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Patrick Walsh

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Fighting For Human Rights: The Application of Human Rights Treaties to United States' Military Operations

Patrick Walsh*

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*The United States and other free nations have a duty to defend human rights. . . . We must help countries . . . ensure human rights are respected over the long term. . . . We must call countries to account when they retreat from their international human rights commitments. . . . By defending and advancing human rights . . . we keep faith with our country's most cherished values and lay the foundation for lasting peace.*¹

I. INTRODUCTION

The United States encourages nations around the world to enforce human rights treaties and “calls to account” those who do not. But recently, the international community has been calling the United States to account for retreating against its own international human rights commitments under the International Covenant on Civil and Political Rights (“ICCPR”).² Members of the international community challenge the U.S. position that the ICCPR and other international human rights treaties do not apply outside U.S. territories or to U.S. military operations during armed conflicts.³ There is a growing call for change to the U.S. policy on the application of these international human rights treaties.⁴ The call for change is coming from both the international community and, surprisingly, from within the U.S. military, albeit for different reasons.

The international community is embracing an emerging view that international human rights law applies both during armed conflicts and outside of a nation’s territory.⁵ International courts and other administrative bodies have advised that the ICCPR and other regional human rights treaties apply outside a State’s borders.⁶ These same

1. U.S. DEP’T OF STATE, 2005 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (Mar. 8, 2006) (preface by Sec. of State, Condoleezza Rice).

2. See United Nations International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR is a comprehensive international human rights treaty that has been ratified by 164 States. For a further discussion of the ICCPR, see *infra* Section II.

3. See U.N. Econ. & Soc. Council, Hum. Rts. Comm., *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, 6th Sess., 14, U.N. Doc. E/CN.4/365 (Mar. 22, 1950) (U.S. proposal) [hereinafter U.N. ESCOR Hum. Rts. Comm].

4. See U.N. Hum. Rts. Comm., *Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) (calling on the United States to concede that the ICCPR, a human rights treaty, applies outside U.S. territory). For further discussion, see *infra* Section III.

5. See *infra* Sections III-IV.

6. See Heidi Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law In the ICRC Customary Law Study*, 11 J. OF

international bodies have concluded that human rights treaties in general, and the ICCPR in particular, apply during armed conflicts.⁷ In support of this emerging view, the United Nations and the international community are calling upon the United States to account for its failure to acknowledge that international human rights treaties apply during military operations and outside its borders.⁸

Although the United States disagrees with the proposition that international human rights treaties apply extraterritorially and during armed conflicts,⁹ the U.S. military incorporates guidance from international human rights treaties, particularly the ICCPR, in its military doctrine.¹⁰ The U.S. military now sees strategic value in applying human rights during some military operations. Enforcing human rights benefits government stability operations, helps establish the rule of law, and is a tool to defeat insurgents in war-torn countries.¹¹ For these reasons, the United States should concede that the ICCPR does apply outside the United States and during armed conflicts.

This paper will examine the emerging view that human rights treaties can and do apply to current military operations conducted outside of the United States. Then, the paper will compare this emerging view to the traditional view of the United States. Next, the paper will explore how the United States has issued new military doctrine to encourage the application of human rights during military operations. Finally, this paper will explain why the United States should adopt the emerging view on the application of the ICCPR and international human rights law to its military operations.

CONFLICT & SEC. L. 268 (2006). For further discussion on this emerging view, see *infra* Section III.

7. See Krieger, *supra* note 6.

8. See *infra* Section IV.

9. See U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1993, Addendum: United States of America*, 12-25, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (considering U.S. report submitted July 29, 1994) [hereinafter U.N. Hum. Rts. Comm.].

10. See U.S. DEP'T OF ARMY, FIELD MANUAL 3.07, STABILITY OPERATIONS 1-7 (Oct. 6, 2008) (stating that stable governments must follow international human rights treaties) [hereinafter FM-3.07].

11. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY D-8 (Dec. 15, 2006) (stating that protection of fundamental human rights is important in counterinsurgency operations) [hereinafter FM 3-24].

II. THE TRADITIONAL VIEW OF APPLYING INTERNATIONAL HUMAN RIGHTS LAW EXTRATERRITORIALLY AND DURING TIMES OF ARMED CONFLICT

Under the traditional view, human rights treaties apply only to a nation's treatment of its own population and only in times of peace.¹² The United States was a strong proponent of this view during the development of international human rights law after World War II and continues to subscribe to this view today.¹³ To understand the traditional view, one must understand the development of the international human rights law in the years after World War II, the application of the legal maxim of *lex specialis* to international law, and the drafting of the most comprehensive international human rights treaty, the International Covenant on Civil and Political Rights of 1966 (ICCPR).¹⁴ This background will provide a basis for understanding the U.S. view that international human rights treaties focus only on a State's domestic relations to persons within its territory during peacetime.

A. *The Early Development of International Human Rights Law*

International human rights law flourished after World War II and was one of the early successes of the United Nations ("U.N.").¹⁵ The international community revised international humanitarian law by enacting the four 1949 Geneva Conventions.¹⁶ International humanitarian law covered the conduct of States during wartime and restricted States' conduct against foreign nationals.¹⁷ However, others believed a separate body of law was needed to regulate the areas

12. RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 2-7* (Cambridge Univ. Press) (2002).

13. See U.N. ESCOR Hum. Rts. Comm., *supra* note 3 (U.S. proposal after World War II); U.N. Hum. Rts. Comm., *supra* note 9 (considering U.S. report submitted July 29, 1994).

14. ICCPR, *supra* note 2.

15. See Universal Declaration of Human Rights, G.A. Res. 217A, 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; see also PROVOST, *supra* note 12, at 3-7 (discussing other UN General Assembly Resolutions on Human Rights).

16. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GPW]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28.

17. See *supra* note 16.

humanitarian law did not cover; the conduct of States during peacetime and the conduct of States in relation to their own citizens.¹⁸

The Universal Declaration on Human Rights (“Universal Declaration”) was the first major declaration of this new body of law.¹⁹ The Universal Declaration focused on individual rights, such as the right to life, liberty, security, and the freedom of speech and religion.²⁰ The Universal Declaration was not a binding treaty, but was the explanation of “universal” human rights and a call to States to guarantee these rights for their citizens.²¹ The Universal Declaration was the precursor to the enactment of the most widely accepted and most comprehensive human rights treaty, the ICCPR.²²

The ICCPR adopted many of the rights espoused in the Universal Declaration.²³ The ICCPR guarantees these human rights, some of which mirror the U.S. Constitution’s Bill of Rights.²⁴ These rights include the protection of life; freedom of movement, speech, and religion; freedom from arbitrary arrest and detention; and basic due process in civil and criminal matters.²⁵ Although some of these protections are similar to protections provided under international humanitarian law like the four Geneva Conventions, the ICCPR provides broader individual protections and is more restrictive on State conduct.²⁶ Most important, 164 States are parties to the ICCPR, including the United States.²⁷

B. *The Territorial Limits of the ICCPR*

When the international community drafted the ICCPR, the United States specifically requested language to limit its application to domestic

18. PROVOST, *supra* note 12, at 2-3.

19. Universal Declaration, *supra* note 15.

20. *Id.* arts. 1, 3, 18.

21. *Id.* pmb.; *see generally*, MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS?, 52-53 (1973) (discussing the debate over whether the Universal Declaration of Human Rights should be binding).

22. *See* SARAH JOSEPH, ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 4 (Oxford Univ. Press, 2d ed. 2004) (2000).

23. *See generally*, Universal Declaration, *supra* note 15; *see also* ICCPR, *supra* note 2.

