

INTERNATIONAL HUMAN RIGHTS LAW

I. OBJECTIVES

- A. Understand the history and development of international human rights law and how it interacts with the law of armed conflict.
- B. Understand major international human rights treaties, their scope and application, as well as the United States' approach to human rights treaty law.
- C. Understand those human rights considered customary international law.
- D. Understand different regional international human rights systems.

II. INTRODUCTION

- A. International human rights law¹ focuses on the “inherent dignity” and “inalienable rights **of individual human beings**. In contrast to most international law, international human rights law (IHRL) protects persons as individuals rather than as subjects of sovereign States.
- B. International human rights law exists primarily in two forms: **treaty law** and **customary international law (CIL)**.² Human rights law established by treaty applies according to the scope of each treaty. Under the U.S. view, with the exception of the Convention Against Torture, treaty-based IHRL generally only binds the party State in relation to persons within its territory and subject to its jurisdiction. Customary IHRL determined to be fundamental (*jus cogens*), on the other hand, binds a State's forces during all operations, both inside and outside the State's territory. Customary IHRL that does **not** protect fundamental rights generally binds States to a lesser extent. Non-fundamental customary IHRL binds States to the extent and under the particular circumstances those IHRL tenets are customarily applied. There is no authoritative source listing all the human rights the United States considers to be CIL.

III. HISTORY AND DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW

- A. As a field of international law, human rights did not form until the years following World War II. The systematic abuse and near-extirpation of entire populations by

¹ All references to “human rights law” in this chapter refer to international human rights law, not to domestic human rights law, unless otherwise noted.

² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701 (2003) [hereinafter RESTATEMENT].

States aided the acceptance of human rights as international law. Prior to modern human rights law, how States treated their own citizens was, to a large degree, regarded as a purely domestic matter. Up to this point, international law had regulated State conduct vis-à-vis other States, and chiefly protected individuals as symbols 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. Human rights law, however, pierced the “veil of sovereignty” by seeking directly to **regulate how States treated their own people within their own borders.**³

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 resolutions, the **Universal Declaration of Human Rights**⁴ (UDHR), is the foundational statement of universal human rights norms. Though aspirational, it continues to shape treaty interpretation and custom.
3. Following the adoption of the **1949 Geneva Conventions**, law of armed conflict (LOAC) development began to slow. By the mid-1950’s, the LOAC process 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.⁵ In fact, the LOAC would not see a significant development in humanitarian protections until the 1977 Additional Protocols.
4. At the same time, however, human rights law experienced a boom. Two of the most significant human rights treaties, the International Covenant on Civil and Political Rights⁶ (ICCPR) and the International Covenant on Economic Social

³ 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.”).

⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

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

⁶ 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). Reprinted in the Documentary Supplement.

and Cultural Rights,⁷ were adopted and opened for signature in 1966, and came into force in 1976. Since the 1970s, news media, private activism, public diplomacy, and legal institutions have monitored and reported on human rights conditions worldwide with increasing scrutiny and sophistication. Human rights promotion also remains a core part of both the U.S. National Security Strategy and U.S. public diplomacy.⁸ This is a growth area of the law.

- B. IHRL and the LOAC. Scholars and States disagree over how the two bodies of law interact. Some argue that they are entirely separate systems, others for a default rule of IHRL governing at all times (with a correspondingly narrow view of LOAC). Still others argue they should be interpreted in a complementary manner, mutually reinforcing each other. In the late 1960's, the United Nations General Assembly attempted to address application of human rights during armed conflict.⁹ Ultimately, however, the resolutions passed produced many ambiguous references, but few useful rules. The most pressing current question is to what extent IHRL should apply outside a nation's borders (extraterritorially) to battlefield situations traditionally governed by LOAC (i.e. as inapplicable, complementary, gap-filling, or even the dominant law).
1. The Displacement View. Traditionally, IHRL and the LOAC have been viewed as separate systems of protection. This classic view applies human rights law and the LOAC to different situations and different relationships respectively, with one body of law wholly displacing the other. The United States embraced this regime-displacement view¹⁰ until recently.
- a. IHRL traditionally regulates the peacetime relationship between States and individuals within their territory and under their jurisdiction. It may, however, be inapplicable during emergencies. This reflects the original

⁷ Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁸ 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. NATIONAL SECURITY STRATEGY (2015) (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).

