to truly take ownership of their claims.

Indeed, this approach might flip the current power dynamic of human rights advocacy, shifting the center of gravity of the debate and its language away from Western capitals and toward the States most impacted by armed conflict (such as Iraq, Afghanistan and Pakistan). We might imagine that local human rights organizations and advocates would take the lead on determining how to craft human rights strategies appropriate to armed conflict, building their capacity to work with both human rights and IHL, and working with domestic lawyers and laws to enhance enforcement. This approach would also have the payoff of building up these domestic institutions for the long term: as parallel application of human rights and IHL would always be in the background, domestic human rights and legal mechanisms would increase their capacity to deal not only with foreign militaries, but also with the violations committed by internal armed groups operating within the State.

Move from Law to Policy, Emphasizing Pragmatism over Formal Legal Rules

In this final path, human rights advocates and scholars would need to get their hands dirty in actual military policymaking and planning. Rather than insisting on formal normative consensus, or repeatedly citing unclear and relatively impractical legal definitions of "effective control," "cause and effect" and other grounds for human rights jurisdiction, those following this approach would make a definitive turn away from law and toward policy.

Leaving behind the normative certainty of convergence and the trump card of rights talk, advocates and scholars might instead seek to formulate human rights in the language of military policy and planning. We increasingly see that the military references much of its behavior on policy grounds. Thus, detainee treatment going above the standards of IHL (such as providing advocates for detainees going before

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boards, or providing compensation for civilian victims of attacks) is often explained not on the basis of IHL (where States would normally deny that they have such obligations) or formal human rights obligation, but rather as a matter of policy (a policy that may well be presented as influenced by a number of factors including human rights, counterterrorism and nation building).

It may well be that human rights talk and rights culture have, to varying degrees based on the country in question and its domestic rhetoric around rights and international law, been absorbed into military and State thinking on strategic and policy decisions on the ground. Indeed, one could likely trace the human rights origins of key provisions in individual coalition member's detention policies in Iraq and Afghanistan, or in important paragraphs of their bilateral security arrangements with those nations. Human rights actors and scholars can and should be proud of such impact on strategy and policymaking, and that the absorption of human rights norms into bilateral agreements,[96] detention policies, rules of engagement, counterinsurgency doctrine[97] and even individual orders in the field may well result in improved conditions and treatment of civilians and prisoners inspired by the content of human rights instruments.

But we should not forget that there is a difference between decision making and conduct on the basis of policy, and obligations to act as a matter of law. At the margins, and in areas where interpretations of law are wildly divergent, formalism may still matter. To the extent that concerns about the specifics of applying convergence, or "operationalizing" its norms, are dismissed by States with claims that human rights law is already applied as a matter of policy, or that it is already part and parcel of any on-the-ground decision-making environment, it is worth pointing out that when a detainee brings a claim for remedy on the basis of international human rights law, or when a humanitarian organization is attempting to understand its roles and responsibilities on the ground, actual legal obligations will determine outcomes.

However, this approach could be the most impactful of all in terms of real change to State and military behavior, and tangible increases in protection, treatment and respect for basic rights. While it involves considerable sacrifices in terms of the types of argumentation available to human rights advocates, and while it moves away from the current focus on litigation, this approach would facilitate more fluid negotiations with the military planners and decisionmakers on the ground and at the capital level, leaving law and obligations out of the room and focusing on the practical ways in which States can improve their outcomes by incorporating human rights principles into the day-to-day operations of soldiers. I imagine that one reason this approach would be unattractive to many human rights advocates is that it would involve, first, promoting human rights in a context

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that might involve justifying these principles on the basis of counterterrorism, counterinsurgency, increased cooperation of the population with the military, increased acquiescence of the population to the policy desires of foreign States, etc. Second, such an approach would necessarily mean getting involved with the ugly realities of military decision making, accepting that not all legal rights–holders will be granted protections in the same way, and that military security will likely always trump policy-based rights and protections. Finally, contrary to much of human rights advocacy that relies on soliciting public support and eliciting public outrage, this approach would likely need to be confidential, involving little engagement with the public and focusing on identifying compelling and practical tools that will convince States that it is in their interests to embrace aspects of human rights into their military policies, rules of engagement and orders.