24. U.S. CONST. amends. I-X.

25. ICCPR, *supra* note 2, arts. 6, 9, 14, 15, 18, 19.

26. JOSEPH, ET AL., *supra* note 22, at 4. The ICCPR has “universal coverage” (unlike the European Convention on Human Rights), a “large number of rights” (unlike single-issue treaties) and it applies to all “classes of persons” (unlike treaties focused specifically on children or women). *Id.* For all of these reasons, the ICCPR has been labeled “probably the most important human rights treaty in the world.” *Id.*

27. United Nations Treaties Database, <http://treaties.un.org> (last visited Mar. 12, 2009). Some States, like those who were separated from the former Yugoslavia, have succeeded to these obligations. *Id.*

situations.²⁸ Article 2 of the ICCPR states that the treaty applies to “all individuals within its territory *and* subject to its jurisdiction.”²⁹ This language implies, and some would argue it clearly states, that the ICCPR cannot apply to an individual who is outside the territory of a signatory nation, even if that individual is subject to its jurisdiction. For example, the ICCPR would not apply to detainees held by U.S. military personnel outside of a U.S. territory. This is consistent with the traditional view that human rights treaties govern the relationship between states and persons who are in the state’s territory and under the state’s jurisdiction.³⁰

The legislative history of the ICCPR supports this assertion. The United States specifically stated through its representative, Eleanor Roosevelt, that the language in Article 2, “within its territory *and* subject to its jurisdiction,” was meant to apply only within the nation’s territorial boundaries:

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes.³¹

France and other nations initially objected to this limitation, but the ICCPR was passed with the language the United States proposed.³² The United States has reaffirmed its position in its regular reports to the U.N. under Article 40 of the ICCPR.³³ While the ICCPR’s jurisdictional limits appear clear under Article 2, the United States has a broader legal argument that international human rights law does not apply during times of armed conflict because international humanitarian law applies in its place. This concept that international humanitarian law replaces

28. See M.J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 54 (1987).

29. ICCPR, *supra* note 2, art. 2(1) (emphasis added).

30. PROVOST, *supra* note 12, at 18-24.

31. U.N. ESCOR Hum. Rts. Comm., *supra* note 3. The U.S. amendment added the words “territory and subject to its” before “jurisdiction” in Article 2(1). *Id.*

32. ICCPR, *supra* note 2, art. 2(1).

33. See U.N. Hum. Rts. Comm., *supra* note 9, at 12-25 (considering U.S. report submitted July 29, 1994); see also U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of States Parties Due in 1995: Addendum: United States of America*, 183-88, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (considering U.S. report submitted Oct. 15, 1999).

international human rights law is explained by the traditional view of *lex specialis*.³⁴

C. *The Traditional View of Lex Specialis and the Application of Human Rights Treaties During Armed Conflicts*

The traditional view of *lex specialis* dictates that when armed conflicts arise, human rights treaties are shelved and the more applicable treaties, those regulating conduct during armed conflict, are applied instead. The Latin term *lex specialis derogat lex generalis* is loosely translated as “the more specific law has precedence over the more general law.”³⁵ Since humanitarian law treaties, like the 1949 Geneva Conventions, are designed to apply only when armed conflicts occur, the humanitarian law treaties are more specific to armed conflicts than human rights treaties, which apply generally.

Lex specialis is needed because international humanitarian law, such as the 1949 Geneva Conventions, and international human rights treaties, such as the ICCPR, were developed concurrently.³⁶ Both the humanitarian law and the human rights treaties cover some related topics such as the treatment of prisoners and detained persons.³⁷ The traditional view believes “human rights governed relations between the state and its own nationals; . . . the law of war dealt with . . . the state and enemy nationals.”³⁸

Applying *lex specialis* to the application of international treaties allows legal experts to determine which of two or more conflicting treaties would control a particular situation. Under a traditional view, *lex specialis* requires the whole body of international humanitarian law to replace the whole body of international human rights law during times of armed conflict. Jean Pictet, the noted rapporteur to the 1949 Geneva

34. See *infra* Section II-C.

35. *In re Lazarus*, 478 F.3d 12, 19 (1st Cir. 2007); see also *U.S. v. Lara*, 181 F.3d 183, 198 (1st Cir.1999); see also *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 n.7 (S.D. Fla. 2006).