⁹ 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) [hereinafter Schindler].

¹⁰ See, e.g., Michael J. Dennis, *Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or Just Right?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?*, 12 ILSA J. INT'L & COMP. L. 459 (2006).

focus of human rights law, which was to protect individuals from the harmful acts of their own governments.

- b. LOAC traditionally regulates wartime relations between belligerents and civilians as well as protected individuals, usually not one's own citizens or nationals. LOAC largely predates IHRL and, therefore, was never intended to comprise a sub-category of human rights law. This view notes that LOAC includes very restrictive triggering mechanisms which limit its application to specific circumstances.¹¹ As such, LOAC is cited as a *lex specialis* to situations of armed conflict and therefore applies in lieu of, not alongside, IHRL.¹² The argument is becoming increasingly hard to maintain though.¹³
2. Complementarity View. An expanding group of scholars and States now views the application of IHRL and the LOAC as complementary and overlapping. In this view, IHRL can regulate a sovereign's conduct even on distant battlefields towards non-citizens, during periods of armed conflict as well as during peacetime. The International Court of Justice recently adopted this view in two different Advisory Opinions,¹⁴ though without clear explanation. Though most international scholars accept that the LOAC constitutes a *lex specialis* for situations of armed conflict, opinions differ as to when and how much of IHRL or domestic law the LOAC will displace.
3. Most Recent Periodic Report. In its Fourth Periodic Report to the UN Human Rights Committee on compliance with the ICCPR, the United States clarified

¹¹ See e.g. Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949, art. 2. ; see also, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, para. 25 (July 8).

¹² 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 9, at 397. *Lex specialis* means that a law governing a specific subject matter (*lex specialis*) is not overridden by a law which only governs related general matters (*lex generalis*).

¹³ See e.g., Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law* 90 INT'L REV. RED CROSS 501, 501 (2008) (“[T]here is today no question that human rights law comes to complement humanitarian law in situations of armed conflict.”)

¹⁴ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226. (“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.”). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 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 [i.e., LOAC] and human rights law, there are thus three possible situations: some rights may be exclusively matters of [LOAC]; others may be exclusively matters of [IHRL]; 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.

that “a time of war does not suspend the operation of the [ICCPR] to matters within its scope of application.”¹⁵ The Report also noted:

“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 . . .”¹⁶ where there is far less developed law.

This statement suggests that while the United States has not changed its position on the ICCPR’s scope (see below), it considers rule by rule and situation by situation whether the LOAC displaces applicable provisions of IHRL. In situations of armed conflict, where the LOAC provides specific guidance, these will displace competing norms of IHRL and provide authoritative guidance for military action. Where the LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement the LOAC.

C. Modern Challenges. As human rights are asserted on a global scale, many governments regard them as “a system of values imposed upon them.”¹⁷ Some states in Asia and the Islamic world question the universality of human rights as a neo-colonialist attitude of northern states.¹⁸ It is perhaps for this reason that neither of these two regions has a separate human rights system, such as the European, Inter-American, or African systems, discussed *infra*.

IV. CUSTOMARY INTERNATIONAL HUMAN RIGHTS

- A. Customary “fundamental” human rights, such as freedom from slavery and torture, are binding on U.S. forces during all military operations. However, not all customary human rights law is considered fundamental. Non-fundamental customary IHRL binds States to the extent and under the particular circumstances those IHRL tenets are customarily applied. Determinations as to what constitutes customary IHRL are fact-specific. There is no definitive “source list” of those human rights

¹⁵ 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>.

¹⁶ *Id.* at para. 507

¹⁷ MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 2 (2003) [hereinafter NOWAK].

