

## CHAPTER 3

### INTERNATIONAL HUMAN RIGHTS LAW

#### REFERENCES

1. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985).
2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
3. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195.
4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516.
5. Executive Order No. 13107, Implementation of Human Rights Treaties, 63 Fed. Reg. 68991 (10 December 1998).
6. Restatement (Third) of the Foreign Relations Law of the United States (1987).
7. Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).

#### I. INTRODUCTION

A. International human rights law (IHRL) focuses on the State's obligation to protect the "inherent dignity" and "inalienable rights" of individual human beings.<sup>1</sup> In contrast to most international law, IHRL recognizes rights based on an individual's personhood rather than on one's status as a citizen or subject of a State party to a treaty. International human rights law was designed to protect the individual from being abused by his or her own government, as opposed to a foreign government.

B. International human rights law exists primarily in two forms: treaty law and customary international law (CIL).<sup>2</sup> IHRL treaties vary in the scope of their application. Whether or not many key IHRL treaties govern signatory States both inside the States' territory as well as outside the States' territory is unsettled, internationally. Customary IHRL's scope of application depends on the type of customary IHRL at issue.<sup>3</sup>

#### II. HISTORY AND DEVELOPMENT OF HUMAN RIGHTS LAW

A. As a field of international law, IHRL did not form until the years following World War II. The systematic abuse and near-extirpation of entire populations by States during the first half of the 20<sup>th</sup> Century served to aid the acceptance of IHRL as a field of international law. Prior to modern IHRL, how States treated their own citizens inside their own borders was regarded largely as a purely domestic matter. International law regulated State conduct vis-à-vis other States and chiefly protected individuals as representatives of their parent States (e.g., diplomatic immunity). As sovereigns in the international system, States could expect other States not to interfere in their internal affairs. IHRL, however, 'pierced the veil' of sovereignty by seeking to directly regulate how States treated their own people within their own borders.<sup>4</sup>

1. The Nuremberg War Crimes Trials are an example of a human rights approach to protection. The trials in some cases held former government officials legally responsible for the treatment of individual citizens within the borders of their state. The trials did not rely on domestic law, but rather on novel charges like "crimes against humanity."

2. Human rights occupied a central place in the newly formed United Nations. The Charter of the United Nations contains several provisions dealing directly with human rights. One of the earliest General Assembly

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), pmb.

<sup>2</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987) [hereinafter Restatement].

<sup>3</sup> See *id.* at § 702.

<sup>4</sup> See LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, 13–16 (Henkin ed., 1981) ("International human rights law and institutions are designed to induce states to remedy the inadequacies of their national law and institutions so that human rights will be respected and vindicated.").

resolutions, the Universal Declaration of Human Rights (UDHR), became the foundational international human rights law instrument.

3. Following the adoption of the 1949 Geneva Conventions, law of armed conflict (LOAC) development began to slow. The so-called Geneva Tradition had introduced an approach to regulating armed conflict that focused on protecting and respecting individuals. By the mid-1950s, however, LOAC development stalled. The international community largely rejected the 1956 Draft Rules for Limitation of Dangers Incurred by Civilian Populations in Time of War as a fusion of the Geneva and Hague Traditions.<sup>5</sup> In fact, the LOAC would not see a significant development in humanitarian protections until the 1977 Additional Protocols.<sup>6</sup>

4. During the same time period, however, IHRL experienced significant growth. Two of the most significant international human rights treaties, the International Covenant on Civil and Political Rights<sup>7</sup> (ICCPR) and the International Covenant on Economic Social and Cultural Rights<sup>8</sup> were adopted and opened for signature in 1966, then came into force in 1976. Since the 1970s, news media, private activism, public diplomacy, and legal institutions increasingly monitor and report on human rights conditions worldwide. Human rights promotion remains a core part of both the U.S. National Security Strategy and U.S. public diplomacy.<sup>9</sup> Human rights is a growth area of the law.

A. **Major Human Rights Treaties.** Human rights treaties cover a wide range of subjects. The United States did not ratify any major international human rights treaties until 1988. Table 1 lists ten treaties that the United Nations considers core human rights treaties.<sup>10</sup> Each is administered by a separate treaty-monitoring international body.<sup>11</sup>

Table 1. Core United Nations Human Rights Treaties <sup>12</sup>				
TREATY	SUBJECT	OPEN	MONITOR	U.S. STATUS <sup>13</sup>
CPPCG	Genocide	1948	Various	Ratified 1988
ICERD	Racial Discrimination	1965	CERD	Ratified 1994
ICCPR**	Civil & Political Rights	1966	UNHRC	Ratified 1992
ICESCR*	Economic, Social & Cultural Rights	1966	CECSR	Signed 1977

<sup>5</sup> Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, reproduced in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICT, 339 (2004).