36. Compare Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, (signed in 1949) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (signed in 1949), with Universal Declaration, *supra* note 15, and European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (enacted in 1950); and ICCPR, *supra* note 2 (drafted in 1947–48).

37. Compare Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, with ICCPR, *supra* note 2, arts. 7–10.

38. 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 (Spring 2006).

Conventions, stated the traditional view of *lex specialis* succinctly: “Humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime.”³⁹ Treaties like the ICCPR would not apply during times of armed conflict because treaties like the 1949 Geneva Conventions are more specific to armed conflicts.⁴⁰

The jurisdictional limitations of the ICCPR and the maxim *lex specialis* support the United States position that human rights treaties in general, and the ICCPR in particular, do not apply outside U.S. territories or during armed conflicts.⁴¹ However, there exists growing international objections to the view long held by the United States. This emerging view believes that international human rights treaties including the ICCPR apply both extraterritorially and during armed conflicts.⁴²

III. THE EMERGING VIEW ON THE APPLICATION OF HUMAN RIGHTS EXTRATERRITORIALY AND DURING ARMED CONFLICTS

Despite the language of the ICCPR, the U.N., the International Court of Justice (“ICJ”), the United Nations Human Rights Committee (“UNHRC”), and other international bodies now argue that human rights treaties do apply outside a State’s territory.⁴³ This emerging view also holds that *lex specialis* does not prohibit the application of human rights treaties during armed conflicts.⁴⁴ This section will provide an overview of the emerging view.

A. *The Emerging View of Lex Specialis*

Under the emerging view, the doctrine of *lex specialis* does not require a choice of either international humanitarian law or human rights law in their entirety. Instead, the maxim should be used narrowly to apply only when a specific provision of human rights laws and a specific

39. JEAN PICTET, HUMANITARIAN LAW AND PROTECTIONS OF WAR VICTIMS 15 (1975).

40. *See id.*

41. The United States does accept that certain “fundamental human rights” apply at all times because they are considered customary international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 701 (2003). There is no official list of “fundamental human rights” but they include prohibitions against genocide, slavery and torture. *Id.* §702. Human rights treaties, on the other hand, would not apply during armed conflicts. For additional support of this view, *see* U.N. Hum. Rts. Comm., *supra* note 9, at 12–25 (considering U.S. report submitted July 29, 1994).

42. *See* discussion *infra*, Section III.

43. *See* discussion *infra*, Section III-A-B.

44. *See* discussion *infra*, Section III-A-B.

provision of humanitarian law conflict.⁴⁵ This would mean that human rights law applies all the time, even during armed conflict, unless a specific provision of humanitarian law is directly on point.⁴⁶

This emerging view is gaining broad international support. The United Nations Security Council (“UNSC”),⁴⁷ the UNGA,⁴⁸ the ICJ,⁴⁹ the UNHRC,⁵⁰ and courts in the United Kingdom⁵¹ have all supported this view. The UNGA declared that human rights exist during armed conflicts.⁵² The UNHRC believes that humanitarian law and human rights law “are complementary, not mutually exclusive.”⁵³ The ICJ advised that the protections of the ICCPR applied during times of armed conflict and that human rights law can apply at the same time as humanitarian law.⁵⁴

Some scholars believe now that this emerging view is more accepted than the traditional view.⁵⁵ The emerging view extends beyond applying international human rights law during armed conflicts. The