¹⁸ 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)).

considered by the United States to fall within this category of fundamental human rights. As a result, the Judge Advocate (JA) must rely on a variety of sources to answer this question. These sources may include: the UDHR - although the United States has not taken the position that everything in the UDHR is CIL; Common Article 3 of the Geneva Conventions; and the Restatement (Third) of The Foreign Relations Law of the United States (2003). The Restatement claims that a State violates international law when, as a matter of policy, it “practices, encourages, or condones”¹⁹ a violation of human rights considered CIL.²⁰

- B. Furthermore, the Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. It is the CIL status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States.

V. HUMAN RIGHTS TREATIES

- A. The original focus of human rights law—to protect individuals from the harmful acts of **their own governments**²¹—must be emphasized. The original focus of human rights law was its “groundbreaking” aspect: that international law could regulate the way a government treated the residents of its own State. Human rights law was not originally intended to protect individuals from the actions of **any** government agent they encountered. This is partly explained by the fact that historically, other international law concepts provided for the protection of individuals from the cruel treatment of foreign nations.²²
- B. Major Human Rights Instruments. Until 1988, the United States had not ratified any major international human rights treaties.²³ Since then, the United States has ratified a few international human rights treaties, including the ICCPR; however, there are numerous human rights treaties that the United States has not ratified. The following is a list of the major international human rights treaties including a brief description of each one and whether the United States is a party to the treaty.

¹⁹ *Id.*

²⁰ The Restatement gives the following examples of human rights that fall within the category of CIL: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, violence to life or limb, hostage taking, punishment without fair trial, prolonged arbitrary detention, failure to care for and collect the wounded and sick, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights. *Id.* at §702.

²¹ See RESTATEMENT, *supra* note 2, and accompanying text.

²² See *id.* at Part VII, Introductory Note.

²³ THOMAS BUERGENTHAL ET. AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 350 (2002).

1. International Covenant on Civil and Political Rights (ICCPR) (1966).²⁴ The preeminent international human rights treaty, the ICCPR was ratified by the United States in 1992. It is administered by UN Human Rights Committee (HRC). Parties must submit reports in accordance with Committee guidelines for review by the HRC. The HRC may question State representatives on the substance of their reports. The HRC may report to the UN Secretary General. The HRC issues General Comments to members but those comments have no binding force in international law. 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.
 - a. 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 argue for a disjunctive reading of “and,” such that the ICCPR would cover anyone simply under the control of a Party,²⁵ the United States interprets the extraterritoriality provision narrowly.²⁶
 - b. First Optional Protocol. The First Optional Protocol to the ICCPR empowers private parties to file “communications” with the UN HRC. Communications have evolved as a basis for individual causes of action under the ICCPR. **The United States is not party to the First Protocol.**
 - c. Second Optional Protocol. The Second Optional Protocol to the ICCPR seeks to abolish death penalty. The United States is also not party to the Second Protocol.

2. International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966). The ICESCR deals with so-called “second generation human rights.”²⁷ Included in the ICESCR are the right to self-determination (art. 1), the right to work (art. 6), the right to adequate standard of living (art. 11), and the right to an education (art. 13). States party to this treaty must “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [the] available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant.”

²⁴ Reprinted in the Documentary Supplement.

²⁵ Human Rights Committee, General Comment No. 31, U.N. Doc. HRI/GEN/1/Rev.6 (2004).

²⁶ Mary McLeod, U.S. Department of State, Acting Legal Advisor, Statement to U.N. Human Rights Committee, (March 13, 2014); *See also* 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> (last visited Feb. 26, 2008) (“[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”).

²⁷ NOWAK, *supra* note 17, at 80.