<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

<sup>7</sup> Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>8</sup> Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>9</sup> See generally 22 U.S.C. § 2304(a)(1) (2006) (“The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.”); U.S. GOV'T, NATIONAL SECURITY STRATEGY (May 2010) (prominently embracing promotion of democracy and human rights as part of the U.S. national security strategy); U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Human Rights homepage, at <http://www.state.gov/j/drl/hr/> (discussing State Dep't initiatives to promote human rights)

<sup>10</sup> See also the UN online database of multi-lateral treaties deposited with the Secretary-General, chapter IV on Human Rights, available at <http://treaties.un.org/pages/ParticipationStatus.aspx> (last visited May 25, 2012).

<sup>11</sup> THOMAS BUERGENTHAL ET. AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 350 (2002).

<sup>12</sup> Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture, Inhuman or Degrading Treatment, or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers, and Members of Their Families (ICRMW); International Convention for the Protection of All People from Enforced Disappearance (CPED); Convention on the Rights of Persons with Disabilities (CPRD).

<sup>13</sup> Current as of May 4, 2014.

CEDAW*	Discrimination Against Women	1979	CEDAW	Signed 1980
CAT*	Torture, Inhumane Punishment	1984	CAT	Ratified 1994
CRC**	Rights of the Child	1989	CRC	Signed 1995‡
ICRMW	Migrant Worker & Family Rights	1990	CMW	No action
CPED	Enforced Disappearances	2006	CED	No action
CPRD*	Persons with Disabilities	2006	CPRD	Signed 2009

Table Notes: \* Treaty has one related Optional Protocol \*\* Treaty has two related Optional Protocols  
‡ In 2002, the United States ratified CRC Optional Protocols on Child Soldiers and Child Pornography, but not the CRC. The United States has not ratified any other Optional Protocols noted in Table 1.

B. When examining IHRL treaties, it is important to remember that the original focus of IHRL was protecting individuals from the harmful acts of their own governments.<sup>14</sup> This focus of IHRL was groundbreaking when it emerged after World War II. Previously, such protections have been viewed as a function of domestic law. International law regarding protection of individuals focused on fair treatment at the hands of foreign nations, not an individual’s own government.<sup>15</sup> The remainder of this section briefly describes several of the treaties in Table 1 and the body that administers each one.<sup>16</sup>

1. **International Covenant on Civil and Political Rights (ICCPR)** (U.S. ratification in 1992).

a. Administered by the UN Human Rights Committee (UNHRC). Parties must submit reports in accordance with Committee guidelines for review by UNHRC. The UNHRC may question state representatives on the substance of their reports, issue general comments, and report to the UN Secretary General. As the treaty limits the UNHRC’s role primarily to commentary, the UNHRC has limited ability to enforce the provisions of the ICCPR.

b. The ICCPR addresses so-called “first generation rights.” These include the most fundamental and basic rights and freedoms. Part III of the Covenant lists substantive rights.

c. The ICCPR is expressly non-extraterritorial. Article 2, clause 1 limits a Party’s obligations under the Covenant to “all individuals within its territory and subject to its jurisdiction . . .” Although some commentators and human rights bodies have argued for a disjunctive reading of “and,” such that the ICCPR would cover any person under the control of a Party,<sup>17</sup> the United States interprets the extraterritoriality provision narrowly.<sup>18</sup>

d. The First Optional Protocol empowers private parties to file “communications” with the UNHRC. Communications have evolved to operate as a basis for individual causes of action under the ICCPR where domestic remedies have been exhausted. The United States is not a party to the First Optional Protocol.

e. The Second Optional Protocol seeks to abolish the death penalty. The United States is not a party.

2. **International Covenant on Economic, Social, and Cultural Rights (ICESCR)** (U.S. signature in 1977, no ratification).

a. The ICESCR does not establish a standing committee; reports go to the Committee on Economic, Social, and Cultural Rights, which is composed of eighteen elected members. There is no procedure for individual complaint. The Committee may make general comments to States Party to highlight and encourage compliance.

<sup>14</sup> See RESTATEMENT, *supra* note 2.

<sup>15</sup> See *id.* at Part VII, Introductory Note.

<sup>16</sup> According to the Restatement, as of 1987, eighteen treaties fell under the category of “Protection of Persons” as human rights treaties. This list did not include the Universal Declaration of Human Rights, or those provisions of the United Nations Charter that relate to human rights, which are considered expressions of principles, and not obligatory. Several treaties and optional protocols, for example on rights of children, migrant workers, and persons with disabilities, came into being after 1987.

<sup>17</sup> Human Rights Committee, General Comment No. 31, U.N. Doc. HRI/GEN/1/Rev.6 (2004).