That said, this approach may facilitate a discussion and practical engagement with human rights in armed conflict that moves out of academic scholarship and discussions at conferences over *lex specialis*, and shifts to the real choices human rights advocates expect military leaders and soldiers to make on the ground. Rather than engaging in an adversarial conversation mediated by courts or human rights bodies, this approach would ask that human rights advocates envision rights through the prism of armed conflict, and from the perspective of the military. This raises a number of serious concerns about the extent to which this would still be human rights advocacy as we know it, but it may also pave the way for actual and significant changes in on-the-ground decisions, and in the ability of individuals caught in armed conflict to lead more dignified lives.

Notes

1. I will use IHL and LOAC (law of armed conflict) interchangeably throughout, while acknowledging and appreciating Yoram Dinstein's call to refer to this body of law as LOAC exclusively. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT 13–14 (2004).

2. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 243–44 (2000). Meron's article was part of the first wave of work on this issue, and did not call for the full implementation of human rights in international armed conflict as it is sometimes imagined today.

3. I will be using the terms "convergence," "parallel application" and "co-application" interchangeably to refer to the concept that international human rights law and international humanitarian law are applicable simultaneously during armed conflict, and that States are obligated to comply with obligations under both bodies of law (including obligations to report to relevant legal bodies, cooperate with organizations, etc.), and that to some extent, individual soldiers can potentially be liable for violations of either or both bodies of law for their conduct during hostilities outside of the territorial State. While it could be argued that "convergence" and "parallel application" represent different methods of co-applicability, with the former indicating a sudden

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moment when both bodies of law come together and create a single legal framework blending provisions from both regimes, and the latter representing dual and *distinct* legal frameworks that apply independently of one another until and unless they come into direct contact, the literature seems to treat the two terms as having the same meaning and resulting in similar implications in terms of legal framework.

4. Any argument that attempts to take on a topic on which there has been so much scholarship runs the risk of becoming mired in a literature review or a rehashing of existing material. There is a tremendous amount of writing on both the general topic of overlap between IHRL and IHL, and the various subtopics within the broad issue of convergence. Indeed, two recent full volumes of law journals were dedicated exactly to this issue. *See* 40 ISRAEL LAW REVIEW (2007); 90 INTERNATIONAL REVIEW OF THE RED CROSS (2008). For an understanding of the broad issues related to overlap and convergence, see, e.g., Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL LAW REVIEW 648 (2007); for a focus on human rights law in occupation, see Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 8 (2007); Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 653 (2008); for a clear articulation of the contra-convergence position, see Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISRAEL LAW REVIEW 453 (2007); for a very useful and comprehensive review of the relevant international jurisprudence on the debate, see John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1447 (2006); for the leading analysis of how human rights norms might impact right to life and use of force issues, see Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 9 (2004).

5. International Covenant on Economic, Social and Cultural Rights art. 13, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 [hereinafter ICESCR].

6. *Id.,* art. 12.

7. *Id.,* art. 11.

8. *Id.,* art. 10(1).

9. International Covenant on Civil and Political Rights art. 18, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

10. *Id.,* arts. 9, 14.

11. ICESCR, *supra* note 5, art. 8.

12. ICCPR, *supra* note 9, art. 25.

13. *Id.,* art. 18.

14. Because of the sheer volume of writing on this issue in recent years, my goal here is not to do justice to the many contributions on the question of convergence, nor to focus on the nuance within each sub-issue of the debate. Rather, I want to try to give a rough map of the key issues in the debate, before moving into the critique. For a more detailed review of the current debate, see Lubell, *supra* note 4.

15. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter Wall Advisory Opinion]; Issa and Others v. Turkey, App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567 (2004) [hereinafter Issa]; U.N. Human Rights Committee, *General Comment No. 31: The Nature of the*

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General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31]; Françoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 549 (2008).

16. *See generally* Dieter Fleck, *Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, *in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES (SYMPOSIUM IN HONOUR OF KNUT IPSEN) 171 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007). Fleck notes,

> It is not only the *lex specialis* character of international humanitarian law, but even more so the particular deficiencies of law application in international armed conflicts, non-international armed conflicts and internal disturbances which makes the exercise of individual and international responsibility a complex, difficult and often hopeless task. Lawyers, tasked to find appropriate remedies for violations of international humanitarian law, are navigating in foggy areas in which relevant provisions are not too systematic and more than often competing interests obscure what should be achieved for restoring peace and justice.

Id. at 173.

17. *E.g.*, Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Order, ¶¶ 706, 719 (Dec. 5, 2003).

18. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 950, ¶ 3346 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), which notes,

> Thus historically, the law of armed conflict was created largely in the heat of battle, and the weight and obligation of its implementation and development rests primarily on the shoulders of those who exercise military command in the field. To withdraw this fundamental responsibility—which has always been that of military commanders—from them, would undoubtedly have constituted a serious error, and the Protocol was careful to avoid this.

19. *E.g.*, ICCPR, *supra* note 9, arts. 18, 19; ICESCR, *supra* note 5, arts. 9, 11; Convention on the Elimination of All Forms of Discrimination against Women arts. 13, 14, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination arts. 2, 5, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

20. Lubell, *supra* note 4, at 650.

21. Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 501, 548 (2008). See also Lubell, *supra* note 4, at 660, which concludes, using the analogy of a difficult but worthwhile romantic relationship that seems common in this genre of scholarship:

> It is clear that while International Humanitarian Law and International Human Rights Law have been engaged in a relationship for many years, there are still some rocky patches that need to be navigated before we can be assured that the two branches of law can live together happily ever after.

22. *See, e.g.*, Dennis, *supra* note 4, at 453–502. Mr. Dennis is a long-standing attorney in the Office of the Legal Adviser, US Department of State.

23. One author notes, "Few states have contested, vis-à-vis the human rights bodies, the application of the human rights treaties abroad. Apart from Israel, it is doubtful whether any state

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has consistently objected to the extraterritorial application of human rights instruments." Droege, *supra* note 21, at 519.

24. *See*, *e.g.*, Watkin, *supra* note 4, at 9 (noting that "[t]he normative framework of international humanitarian law differs in many respects from that of international human rights law"). The relative or married couple metaphor is seen often in writing on this topic. *See*, *e.g.*, Robert Kolb, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 80 INTERNATIONAL REVIEW OF THE RED CROSS, 409 (1998) (noting, "Today there can no longer be any doubt: international humanitarian law and international human rights law are near relations"). *See also* Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS (1993) 94–119, at 94 (stating that "as human rights law and humanitarian law have totally different historical origins, the codification of these laws has until very recently followed entirely different lines").

25. Dennis, *supra* note 4, at 453.

26. *See, e.g.,* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Dec. 10, 1998) (noting that "[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raision d'etre* of international humanitarian law and human rights law").

27. Meron, *supra* note 2, at 239.

28. Hampson, *supra* note 15, at 561. *See also* Nancie Prud'homme, Lex Specialis: *Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 356 (2007).

29. Dennis, *supra* note 4, at 453.

30. G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflict*, 1 ISRAEL YEARBOOK OF HUMAN RIGHTS 191 (1971).

31. *See* Dan E. Stigall, Christopher L. Blakesley & Chris Jenks, *Human Rights and Military Decisions: Counterinsurgency and Trends in the International Law of Armed Conflict,* 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 1367, 1370 (2009) [hereinafter Stigall et al.].

32. *See*, *e.g.*, Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 ISRAEL LAW REVIEW 503, 516 (2007).