(art. 2). The ICESCR does not establish a standing committee. Reports go to the Committee on Economic, Social, and Cultural Rights, composed of eighteen elected members. There is no individual complaint procedure. The Committee uses General Comments to Parties to highlight and encourage compliance. As with the ICCPR, these general comments are not binding international law. **The United States has signed, but not ratified, the ICESCR.**

3. Convention on the Prevention and Punishment of the Crime of Genocide²⁸ (1948). The United States signed the Genocide Convention in 1948, and transmitted it to the Senate in 1949. **The treaty was ratified by the United States in 1988.** The Genocide Convention was the first international human rights law treaty and also the first one that the United States ratified.
4. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT) (1984).²⁹ The CAT is a United Nations treaty, administered by UN Committee on Torture, which is composed of ten elected experts. The Committee is informed by periodic reporting system and inter-state and individual complaint procedures. Article 20 empowers the Committee to conduct independent investigations, but it must have cooperation of the State Party subject of investigation. **The United States ratified the CAT in 1994.**
 - a. 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.”
 - b. 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. As recently as January 2013, the United States ceased detainee transfers to thirty four Afghan units and Afghan facilities following reports of widespread detainee abuse by the United Nations Assistance Mission in Afghanistan (UNAMA).
 - c. Article 3(2) contains the standard for evaluating violations: “For the purpose of determining whether there are such grounds, the competent

²⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 UNTS 277. Reprinted in the Documentary Supplement.

²⁹ Reprinted in the Documentary Supplement.

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.”

5. Convention on the Elimination of All Forms of Racial Discrimination³⁰ (CEFRD) (1965). The CEFRD 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.”³¹ The parties agree to eliminate racial discrimination and apply rights set out in the Universal Declaration of Human Rights and the two Covenants. The CEFRD is administered by United Nations Committee on the Elimination of Racial Discrimination. The United States signed in 1966, transmitted to the Senate in 1978, and **ratified the CEFRD in 1994**.³²
- C. The United States Treaty Process.
1. Article II, Section 2, clause 2 of the United States Constitution enumerates to the President the power to make treaties. After receiving the advice and consent of two-thirds of the Senate, the President may ratify a treaty. Article VI of the United States Constitution establishes treaties as “the supreme Law of the Land.” Consequently, treaties enjoy the same force as statutes. When treaties and statutes conflict, the later in time is law.
 2. Reservations, Understandings and Declarations (RUDs). The United States policy toward human rights treaties relies heavily on RUDs. RUDs have been essential to mustering political support for ratification of human rights treaties in the United States Senate.
 - 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 proposed reservation does not operate between the two States.³³ An example of a reservation would be the United States’ reservation to the

³⁰ 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).

³¹ Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

³² 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. See Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93.

³³ 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). Reprinted in the Documentary Supplement.

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.”³⁴

- 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.”³⁵
- 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.³⁶
- 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 U.S. applies human rights treaties requires an appreciation of two concepts: non-extraterritoriality and non-self execution.

1. **Non-extraterritoriality.** In keeping with the original focus of human rights law, the United States interprets many human rights treaties as applying to persons within the territory of the United States, and not to individuals outside of our borders.³⁷ This theory of treaty interpretation is referred to as “non-

³⁴ International Covenant on Civil and Political Rights, Text of Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations and Approved by the Senate (Apr. 2, 1992). The RUDs mentioned in the text are reprinted in the Documentary Supplement following the ICCPR.

³⁵ *Id.*

³⁶ *See e.g., id.* (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

³⁷ 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

extraterritoriality.”³⁸ The result of this theory is that these international agreements do not create treaty-based obligations on U.S. forces when dealing with civilians in another country during the course of a contingency operation.

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 U.S., judge advocates must also be familiar with the concept of **treaty execution**. Although treaties entered into by the United States become part of the “supreme law of the land,”³⁹ 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.⁴⁰ However, the impact on whether a judge advocate should conclude that a treaty creates a binding obligation on U.S. forces is potentially profound. First, there is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an obligation.⁴¹ More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, that is given effect by U.S. courts, and

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).

³⁸ See Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78-82 (1995); see also CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, at 49 (1995) (citing human rights groups that mounted a defense for an Army captain that misinterpreted the ICCPR to create an affirmative obligation to correct human rights violations within a Haitian Prison). See also LAWYERS’ COMMITTEE FOR HUMAN RIGHTS, PROTECT OR OBEY: THE UNITED STATES ARMY VERSUS CPT LAWRENCE ROCKWOOD 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion).

³⁹ 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.

⁴⁰ See RESTATEMENT, *supra* note 2, at cmt h.