<sup>18</sup> Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep’t of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), <http://www.state.gov/g/drl/rls/70392.htm>, (“[I]t is the longstanding view of the United States that the Covenant by its very terms does not apply outside the territory of a State Party. . . . This has been the U.S. position for more than 55 years.”).

b. The ICESCR addresses so-called “second generation human rights.”<sup>19</sup> These include the right to self-determination (art. 1), right to work (art. 6), right to adequate standard of living (art. 11), and right to education (art. 13). States that are party to this treaty undertake “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant.” (art. 2).

3. **Convention on the Prevention and Punishment of the Crime of Genocide**<sup>20</sup> (1948). The United States signed in 1948, transmitted to Senate in 1949, and ratified in 1988.

4. **Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment** (1984) (CAT). The United States ratified in 1994. The Torture Victim Protection Act of 1991 implements it.<sup>21</sup>

a. The CAT is administered by the UN Committee on Torture, composed of ten elected experts. The committee is informed by a periodic reporting system and inter-state and individual complaint procedures.

b. Unlike the ICCPR, the CAT applies to U.S. activities worldwide, including military operations. Article 2(1) requires each state party “to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 2(2) expressly applies the CAT to situations of armed conflict, and requires that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

c. For detainee transfers, Article 3(1) forbids states party from expelling, returning (French: “refouler”) or extraditing a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This provision is often called the “non-refoulement” rule. In January 2013, the United States stopped detainee transfers to thirty-four Afghan units and Afghan facilities following reports from the United Nations Assistance Mission in Afghanistan (UNAMA) of detainee abuse.

d. Article 3(2) states, “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

e. Article 20 empowers the Committee to conduct independent investigations but it must have cooperation of the State Party that is the subject of the investigation.

5. **Convention on the Elimination of All Forms of Racial Discrimination**<sup>22</sup> (1965) (CERD). The United States signed in 1966, transmitted to the Senate in 1978, and ratified in 1994.

a. The southern congressional delegation’s concern over the international community’s view of Jim Crow laws in the South delayed U.S. ratification of this treaty, which was implemented by the Genocide Convention Implementation Act of 1987.<sup>23</sup>

b. The CERD is administered by United Nations Committee on the Elimination of Racial Discrimination, composed of eighteen members elected by parties to the Convention. The committee reviews reports and may hear inter-state or individual complaints. Unlike the ICCPR, the interstate complaint system is not optional like that of the ICCPR. The system, however, has never been used in its interstate form.

c. The CERD prohibits and defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” to “nullify[] or impair[] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>24</sup> Parties agree to eliminate racial discrimination and apply rights set out in the Universal Declaration of Human Rights and the two Covenants.

### C. The United States Treaty Process

<sup>19</sup> MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 2 (2003) [hereinafter Nowak] at 80.

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>21</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (2000).

<sup>22</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).

<sup>23</sup> Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93 (2000).

<sup>24</sup> Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

1. Article VI of the United States Constitution establishes ratified treaties as “the supreme Law of the Land.” Consequently, these treaties enjoy the same force as statutes.

2. Article II, Section 2, clause 2 of the United States Constitution enumerates that the President has the power to make treaties. After receiving the advice and consent of two-thirds of the Senate, the President may ratify a treaty. In practice, this means some treaties may take years to be fully debated and voted upon.<sup>25</sup>

3. Reservations, Understandings and Declarations (RUDs). The United States policy regarding international human rights treaties relies heavily on RUDs to specifically delineate U.S. concerns, interpretations, and policies at the time of treaty ratification. RUDs have been essential to mustering political support for ratification of human rights treaties in the U.S. Senate. When conducting treaty research, judge advocates should always check whether RUDs accompany a particular treaty.

a. **Reservations** modify treaty obligations with respect to relevant provisions between parties that accept the reservation; reservations do not modify provisions for other parties; if a State refuses a reservation but does not oppose entry into force between the reserving State and itself, the provision proposed for reservation does not operate between the two States.<sup>26</sup> An example of a reservation would be the United States’ reservation to the ICCPR whereby it “reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”<sup>27</sup>

b. **Understandings** are statements intended to clarify or explain matters incidental to the operation of the treaty. For instance, a State might elaborate on or define a term applicable to the treaty. Understandings frequently clarify the scope of application. An example of an understanding would be the United States’ understanding to the ICCPR whereby it stated “[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments.”<sup>28</sup>

c. **Declarations** give notice of certain matters of policy or principle. For instance, a State might declare that it regards a treaty to be non-self-executing under its domestic law.<sup>29</sup>

d. **United States practice:** When the Senate includes a reservation or understanding in its advice and consent, the President may only ratify the treaty to the extent of the ratification or understanding.

D. **Application of Human Rights Treaties.** Understanding how the United States applies human rights treaties requires an appreciation of two concepts: non-extraterritoriality and non-self execution.