45. See Michelle Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict*, 194 MIL. L. REV. 1, 22 (Winter 2007).

46. See Krieger, *supra* note 6, at 268.

47. See S.C. Res. 1378, U.N. Doc. S/RES/1378 (2001); S.C. Res. 1381, U.N. Doc. S/RES/1381 (2001); S.C. Res. 1483, ¶ 8.g., U.N. Doc. S/RES/1483 (2003); S.C. Res. 1546, pmb. and ¶ 7(b)(iii), U.N. Doc. S/RES/1546 (2004); S.C. Res. 1589, ¶ 10 U.N. Doc. S/RES/1589, (2005); S.C. Res. 1723, pmb., U.N. Doc. S/RES/1723, (2006).

48. U.N. GAOR, 29th Sess., Supp. No. 31, (1974), reprinted in, SCHINDLER AND TOMAN, *LAW OF ARMED CONFLICT* 269 (1970) [hereinafter U.N. GAOR No. 31].

49. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8); *Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory*, 2004 I.C.J. 136, 178 (July 9) [hereinafter *The Wall Opinion*].

50. See *Lopez Burgos v. Uruguay*, No. 52/1979, Views of the U.N. Hum. Rts. Comm., ¶12.3, U.N. Doc. CCPR/C/13/D/52/1979, (July 29, 1981) [hereinafter *Lopez Burgos*]; U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment 31*]. The UNHRC was created by Article 28 of the ICCPR. Its responsibilities include issuing General Comments to explain provisions of the ICCPR, resolving complaints between States and issuing decisions pursuant to the First Optional Protocol to the ICCPR. ICCPR, *supra* note 2, art. 28.

51. *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26.

52. U.N. GAOR No. 31, *supra* note 48.

53. *General Comment No. 31*, *supra* note 50, at 11.

54. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 240; *The Wall Opinion*, 2004 I.C.J. at 178.

55. See Krieger, *supra* note 6, at 268 (noting that “it is generally accepted that although human rights law is applicable in armed conflicts, the rules of international humanitarian law take precedence as *lex specialis*.”); see also, Jochen Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 ISR. Y.B. HUM. RTS. 1, 10 (1998).

emerging view also holds that, despite its seemingly clear jurisdictional language,⁵⁶ the ICCPR applies outside a State's territory.

B. The Emerging View of the Extraterritorial Application of the ICCPR

The same cases and international bodies that addressed the application of human rights treaties during times of armed conflict also addressed the jurisdictional issue of the ICCPR. These bodies, including the UNHRC, the ICJ and regional human rights organizations have decided that the ICCPR does apply to any signatory nation's actions outside of its territory.⁵⁷

In 1981, the UNHRC issued an opinion that the ICCPR applies outside a State's territory, despite the language of Article 2(1).⁵⁸ In *Lopez Burgos v. Uruguay*, the UNHRC found that Uruguay's actions outside its borders could violate the ICCPR.⁵⁹ According to the opinion, Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the [ICCPR] which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."⁶⁰

The ICJ has also opined that the ICCPR applies to a nation's actions outside its territorial boundaries.⁶¹ The Court reasoned that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory."⁶² The IJC also found support in the UNHRC's "constant practice" of finding the ICCPR applicable when a "State exercises its jurisdiction on foreign territory."⁶³ In addition to the decisions of the UNHRC and the ICJ, regional human rights organizations in Europe and the Americas have also found that the human rights treaties apply extraterritorially.⁶⁴

56. ICCPR, *supra* note 2, art. 2(1)

57. *Lopez Burgos*, *supra* note 50, ¶ 12.3; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 240.

58. *Lopez Burgos*, *supra* note 50, ¶ 12.3

59. *Id.*

60. *Id.*

61. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 240 (stating that the protections of the ICCPR, a human rights treaty applies during times of armed conflict); *The Wall Opinion*, 2004 I.C.J. at 178 (cites nuclear weapons opinion and applies ICCPR to Israel's actions in occupied territory).