33. Human rights are not based on the status of citizenship in any formal sense; I use the term here to denote the concept of a member of a community, a person in a society that relates to a government, a member of a civil polity. While, of course, human rights protections extend to individuals who find themselves on the territory of an obliged State even for a short period of time, the bulk of human rights law, jurisprudence and scholarship focuses on the relationship between the governed and the governors, those who are part of a society for the long term and those who are in power in that society.

34. Al-Skeini v. Secretary of State for Defence [2007] UKHL 26 [hereinafter Al-Skeini (HL)].

35. See, e.g., Wilde, *supra* note 32, and Hampson, *supra* note 15, for critiques of the Al-Skeini (HL) decision.

36. Al-Skeini (HL), *supra* note 34, ¶ 109.

37. *Id.*, ¶¶ 127, 129.

38. *See* DINSTEIN, *supra* note 1, at 21–22.

39. One of the rare articles to take a critical view of convergence theories from the perspective of concern for civilians (as opposed to from a military or State entitlement perspective) is an important piece by Tel Aviv University Professor Aeyal Gross, questioning the application of human rights law in the most long-standing military occupation in contemporary history, that of Israel in the Occupied Palestinian Territory. Gross argues that

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> [rights] analysis is usually best at identifying and treating individual localized violations, which are deemed the exception in a regime where democracy and human rights are the norm. In the context of occupation, where the norm is the denial of rights and the lack of democracy, rights analysis may distort the picture by pointing to rights denial as the exception rather than the norm. Rights analysis is weak at creating structural changes. The result, even if the rights of the people living under occupation prevail in specific cases, may often be the legitimation of rights' denial rather than the opposite: cases where individuals win rights' victories may create the myth of a "benign occupation" that protects human rights even though they are mostly denied.

Gross, *supra* note 4, at 8. Gross's significant article seems to have gained little notice in the literature on convergence, and I hope to argue here that his analysis can and should be expanded to include situations beyond the Israeli/Palestinian conflict, and the specifics of long-term occupation.

40. Wilde, *supra* note 32, at 518–19.

41. *Id.* at 519.

42. Al-Skeini v. Sec. of State for Defence [2005] EWCA 1609 (Civ.), ¶¶ 196–97, *quoted in* Wilde, *supra* note 32, at 519 [hereinafter Al-Skeini (Civ.)].

43. Wall Advisory Opinion, *supra* note 15, ¶ 106.

44. Prud'homme, *supra* note 28.

45. The *Al-Skeini* decision recognizes the problem in reviewing existing ECtHR decisions, noting,

> The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.

Al-Skeini (HL), *supra* note 34, ¶ 67.

In its leading case on this issue, the Canada Federal Court of Appeal also recognizes the challenge posed to national courts attempting to understand the current interpretation of the law on this issue, noting that "the current state of international jurisprudence in this area is somewhat uncertain." Amnesty International Canada v. Canada (Chief of the Defence Staff), [2008] 4 F.C. 546, ¶ 214 [hereinafter Amnesty v. Canada]. A range of scholars across the spectrum of the debate has also recognized the lack of clarity on this issue. *See, e.g.,* Dennis, *supra* note 4, at 482 (noting that "there is no clear understanding concerning the precise manner in which the obligations assumed by states under international human rights treaties interact with the *lex specialis* of international humanitarian law, if it is assumed the former apply extraterritorially during periods of armed conflict and military occupation"); Françoise Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, *in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 485, 510 (Michael N. Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies) (noting that "[h]uman rights bodies and the ICJ are of the view that [human rights law] also applies to cases of military occupation but it is not clear how human rights bodies understand the concept of occupation, and the application of human rights law is not free of theoretical and practical difficulties. What is wholly unclear is the extent to which and the manner in which it applies in other extraterritorial circumstances, particularly to the conduct of military operations"); Stigall et al., *supra* note 31, at 1372 (stating that "various countries, regional organizations and international organizations differ in their position on the proper extraterritorial application or jurisdictional scope of their own and

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international human rights norms"); Droege, *supra* note 21, at 502 (reiterating the current confusion over how the two bodies of law can apply coherently, and stating that "[j]urisprudence on concrete cases will, hopefully, provide more clarity over time. . . . [S]ome areas are becoming clearer and in other areas patterns are emerging but are not consolidated").