1. **Non-extraterritoriality:** The United States interprets the scope of application of its IHRL treaty obligations based on the language in the various treaties. Perhaps most significantly, the United States interprets its obligations under the preeminent human rights treaty, the ICCPR, as applying to persons who are both within the territory of the United States and within its jurisdiction, consistent with the treaty’s language.<sup>30</sup> The United States reaffirmed its position regarding the non-extraterritorial nature of the ICCPR in March 2014.<sup>31</sup> This theory of treaty

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<sup>25</sup> For a list of treaties pending advice and consent of the U.S. Senate, see the U.S. State Dep’t Treaty Affairs website at <http://www.state.gov/s/l/treaty/pending/> (regularly updated).

<sup>26</sup> Vienna Convention on the Law of Treaties, .N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT’L L. 875 (1969), *and in* 8 I.L.M. 679 (1969).

<sup>27</sup> S. EXEC. REP. NO. 102–23, at 11–12 (1992).

<sup>28</sup> *Id.*

<sup>29</sup> *See e.g., id.* (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

<sup>30</sup> While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to “all individuals subject to [a state’s] jurisdiction” the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States. *See* RESTATEMENT, *supra* note 2, at § 322(2) and Reporters’ Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

<sup>31</sup> *See* Statement of Mary McLeod, Acting Legal Advisor, United States Department of State, to the U.N. Human Rights Committee, March 13, 2014, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E>.

interpretation is referred to as “non-extraterritoriality.”<sup>32</sup> Not all human rights treaties contain non-extraterritorial scope language. For example, the Convention Against Torture (CAT) expressly contains no geographic limitation on its application. Other treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) do not squarely address territorial or jurisdictional limitations on the treaty’s application. Treaties interpreted as being non-extraterritorial do not create treaty-based obligations for U.S. forces operating outside U.S. territory. The UN Human Rights Committee does not share the U.S. non-extraterritoriality view with regard to the ICCPR. They interpret the IHRL obligations within the ICCPR as applying to state actions toward individuals over whom the State has jurisdiction, both within their territory and beyond their territories. Judge advocates working with other nations should recognize that an allied State’s interpretation of the application of IHRL treaties such as the ICCPR, may differ from the United States’ view, and can impact that nation’s military operations, which can in turn affect U.S. operations.<sup>33</sup>

2. **Non-self execution:** While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the United States, judge advocates should also be familiar with the concept of treaty execution. According to this treaty interpretation doctrine, although treaties entered into by the United States become part of the “supreme law of the land,”<sup>34</sup> some are not enforceable in U.S. courts absent subsequent legislation or executive order to “execute” the obligations created by such treaties.

a. This “self-execution” doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.<sup>35</sup> However, whether or not a treaty creates a binding obligation on U.S. forces can potentially affect an operational judge advocate’s work. There is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an obligation.<sup>36</sup> More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, which is given effect by U.S. courts and therefore defines the scope of U.S. obligations under our law.<sup>37</sup>

b. The U.S. position regarding the human rights treaties discussed above is that “the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation.”<sup>38</sup> The U.S. position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. Thus, if the U.S. adds such a declaration to a treaty, the declaration determines the interpretation the U.S. will apply when determining the nature of the obligation.<sup>39</sup>

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<sup>32</sup> See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int’l L. 78-82 (1995).

<sup>33</sup> For example, the European Court of Human Rights recently embraced an expansive reading of the European Convention on Human Rights, now binding on all members of the Council of Europe. See *United Kingdom v. al Skeini et. al.* (2011), *United Kingdom v. al Jeda* (2011).

<sup>34</sup> U.S. CONST. art VI. According to the Restatement, “international agreements are law of the United States and supreme over the law of the several states.” RESTATEMENT, *supra* note 2, at § 111. The Restatement Commentary states the point even more emphatically: “[T]reaties made under the authority of the United States, like the Constitution itself and the laws of the United States, are expressly declared to be ‘supreme Law of the Land’ by Article VI of the Constitution.” *Id.* at cmt. d.

<sup>35</sup> See RESTATEMENT, *supra* note 2, at cmt. h.

<sup>36</sup> There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing. Absent such a ruling, the non-self-executing conclusion is questionable: “[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.” RESTATEMENT, *supra* note 2, at § 111, Reporter’s Note 5. Second, it translates a doctrine of judicial enforcement into a mechanism whereby U.S. state actors conclude that a valid treaty should not be considered to impose international obligations upon those state actors, a transformation that seems to contradict the general view that failure to enact executing legislation when such legislation is needed constitutes a breach of the relevant treaty obligation. “[A] finding that a treaty is not self-executing (when a court determines there is not executing legislation) is a finding that the United States has been and continues to be in default, and should be avoided.” *Id.*

<sup>37</sup> “[I]t is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.” *Id.* Perhaps the best recent example of the primacy of implementing legislation over treaty text in terms of its impact on how U.S. state actors interpret our obligations under a treaty was the conclusion by the Supreme Court of the United States that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty – the Refugee Act. *United States v. Haitian Centers Council, Inc.* 113 S.Ct. 2549 (1993).