62. *The Wall Opinion*, 2004 I.C.J. at 101-2.

63. *Id.* at 102.

64. *Ref. Detainees in Guantanamo Bay, Cuba Request for Precautionary Measures*, Inter-Am. Comm. on Hum. Rts., Mar. 13, 2002, reprinted in 41 I.L.M. 532 (determining that the Inter-American Convention on Human Rights applies to the detainees held in U.S. custody at Guantanamo Bay, Cuba.) [hereinafter *Detainees in Guantanamo Bay*]; *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26 (applying the European

While the decisions of the UNHRC, the ICJ and the regional human rights organizations do not bind the United States, they do bind its neighbors and also many of the States that take part in current coalition military operations. Furthermore, the U.N., through its Security Council, has a significant impact on U.S. military and diplomatic actions around the world. Therefore, this emerging view will have a significant impact on U.S. military operations. The next section will examine how this emerging view will influence U.S. military operations around the world.

IV. THE IMPACT OF THE EMERGING VIEW ON U.S. MILITARY OPERATIONS

The United States cannot ignore the emerging view merely because it has a longstanding traditional view on the application of international human rights treaties. The United Nations, members of the European Union (“EU”), and States in North, Central, and South America have adopted the emerging view.⁶⁵ The views of these countries and international bodies matter because they influence, sanction, or participate in U.S. military actions around the world.

In this section, we will examine recent resolutions by the UNSC and the UNGA applying human rights treaties extraterritorially and during armed conflicts. We will also examine the decisions of the UNHRC and the ICJ on the application of the ICCPR abroad. We will also look at two regional human rights conventions, the European Convention on Human Rights and the Inter-American Convention on Human Rights to determine how their decisions may impact military operations. Each of these bodies has issued directives that will have a direct or collateral affect on U.S. military operations.

A. *The Impact of the United Nations Security Council and General Assembly*

The United Nations and its committees have a significant impact on U.S. military operations. The UNSC has the authority to approve

Convention on Human Rights to British detention operations in Iraq.); *see also* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1373-75 (August 2007).

65. S.C. Res. 1589, ¶ 10, U.N. Doc. S/RES/1589, (2005) (UN Security Council); *see General Comment 31*, *supra* note 50, ¶ 11 (UN Human Rights Committee); *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26 (Great Britain interpreting the ECHR); *Detainees in Guantanamo Bay*, *supra* note 64 (the Inter-American Court of Human Rights, which is binding on 24 nations in North, Central and South America).

military action.⁶⁶ The UNGA can issue resolutions that reflect the views of the majority of the member States.⁶⁷ Both organizations have either explicitly or implicitly affirmed the emerging view that human rights treaties apply during armed conflicts and outside a State's own territory.

1. United Nations Security Council

In its resolutions authorizing the use of force, the UNSC has reaffirmed its position that human rights and humanitarian law coexist.⁶⁸ The UNSC has sanctioned military action while at the same time calling on States to respect and enforce human rights.⁶⁹ In other words, the UNSC has called on member States to enforce human rights during a U.N. sanctioned armed conflict.

These actions further the emerging view that human rights treaties apply during armed conflicts. In addition, these actions impact the authority that the United States and its coalition partners have when engaging in UNSC approved actions. As discussed below, the recent conflicts in the former Yugoslavia, Afghanistan, and Iraq provide good examples of the emphasis on human rights during military operations sanctioned by the U.N.

a. United Nations Security Council Resolutions on Human Rights in the Former Yugoslavia.

During the U.N. sanctioned intervention in the former Yugoslavia, the UNSC issued several resolutions that dealt with both international humanitarian law and international human rights law. United Nations Security Council Resolution (UNSCR) 1031 called on all states to secure "the highest level of internationally recognized human rights and fundamental freedoms."⁷⁰ At the same time, the resolution authorized the use of force under Chapter VII and reaffirmed that States need to comply with "international humanitarian law in the former Yugoslavia."⁷¹

UNSCR 1034 went further, placing human rights and humanitarian law side by side. In authorizing additional action, the UNSC condemned "all violations of international humanitarian law and of human rights in

66. U.N. Charter ch. VII. In fact, the U.N. Charter states that any use of force, other than for self-defense, is unlawful unless approved by the U.N. Security Council. *See id.* arts. 2(4) and 51.