46. This is not a new observation, and is certainly not a critique that applies equally across the board. Several scholars, particularly in the newest iterations of the debate, do seek to propose improved theoretical models for applying *lex specialis*, for harmonizing IHRL and IHL. In addition, some recognize the current paucity of thinking within pro-convergence scholarship on application. Citing another notoriously vague phrase in the (quasi-)jurisprudence on the issue, the UN Human Rights Committee's language in General Comment 31 noting that "[w]hile in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive," the author notes,

> Such generalizations are unlikely to offer solace to those tasked with the responsibility for implementation of the complementarity principle in the field. Thus, given the adoption of this doctrine, there would appear to be merit in exploring the capacity for a joint general comment between the Committee bodies, which could offer guidance on how to address the challenges and obstacles associated with the application of human rights norms during armed conflict and their relationship with international humanitarian law. In the absence of such direction, the clarity and precision necessary to implement complementarity will remain missing.

John Tobin, *Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies*, 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW 356, 366 (2007).

47. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MILITARY LAW REVIEW 1, 51 (2007).

48. In a striking example, one scholar states, "This article holds that, undoubtedly, human rights law speaks about and to armed conflict," and then appends the following footnote to the sentence: "Admittedly such an application does raise some difficulties." Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 171, 196 n.125 (2004).

49. I am not suggesting that human rights law is necessarily more difficult to translate into military application or that it would be impossible to craft tactical battle rules based on human rights law—rather that this work seems not to have been done by many promoting extraterritorial applicability. Dale Stephens addresses this issue elegantly in his analysis of the debate over the relationship between the two bodies of law. Dale Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 1 (2001).

50. It is telling that the two leading articles providing such a clear-eyed and practical-minded overview of how LOAC practice and theory would be impacted by co-application are written by senior military law scholars. Watkin, *supra* note 4, at 9; and Stephens, *supra* note 49.

51. Wall Advisory Opinion, *supra* note 15, ¶ 111; General Comment No. 31, *supra* note 15, ¶ 10; Bankovic v. Belgium et al., App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333; Issa *supra* note 15; Coard et al. v. the United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, Sept. 29, 1999.

52. Françoise Hampson's assessment is incredibly useful to keep in mind here. She notes, "Human rights more generally refers to values and precepts that may (or should) be the basis of

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policy decisions, such as the rule of law, democracy, participation, transparency and accountability. Human rights in this sense is part of the 'good governance' agenda." Hampson, *supra* note 45, at 486.

53. One scholar, after providing an exhaustive review of the relevant case law, concludes,

> It thus appears that states remain bound by human rights law even when engaged in hostilities far from their home territories. Even during the invasion phase of an armed conflict, it would seem that a state would exercise sufficient control over any individuals with whom its forces come in contact for those individuals to fall within the scope of beneficiaries of that state's human rights obligations. This, however, does not mean that the content of those obligations would be the same as if the individuals in question were within the home territory of that state. The scope of the obligation, at least in terms of the level of obligation as explained above, will vary with the degree of control exercised in the circumstances. Once an individual is taken into detention by the state, the degree of control over the individual will clearly have increased.

Cerone, *supra* note 4, at 1507.

54. Haider Ala Hamoudi, *Reconsidering the 'Rule of Law' in Iraq*, JURIST, Sept. 8, 2009, http://jurist.law.pitt.edu/forumy/2009/09/reconsidering-rule-of-law-in-iraq.php.