<sup>38</sup> See RESTATEMENT, *supra* note 2, at § 131.

<sup>39</sup> See RESTATEMENT, *supra* note 2, at § 111, cmt.

3. **Derogations** – Many of the major human rights treaties to which the United States is a party include a derogation clause. Derogation refers to the legal right to suspend certain human rights treaty provisions in time of war or in cases of national emergencies.

- a. Certain rights, however, may not be derogated from, including:
  - (1) Right to life,
  - (2) Prohibition on torture,
  - (3) Prohibition on slavery,
  - (4) Prohibition on *ex post* punishment<sup>40</sup>;
  - (5) Nor may states adopt measures inconsistent with their obligations under international law.

b. With very few exceptions (e.g., GC IV, Article 5, Derogations), the LOAC does not permit derogation. Its provisions already contemplate a balance between military necessity and humanity.

#### IV. CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

A. Customary international law (CIL) results from consistent state practice done out of a sense of legal obligation (*opinio juris*).<sup>41</sup> There are no specific rules on how long a custom must exist before it becomes CIL. Determinations as to what constitutes CIL are fact-specific. CIL is considered part of U.S. law,<sup>42</sup> however there exists no definitive list of those human rights the United States considers to be CIL. Therefore, judge advocates rely on a variety of sources in order to determine what constitutes customary IHRL. These sources may include, but are not limited to, the UDHR,<sup>43</sup> the Restatement (Third) of The Foreign Relations Law of the United States, Common Article III of the Geneva Conventions, and authoritative pronouncements<sup>44</sup> of U.S. policy by ranking government officials. Customary IHRL and treaty law are often interrelated. IHRL treaties can codify existing customary IHRL. Conversely, practices established in treaties can ripen into customary IHRL. Under one widely held view, customary international law and treaty law are equal in stature, with the later in time controlling.<sup>45</sup>

B. Customary IHRL is not all created equal; its scope of application depends on the type of customary IHRL at issue. Customary IHRL can be divided into two general types: Customary IHRL that is considered *jus cogens* (“fundamental human rights”) and customary IHRL that is not considered to be *jus cogens* (“non-fundamental human rights”).<sup>46</sup>

1. Fundamental Human Rights. Customary IHRL determined to be *jus cogens* consists of peremptory norms so fundamental and universally accepted that they do not permit any derogation, even by treaty. The prohibition against genocide, slavery, murder/causing disappearance of individuals, torture/cruel, inhuman

<sup>40</sup> See *supra*, note 8.

<sup>41</sup> See RESTATEMENT, *supra* note 2, § 102(2) cmt c. (1987) (from the Latin *opinio juris sive necessitates*, a practice undertaken by a State out of a sense of legal obligation).

<sup>42</sup> See *The Paquete Habana*, 175 U.S. 677 (1900); see also RESTATEMENT, *supra* note 2 at § 111.

<sup>43</sup> The United States views the UDHR as aspirational, not obligatory. It has not taken the position that the UDHR is CIL.

<sup>44</sup> See RESTATEMENT, *supra* note 2, at § 702. See also, e.g., Office of the Press Secretary, The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy 3 (Mar. 7, 2011), available at [http://www.whitehouse.gov/sites/default/files/Fact\\_Sheet\\_-\\_Guantanamo\\_and\\_Detainee\\_Policy.pdf](http://www.whitehouse.gov/sites/default/files/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf). The Fact Sheet, issued in conjunction with an Executive Order for periodic review of Guantanamo detainee cases, stated:

Although the Administration continues to have significant concerns with Additional Protocol I [to the Geneva Conventions], Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

<sup>45</sup> See Vienna Convention on the Law of Treaties, art. 64 (the emergence of a new *jus cogens* peremptory norm which conflicts with existing treaty obligations voids the conflicting treaty provisions).

<sup>46</sup> See RESTATEMENT, *supra* note 2, § 702, arguably divides customary IHRL into three categories (internationally recognized rights, fundamental rights, and rights that are *jus cogens*). This above two-part division is a simplified version of the RESTATEMENT’S three-part division.

degrading treatment, prolonged arbitrary detention, and systematic racial discrimination are considered to be *jus cogens*.<sup>47</sup> In contrast to much of human rights **treaty** law, fundamental customary IHRL binds a State's forces during all operations, both inside and outside the State's territory. But not all customary IHRL is considered to be fundamental.

2. Non-Fundamental Human Rights. Non-fundamental IHRL encompasses all customary IHRL that is not considered to be *jus cogens*. In contrast to fundamental human rights, these **non**-fundamental human rights do not necessarily bind States during all operations inside and outside a State's territory. Judge advocates trying to determine whether a non-fundamental customary IHRL provision applies to a given situation must look at state practice and *opinio juris* in order to determine if and how that provision is customarily applied under the circumstances at issue. Non-fundamental human rights law binds States to the extent and under the particular circumstances those IHRL tenets are customarily practiced by states out of a sense of legal obligation.