67. *Id.* ch. IV.

68. *See, e.g.*, S.C. Res. 1589, *supra* note 65, ¶ 10.

69. *Id.*

70. S.C. Res. 1031, ¶ 7, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

71. *Id.*

the territory of the former Yugoslavia.”⁷² Under the traditional view of *lex specialis*, only one body of international law would exist at a time.⁷³ The UNSC believes both human rights treaties and humanitarian law can coexist, and that the various militaries operating in the former Yugoslavia were required to abide by both international humanitarian law and international human rights law.

b. UNSCRs on Human Rights in Afghanistan.

The resolutions pertaining to Afghanistan in the wake of the September 11, 2001, attacks shared similar views on the need to enforce human rights during armed conflicts.⁷⁴ In UNSCR 1378, the Security Council noted it was deeply concerned by “the grave humanitarian situation and the continuing serious violations by the Taliban of human rights and international humanitarian law.”⁷⁵ In UNSCR 1381, the Security Council stressed that “all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law.”⁷⁶ Four years later, UNSCR 1589 called for “full respect for human rights and international humanitarian law throughout Afghanistan.”⁷⁷

c. UNSCRs on Human Rights in Iraq

Human rights were also approved in the resolutions pertaining to the Iraq armed conflict. In 2003, UNSCR 1483 called on all member States to promote the “protection of human rights.”⁷⁸ In 2005, UNSCR 1546 called on “all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law,” and also required States to support the U.N. in its mission to “promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq.”⁷⁹ UNSCR 1723 reaffirmed this request, emphasizing both the need for forces to comply with international humanitarian law and to promote the protection of human rights.⁸⁰

72. *Id.*

73. See discussion *supra*, Section II.

74. See S.C. Res. 1378, U.N. Doc. S/RES/1378 (2001); see also S.C. Res. 1589, *supra* note 65, ¶ 10.

75. S.C. Res. 1378, *supra* note 74.

76. S.C. Res. 1381, U.N. Doc. S/RES/1381 (2001).

77. S.C. Res. 1589, *supra* note 65, ¶ 10.

78. S.C. Res. 1483, ¶ 8 (g), U.N. Doc. S/RES/1483 (2003).

79. S.C. Res. 1546, pmb. and ¶ 7(b)(iii), U.N. Doc. S/RES/1546 (2004).

80. S.C. Res. 1723, pmb., U.N. Doc. S/RES/1723 (2006).

All of these resolutions show that the Security Council emphasizes the following of human rights during armed conflicts. As a permanent member of the Security Council, the United States has the power to veto any resolution.⁸¹ The United States did not object to this language, tacitly approving the application of human rights law to armed conflicts. Although none of these resolutions cite to specific human rights treaties like the ICCPR, they do stand for the principle that international human rights law applies during armed conflicts.

During three recent major U.N. sanctioned military actions in Afghanistan, Iraq, and the former Yugoslavia, contributing forces received a mandate to ensure human rights were being protected during armed conflicts. Each contributing State, including the United States, was bound to enforce that human rights mandate when deploying their military forces.

2. United Nations General Assembly

The UNGA has repeatedly issued resolutions stating that human rights and humanitarian law apply equally.⁸² In 1968, the General Assembly issued UNGAR 2444, titled “Respect for Human Rights in Armed Conflicts.”⁸³ That resolution called upon the Secretary-General to issue a report on how to improve protections given to individuals during armed conflict.⁸⁴ In 1970, the General Assembly issued a second resolution with the same title, clearly embracing the emerging view.⁸⁵ “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.”⁸⁶ The General Assembly has consistently held the view that human rights apply at all times, even during armed conflict.