⁴¹ There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing, because 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, Reporters 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.*

therefore defines the scope of U.S. obligations under our law.⁴² 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.⁴³

- 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.”⁴⁴ Thus, 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. Accordingly, if the United States adds such a declaration to a treaty, the declaration determines the interpretation the United States will apply to determining the nature of the obligation.⁴⁵

3. **Derogations.** Each of the major human rights treaties to which the United States is a party includes a derogations clause. Derogation refers to the legal right to suspend certain human rights treaty provisions in time of **war or in cases of national emergencies**. Certain fundamental (customary law) rights, however, may not be derogated from:

- a. Right to life;
- b. Prohibition on torture;
- c. Prohibition on slavery;
- d. Prohibition on *ex post* punishment;
- e. **Nor** may States adopt measures inconsistent with their obligations under international law.

⁴² “[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).

⁴³ In *Sei Fuji v. California*, 38 Cal. 2d, 718, 242 P. 2d 617 (1952), 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.” 242 P. 2d at 621-22. Federal and state courts have largely followed *Sei Fuji’s* lead.

⁴⁴ See RESTATEMENT, *supra* note 2, at § 131.

⁴⁵ See RESTATEMENT, *supra* note 2, at § 111, cmt.

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

VI. INTERNATIONAL HUMAN RIGHTS SYSTEMS

- A. General. International human rights are developed and implemented through a layered structure of complimentary and coextensive systems. “The principle of universality does not in any way rule out regional or national differences and peculiarities.”⁴⁶ As the United States participates in combined operations, judge advocates will find that allies may have very different conceptions of and obligations under human rights law. In addition to the global UN system, regional human rights systems, such as the European, Inter-American, and African systems, have developed 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.⁴⁷ 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.

- B. The United Nations System. An understanding of international human rights obligations begins with the primary human rights system, the UN system, the foundation of which is the Universal Declaration of Human Rights.
 1. The Universal Declaration of Human Rights (UDHR). The UDHR was a UN General Assembly Resolution passed on December 10, 1946. 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.”
 2. The Human Rights Committee (HRC). The HRC was established by the ICCPR as a committee of independent human rights experts who oversee treaty implementation. In this role, the HRC reviews the periodic reports submitted by states party to the ICCPR. The HRC may also hear “communications” from individuals in states party to the (First) Optional Protocol to the ICCPR. **The United States, however, is not a party to the First Protocol to the ICCPR.**
 3. The 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 Council was created by the UN General Assembly in March of 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them. The Council replaced the

⁴⁶ NOWAK, *supra* note 17, at 2.

⁴⁷ *Sei Fujii v. California*, 38 Cal.2d 718, 242 P.2d 617 (1952).

UN Commission on Human Rights, another General Assembly-created body designed to monitor and strengthen international human rights practices.⁴⁸

- C. The European Human Rights System. The European Human Rights System was the first regional human rights system and is widely regarded to be 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 Council of Europe members are party to the ECHR. In recent years, this European Court has taken an expansive interpretation of the ECHR's obligations, even limiting actions normally permitted by LOAC such as battlefield detention. Though the United States is not party to the ECHR, JAs working with European allies should become familiar with the treaty's basic terms⁴⁹ and recent case law that may impact allied operations.
- D. 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**, of which the **United States is not a party**, created the Inter-American Court of Human Rights. Because the United States is not a party to the American 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.⁵⁰
- E. The African Human Rights System. The African System falls under the African Union, which was established in 2001. It is, therefore, the most recent and least formed 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 People's Rights. A later protocol created an African Court of Human and People's Rights, designed to complement the work of the Commission. The Court came into being as a treaty body in 2004, however, it is still in the development stage.

⁴⁸ G.A. Res. 60/251, U.N. Doc A/Res/60/251 (Apr. 3, 2006).

⁴⁹ The Council of Europe's Treaty Office is the depositary for the ECHR, and maintains a website at <http://conventions.coe.int/>. The ECHR's text and copies of the court's decisions can be accessed at http://www.echr.coe.int/ECHR/Homepage_EN.

⁵⁰ 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/1/38642.htm>.