## V. IHRL and the LOAC.

A. If judge advocates determine that IHRL treaty law and/or customary IHRL could apply to a particular armed conflict, they must then determine how the applicable IHRL interacts with LOAC in that situation. Scholars and States disagree over the interaction between non-fundamental IHRL and the LOAC. Positions range from arguments that they are entirely separate systems, to a view that makes LOAC a completely integrated component of IHRL.<sup>48</sup> In the late 1960s, the United Nations General Assembly considered the application of human rights during armed conflict in two different resolutions.<sup>49</sup> Ultimately, however, the resolutions produced few useful pronouncements and many ambiguous references to humanitarian principles. There are two primary views regarding how IHRL and LOAC interact with each other when arguments can be made that both apply to armed conflict.

1. **The Displacement View.** Traditionally, IHRL and the LOAC have been viewed as separate systems of protection, where one wholly displaces the other. The displacement view is an all-or-nothing approach that results in either IHRL **or** LOAC setting the rules that govern the armed conflict at issue. This view applies IHRL and LOAC to distinct situations and relationships. The United States embraced this view<sup>50</sup> until very recently.

a. The displacement view adheres to the legal maxim *lex specialis derogat lex generalis*, or the more specific rule displaces the more general rule. LOAC is cited as the *lex specialis* in relation to situations of armed conflict and therefore governs during armed conflict, displacing peacetime laws such as IHRL.<sup>51</sup> The LOAC includes restrictive triggering mechanisms which limit its application to specific circumstances.<sup>52</sup> This view also notes that the LOAC largely predates IHRL and therefore was never intended to comprise a sub-category of IHRL.

b. The Law of Armed Conflict, under the displacement view, regulates relations between belligerents and protected persons such as civilians, and usually not a state's own citizens or nationals, during an armed conflict. For example, the 1949 Geneva Conventions largely do not apply to a state's own nationals. Much of the Fourth Convention applies to "protected persons," a group characterized as civilians in the hands of their nation's enemy.<sup>53</sup>

c. Under the displacement view, IHRL, as the *lex specialis* during peacetime, regulates the relationship between States and individuals within their territory and under their jurisdiction during peace. This reflects the original focus of IHRL—to protect individuals from the harmful acts of their own governments.

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<sup>47</sup> Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also* See RESTATEMENT, *supra* note 2, § 702.

<sup>48</sup> See RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002).

<sup>49</sup> G.A. Res. 2675 (1970); G. A. Res. 2444 (1968) "Respect for Human Rights in Armed Conflict"; UN GAOR 29th Sess. Supp. No. 31. Professor Schindler argues that while the UN said "human rights" in these instruments, it meant "humanitarian law." Dietrich Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM U. L. REV. 935 (1982).

<sup>50</sup> *See, e.g.*, Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

<sup>51</sup> Christopher Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, in LAW AT THE CENTRE, THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY (1999); Schindler, *supra* note 5, at 397.

<sup>52</sup> *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para.25 (July 8).

<sup>53</sup> *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC IV].

2. **Complementarity view.** An expanding group of scholars and States view the application of IHRL and the LOAC as complementary and overlapping. Under the complementarity view, LOAC does not necessarily displace IHRL during armed conflict. According to complementarity, IHRL can regulate a sovereign's conduct towards individuals on distant battlefields during armed conflict if its rules are a better fit than LOAC's for a given situation. The International Court of Justice adopted this view in two different Advisory Opinions,<sup>54</sup> though without clear explanation. Most international scholars accept that the LOAC constitutes a *lex specialis* for situations of armed conflict, particularly international armed conflict. However, opinions differ as to when and how much IHRL displaces LOAC in armed conflict, particularly during non-international armed conflict.

3. **Most recent Periodic Report.** In the United States Fourth Periodic Report to the UNHRC, the U.S. State Dep't stated that "a time of war does not suspend the operation of the [ICCPR] to matters within its scope of application."<sup>55</sup> The Report also noted that:

"Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC] . . . [IHRL] and [LOAC] are in many respects complementary and mutually reinforcing [and] contain many similar protections. . . . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts . . ."<sup>56</sup>

These statements suggest that while the United States has not changed its position on the ICCPR's scope of application (the "traditional" vs. "emerging" views of the geographic applicability of treaty law issue discussed above), and it will consider rule-by-rule whether the LOAC displaces applicable provisions of IHRL when IHRL has been determined to apply geographically. In situations of armed conflict, where the LOAC provides specific guidance, LOAC will likely set the rules, not IHRL, and provide authoritative guidance for military action. However, where LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement, or possibly even displace, at least to a limited degree, the LOAC in certain cases.