55. *See*, *e.g.*, Brief for Interights et al. as Amici Curiae Supporting Appellants and Respondents, Al-Skeini (HL), *available at* http://www.interights.org/view-document/index.htm?id=245; *see generally* Rachel Brett, *Non-governmental Human Rights Organizations and International Humanitarian Law*, 80 INTERNATIONAL REVIEW OF THE RED CROSS 531–36 (1998).

56. S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009) (noting "that the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security . . ."); GERARD MCHUGH, STRENGTHENING PROTECTION OF CHILDREN THROUGH ACCOUNTABILITY: THE ROLE OF THE UN SECURITY COUNCIL IN HOLDING TO ACCOUNT PERSISTENT VIOLATORS OF CHILDREN'S RIGHTS AND PROTECTIONS IN SITUATIONS OF ARMED CONFLICT (2009) (in a report discussing the role of the UN Security Council in holding violators of children's rights and protections in armed conflict accountable, noting that "[t]he term '*children's rights and protections*' is used throughout this report to include the human rights of children as specified in the Convention on the Rights of the Child and other international human rights Covenants and treaties, as well as the protections afforded to children (by virtue of the obligations to parties to armed conflict) in situations of armed conflict under applicable treaty-based and customary international humanitarian law").

57. Program on Humanitarian Policy and Conflict Research at Harvard University, Live Seminar: Human Rights in the Battlefield: Litigating Violations in Iraq (Sept. 22, 2009), http://ihlforum.ning.com/events/human-rights-in-the (password required).

58. *See*, *e.g.*, Office of the United Nations High Commissioner for Human Rights, *Summary of National Initiatives Undertaken within the World Programme for Human Rights Education (2005–Ongoing)*, http://www2.ohchr.org/english/issues/education/training/Summary-national-initiatives2005-2009.htm (last visited Nov. 16, 2009); Alfred M. Boll, *The Asian Values Debate and Its Relevance to International Humanitarian Law*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2001).

59. *See, e.g.*, René Provost, *International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law*, 40 ISRAEL LAW REVIEW 614 (2007); Ramesh Thakur, *Global Norms and International Humanitarian Law: An Asian Perspective*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 19 (2001).

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60. Al-Skeini v. Secretary of State for Defence [2004] EWHC 2911 ¶ 103 (Admin.).

61. A slightly different way of thinking about this is presented in the excellent and thought-provoking piece by Aeyal Gross, who notes,

> [G]overnment-governed relationships exist during occupation as well, although they assume a different nature because the ruled have not given their consent and the ruler is not accountable. Transplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights-denying nature, and confer upon it the perceived legitimacy of an accountable regime.

Gross, *supra* note 4, at 33.

62. *See, e.g.*, Bennoune, *supra* note 48, at 205 (noting specific rights that would apply in the Iraq war); Cerone, *supra* note 4, at 1498–1507 (arguing that the level of obligation of States acting abroad varies in current legal interpretation, and that there is likely a "variable scope of obligation," where so-called negative rights would apply frequently extraterritorially, and so-called positive rights might apply according to a reasonableness test where "the adoption of affirmative measures is only required when and to the extent that the relevant party de jure or de facto enjoys a position of control that would make the adoption of such measures reasonable." *Id.* at 1505); Stigall et al., *supra* note 31, at 1375 (arguing that "[t]he proper rule in situations of military occupation or control is to apply basic human rights norms extraterritorially . . .").

63. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action* art. 5, U.N. Doc. A/CONF.157/24 pt. 1 (July 12, 1993) (declaring that "[a]ll human rights are universal, indivisible and interdependent and interrelated"); International Conference on Human Rights, April 22–May 13, 1968, *Proclamation of Teheran* art. 3, U.N. Doc. A/CONF. 32/41 (May 13, 1968) ("Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible").