D. **Modern Challenges.** As human rights are asserted on a global scale, many governments regard them as "a system of values imposed upon them."<sup>57</sup> States in Asia and the Islamic world sometimes question the universality of human rights as a neo-colonialist attitude of western states.<sup>58</sup>

## V. INTERNATIONAL HUMAN RIGHTS SYSTEMS

International human rights are developed and implemented through a layered structure of complementary and coextensive systems. "The principle of universality does not in any way rule out regional or national differences and peculiarities."<sup>59</sup> As the United States participates in combined operations, judge advocates will find that allies may have very different conceptions of and obligations under IHRL. In addition to the global system of the United Nations, regional human rights systems, such as the European, Inter-American, and African systems, have

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<sup>54</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, *supra* note 52, ("The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."). *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, I.C.J. Rep. 36. The Advisory Opinion in the *Wall* case explained the operation of this "emerging view" as follows:

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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

<sup>55</sup> See U.S. Dep't of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights para. 506, 30 Dec 11, at <http://www.state.gov/g/drl/rls/179781.htm>.

<sup>56</sup> *Id.* at para. 507.

<sup>57</sup> NOWAK, *supra* note 19.

<sup>58</sup> See DARREN J. O'BYRNE, HUMAN RIGHTS: AN INTRODUCTION 52-55 (2003) (discussing Marxist, Confucian, and Islamic attitudes toward concepts of universal human rights); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 132-35 (2002) (citing ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1997); MIKE FEATHERSTONE, UNDOING CULTURE: GLOBALIZATION, POSTMODERNISM AND IDENTITY (1995)).

<sup>59</sup> NOWAK, *supra* note 19, at 2.

developed and progressed in complexity and scope. Judge advocates will benefit from an appreciation of the basic features of these systems as they relate to allies' willingness to participate in and desire to shape operations.<sup>60</sup> Moreover, in an occupation setting, judge advocates must understand the human rights obligations, both international and domestic, that may bind the host nation as well as how that host nation interprets those obligations. This understanding begins with the primary human rights system -- the UN system -- the foundation of which is the Universal Declaration of Human Rights.

A. **The Universal Declaration of Human Rights (UDHR)** – The UDHR was a UN General Assembly Resolution passed on December 10, 1948. The UDHR is not a treaty but many of its provisions reflect CIL. The UDHR was adopted as “a common standard of achievement for all peoples and nations.”

B. **The UN Human Rights Committee (UNHRC)** – The UNHRC was established by the ICCPR as a committee of independent human rights experts who oversee implementation of the treaty. In this role, the HRC reviews the periodic reports submitted by states party to the ICCPR. The UNHRC may also hear “communications” from individuals in states party to the (First) Optional Protocol to the ICCPR. As mentioned earlier, the United States is not a party to the First Protocol to the ICCPR.

C. **The UN Human Rights Council** – The Human Rights Council is an inter-governmental body within the UN system made up of forty-seven States responsible for strengthening the promotion and protection of human rights around the globe. The UN General Assembly created the Council in March of 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them. The Council replaced the UN Commission on Human Rights, another General Assembly-created body designed to monitor and strengthen international human rights practices.<sup>61</sup> The United States is a member of the UN Human Rights Council and submitted its first report to the Council as part of the Universal Periodic Review process in the fall of 2010.

D. **The European Human Rights System** – The European Human Rights System was the first regional human rights system and is widely regarded as the most robust. The European System is based on the 1950 European Convention of Human Rights (ECHR), a seminal document that created one of the most powerful human rights bodies in the world, the European Court of Human Rights. Presently, all 47 members of the Council of Europe are party to the ECHR. In recent years, this European Court has taken an extraordinarily expansive interpretation of the Convention's obligations, even limiting actions normally permitted by LOAC such as battlefield detention. Though the United States is not a party to the ECHR, judge advocates working with European allies should become familiar with the treaty's basic terms<sup>62</sup> and recent case law that may impact allied operations.

E. **The Inter-American Human Rights System** – The Inter-American System is based on the Organization of the American States (OAS) Charter and the American Convention on Human Rights. The OAS Charter created the Inter-American Commission on Human Rights. The American Convention on Human Rights, to which the United States is not a party, created the Inter-American Court of Human Rights. As the United States is not a party to this Convention, it is not subject to that court's jurisdiction. However, the United States does respond to the comments and criticisms of the Inter-American Commission on Human Rights.<sup>63</sup>

F. **The African Human Rights System** – The African System falls under the African Union, which was established in 2001. It is the most recently established regional human rights system. The African system is based primarily on the African Charter on Human and Peoples' Rights which entered into force in 1986. The Charter created the African Commission on Human and Peoples' Rights. A later protocol created an African Court of Human and Peoples' Rights, designed to complement the work of the Commission. The court came into being as a treaty body in 2004 and published its first judgment on 15 December 2009.<sup>64</sup>

G. There are no current regional human rights treaties for Asia or the Middle East. However, the 53-member Organization of Islamic States recently created an Independent Permanent Human Rights Commission.