64. Bankovic, *supra* note 51, ¶ 75.

65. Al-Skeini (HL), *supra* note 34, ¶ 79.

66. Amnesty v. Canada, *supra* note 45, ¶¶ 310, 311.

67. Al-Skeini (Civ.), *supra* note 42, ¶ 196.

68. I am not addressing here the question of an occupying power's (in the IHL sense) obligation to apply the laws in force in the occupied territory. In reality, of course, most of the "core" rights that are regularly referenced as applying extraterritorially would indeed apply through this mechanism. But the convergence argument seems to want to avoid limiting the extraterritorial applicability of IHRL to situations of military occupation, and indeed its insistence on the additional application of IHRL would suggest that its proponents believe that *some* obligations would be added on top of the already existing obligations under IHL.

69. Many authors refer to the principle as one tool for resolving the problems that arise from parallel application. For a comprehensive treatment of the history of this principle in addressing convergence, *see* Prud'homme, *supra* note 28, at 355–78.

70. *Id.* at 383.

71. There remains, of course, the major issue of accountability and enforcement mechanisms (human rights principles that would not be negated by even the most muscular use of *lex specialis*), which I will address in below sections.

72. *See* Hampson, *supra* note 15, at 560.

73. For a useful attempt at clarifying the various ways in which the rules would interact, and how *lex specialis* might operate in context, see Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Co-application of Humanitarian Law and Human Rights Law to the Occupied Territories*, 37 ISRAEL LAW REVIEW 17 (2004).

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74. Hampson notes,

> The solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions. It cannot be determined after the event, even if that is when it is enforced. . . . Some way needs to be found to develop a coherent approach to the problem.

Hampson, *supra* note 15, at 562.

75. One scholar notes,

> A further explanation for the increased interest in IHL among human rights groups has been the increasingly technocratic and professional nature of some international human rights work. Becoming versed in the intricacies of IHL has allowed human rights advocates to talk like experts and to find a place at the table with military officials and government representatives, debating the choice of targets. This was a pragmatic endeavor which in many ways made sense. Still, too many important concessions can be made for a place at the table when the terms of the discussion held there have already been set.

Bennoune, *supra* note 48, at 222.

76. *See id.* at 214 (noting that "when a war is patently illegal, . . . if the only mode of analyzing the conflict is humanitarian law, then the central illegality, which is the wellspring of all other violations, will be overlooked"). An interesting argument is made by William A. Schabas, in one of the very few analyses critiquing the impact that convergence might have on human rights law and practice, who notes, in illustrating how IHL does not consider the "legitimate aim" (in a human rights law sense) of a State in assessing the legality of a military attack,

> This is where the attempts to marry international human rights law and international humanitarian law break down. International human rights law is not indifferent and does not look favorably upon unjust war. Indeed, it might be said that there is an anti-war or pacifist dimension to international human rights law that is largely absent—for understandable and logical reasons—from international humanitarian law.

William A. Schabas, Lex Specialis? *Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of* Jus Ad Bellum, 40 ISRAEL LAW REVIEW 592, 607 (2007).

77. By way of example, one former Pentagon targeting specialist who went on to become a military analyst at Human Rights Watch has noted that "[t]he administration of President George W. Bush sanctioned up to 30 civilian deaths for each attack on a high-value target in the Iraq war." Suzanne Koelbl, *The Pentagon Official Who Came in from the Cold*, SPIEGEL ONLINE INTERNATIONAL, Apr. 3, 2009, http://www.spiegel.de/international/world/0,1518,617279,00.html (last visited Nov. 11, 2009). Whether or not this is an accurate number, the point is that IHL forces us to speak in such terms, and its language is often focused on precisely such an impossible calculus. Many human rights lawyers and advocates find this very concept repugnant; indeed, they find such an approach anathema to the notion of human rights. Human rights lawyers' arguments and claims, *outside of IHL*, may be critical to ultimately changing the way States understand armed conflict, or the degree of support that home-State populations are willing to grant for political decisions taken to go to war or behavior in war. The more they are brought into the language and discourse of IHL, the more they are complicit in the balancing of military necessity and humanity, the less they are able to fulfill this vital function. *See* Sharon Otterman, The Calculus of Civilian Casualties, NEW YORK TIMES NEWS BLOG, http://thelede.blogs.nytimes.com/2009/01/06/the-calculus-of-civilian-casualties/ (Jan. 6, 2009) (noting that

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the acceptance of thirty civilian deaths per high-value target was also reiterated by General T. Michael Moseley).