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<sup>60</sup> *Sei Fujii v. California*, 38 Cal.2d 718, 242 P.2d 617 (1952).

<sup>61</sup> G.A. Res. 60/251, U.N. Doc A/Res/60/251 (3 Apr. 2006).

<sup>62</sup> The ECHR's text and copies of the court's decisions can be accessed at [http://www.echr.coe.int/ECHR/Homepage\\_EN](http://www.echr.coe.int/ECHR/Homepage_EN). The Council of Europe's Treaty Office is the depositary for the ECHR, and maintains a website at <http://conventions.coe.int/>.

<sup>63</sup> See e.g., U.S. Additional Response to the Request for Precautionary Measures: Detention of Enemy Combatants at Guantanamo Bay, Cuba, (July 15, 2002), available at <http://www.state.gov/s/l/38642.htm>.

<sup>64</sup> See Judgment in the matter of *Michelot Yogogombaye versus the Republic of Senegal*, application No. 001/2008, <http://www.african-court.org/en/cases/latest-judgments/> (last visited Apr. 13, 2010).

## VI. FISCAL ASPECTS OF HUMAN RIGHTS LAW

**A. Training Foreign Security Forces** – Department of Defense Appropriations Act (2015) prohibits funding the “training, equipment, or other assistance” of foreign security forces if the Secretary of Defense has credible information that the security forces to be trained have committed any gross human rights violations.<sup>65</sup> The Secretary of Defense issued implementing guidance of this issue in August 2014.<sup>66</sup>

**B. Human Rights and Security Assistance** – For a discussion of the “Leahy Amendment,” refer to Chapter 14, Fiscal Law. **VII. Remedies for Human Rights Violations**

**A. Human Rights Treaty-Based Causes of Action** – U.S. courts have generally held human rights treaties to be non-self-executing and therefore not bases for causes of action in domestic courts. In *Sei Fuji v. California*,<sup>67</sup> the California Supreme Court heard a claim that UN Charter Articles 55 and 56 invalidated the California Alien Land Law. The land law had varied land owner rights according to alien status. The court struck down the law on equal protection grounds but overruled the lower court’s recognition of causes of action under the UN Charter. The court stated, “The provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification.”<sup>68</sup> Federal and state courts have largely followed *Sei Fuji*’s lead.

**B. Statutory Causes of Action** – The greatest activity in domestic remedies for human rights violations has occurred through the Alien Tort Statute.<sup>69</sup> The statute provides jurisdiction for U.S. District Court to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>70</sup>

1. In *Filartiga v. Peña-Irala*, the Second Circuit recognized a right to be free from torture actionable under the statute.<sup>71</sup> The court’s analysis includes a detailed exploration of CIL and the level of proof required to establish an actionable provision of CIL.

2. The United States Supreme Court addressed the Alien Tort Statute (ATS) in *Sosa v. Alvarez-Machain*.<sup>72</sup> Refining and tightening the standard for establishing torts “in violation of the law of nations,” the Court characterized the statute essentially as a jurisdictional statute.<sup>73</sup> The Court declined to go so far as categorically requiring separate legislation to establish causes of action under the statute; however, the Court set a very high burden of proof to establish actionable causes.

3. In April 2013, the U.S. Supreme Court found in *Kiobel v. Royal Dutch Petroleum Company* that there is a presumption against extra-territorial application of the ATS. However, Justice Breyer’s concurring opinion addressed how that presumption may be overcome when a matter “touches and concerns” the United States with “sufficient force.”<sup>74</sup>

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<sup>65</sup> See Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, §1204, 10 U.S.C. §2282 (2015). <https://www.congress.gov/bill/113th-congress/house-bill/3979/text>. Section 1206 of the same bill contains a limited authority to provide human rights training to foreign forces that would otherwise be prohibited from receiving U.S. training. See also Department of Defense Appropriations Act, 2014 (H.R. 3547-115), SEC. 8057.

<sup>66</sup> See Secretary of Defense Memorandum, Implementation of Section 8057 DoD Appropriations Act, 2014, 18 August 2014.

<sup>67</sup> 38 Cal.2d, 718, 242 P.2d 617 (1952).

<sup>68</sup> 242 P.2d at 621-22.

<sup>69</sup> 28 U.S.C. § 1350 (2004).

<sup>70</sup> *Id.*

<sup>71</sup> 630 F.2d 876 (2d Cir.1980).

<sup>72</sup> 542 U.S. 692 (2004)

<sup>73</sup> *Id.*

<sup>74</sup> 133 S.Ct. 1659 (2013); [http://www.supremecourt.gov/opinions/12pdf/10-1491\\_l6gn.pdf](http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf)

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