78. In her subtle and pragmatic analysis of the issues facing human rights bodies that take on issues of international humanitarian law, Françoise Hampson sets out the dilemmas the current array of legal options presents to human rights bodies seeking to utilize *lex specialis*, engaging in classification and determining in what instances human rights law would demand a higher level of protection than international humanitarian law. She is ultimately critical of the current approach of human rights courts to the issue of extraterritorial application (to the extent that the interpretation is limited to situations of occupation, however defined, and situations of detention) for ignoring the ICJ decision that human rights law continues to apply in armed conflict and because it would allow States a much broader leeway than they would receive from the same human rights courts in situations of non-international armed conflict. Ultimately, despite the significant challenges she illuminates, Hampson is optimistic (I would argue overly so), noting that "[t]he test for any solution is that it must be both coherent and practical and should seek to avoid diminishing existing protection. It ought to be possible to achieve consensus on the implications in practice on the simultaneous applicability of IHL and human rights law." Hampson, *supra* note 15, at 572.

79. Al-Skeini (HL), *supra* note 34, ¶ 78.

80. *See*, *e.g.*, Stigall et al., *supra* note 31, at 1375 (stating that "[t]he suggestion that application of these norms extraterritorially is a form of cultural imperialism is preposterous").

81. Al-Skeini (HL), *supra* note 34, ¶ 129.

82. *Id.*, ¶ 141.

83. Wilde, *supra* note 32, at 522.

84. *Id*. at 521.

85. *Id*. at 522.

86. For an analysis of the relationship between Islamic law and international human rights law, see Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARVARD HUMAN RIGHTS JOURNAL 181 (2004).

87. Issa, *supra* note 15, ¶ 71 [emphasis added].

88. Stigall et al., *supra* note 31, at 1375.

89. Amnesty v. Canada, *supra* note 45, ¶ 152.

90. *Id.*, ¶ 172.

91. *See, e.g.,* Dennis, *supra* note 4, at 471–72.

92. Two scholars discussed above do make such a bold claim, and wisely bypass the well-trod convergence/extraterritoriality arguments in order to argue that human rights law actually demands that States avoid war. *See* Schabas, *supra* note 76; Bennoune, *supra* note 48.

93. There is some development in this direction in recent scholarship, providing an aggressive frontal challenge to IHL and its underpinnings from the perspective of human rights law and moral philosophy. *See* David S. Koller, *The Moral Imperative: Toward a Human Rights–Based Law of War*, 46 HARVARD INTERNATIONAL LAW JOURNAL 231 (2005) (stating that "the commonly shared understanding of the concept of human rights provides a solid basis for drafting replacements for the IHL principles of discrimination, and proportionality, resulting in a human rights–based law of war." *Id.* at 243–44). *See also* Bennoune, discussed *supra* note 48.

94. *See* Watkin, *supra* note 4, at 9 (noting that "[t]he approach to the control of force in armed conflict as the exclusive domain of international humanitarian law is facing an intensified effort to have it encompass human rights norms and their associated accountability structure").

95. One scholar considers such a possibility, but ultimately rejects it:

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> It might be tempting to propose a radical solution: the creation of a right of individual petition for violations of IHL which would be submitted to a new dispute settlement mechanism, and the exclusion of such cases from human rights bodies. This would only work if the ICJ accepted that a rigid distinction had been created between IHL and human rights law.

Hampson, *supra* note 15, at 572.

96. Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, Can.-Afg., May 3, 2007, *available at* http://www.afghanistan.gc.ca/canada-afghanistan/documents/arrangement_detainee.aspx?lang=eng.

97. *See* HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, THE US ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (University of Chicago Press 2007) (2006).

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