The UNSC and the UNGA were not the only organizations in the U.N. to address the application of human rights during armed conflicts. The UNHRC has taken this one step further, by determining that the ICCPR applies outside a State’s territory and during an armed conflict.

81. U.N. Charter art. 27.

82. Universal Declaration, *supra* note 15; U.N. GAOR, 23rd Sess., Supp. No. 19, *reprinted in*, SCHINDLER AND TOMAN, LAWS OF ARMED CONFLICT 263 (1970) [hereinafter U.N. GAOR No. 19]; U.N. GAOR No. 31, *supra* note 48.

83. U.N. GAOR No. 19, *supra* note 82.

84. *Id.*

85. U.N. GAOR No. 31, *supra* note 48.

86. *Id.*

B. *The Impact of the United Nations Human Rights Committee*

The UNHRC was formed pursuant to the ICCPR and continues to develop the law on the protections in the ICCPR.⁸⁷ The UNHRC issues general comments to members of the ICCPR to explain its view on the application of ICCPR provisions.⁸⁸ The UNHRC also acts as a judicial body, arbitrating disputes brought to it by member States.⁸⁹ For twenty years in both of these capacities, the UNHRC has issued guidance stating that the ICCPR applies outside a State's territory.⁹⁰

1. UNHRC General Comments

The UNHRC, in its General Comments, has repeatedly stated that the ICCPR applies both outside a State's territory and during armed conflicts.⁹¹ The General Comments are not issued in a vacuum, but rather are issued in response to, or in recognition of, regular reports submitted by the State parties to the ICCPR.⁹² The Committee issues general comments to members and can question member representatives on the reports submitted.⁹³ In these reports, the UNHRC has repeatedly stated that human rights treaties, such as the ICCPR, apply at all times, even during armed conflicts.⁹⁴

The UNHRC determined, in concurrence with the UNSCR and UNGAR resolutions cited above, that human rights law coexists with international humanitarian law.⁹⁵ The UNHRC stated that while "more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [the rights outlined in the ICCPR], both spheres of law are complementary, not mutually exclusive."⁹⁶ In other words, human rights treaties such as the ICCPR can apply to armed conflicts at the same time that the Geneva Conventions or other humanitarian law treaties also apply.

As previously stated, the United States believes that ICCPR article 2(1) "within its territory and subject to its jurisdiction" means exactly

87. ICCPR, *supra* note 2, art. 28.

88. *Id.* art. 40(4).

89. *Id.* art. 42.

90. See *General Comment 31*, *supra* note 50, ¶ 11; see also *Vuolanne v. Finland*, U.N. Hum. Rts. Comm., Comm. No. 265/1987, ¶ 9.3, CCPR/C/35/D/265/1987 (1989) [hereinafter *Vuolanne*]; *Lopez Burgos*, *supra* note 50, ¶ 10.

91. *General Comment 31*, *supra* note 50.

92. ICCPR, *supra* note 2, art. 40(4).

93. *Id.*

94. See *General Comment 31*, *supra* note 50, ¶ 11; see also *Vuolanne*, *supra* note 90, ¶ 9.3.

95. *General Comment 31*, *supra* note 50, ¶ 11.

96. *Id.*

what it says, that an individual must be both (1) on U.S. soil; and (2) subject to U.S. jurisdiction, for the ICCPR to apply.⁹⁷ The United States also states that international human rights treaties do not apply during armed conflicts.⁹⁸ The UNHRC disagrees, calling the United States view an “excessively literal reading” which would “lead to often absurd results.”⁹⁹

General Comment 31 rejected the U.S. position on the jurisdictional language of ICCPR Article 2(1).¹⁰⁰ In General Comment 31, the UNHRC substantially broadens Article 2(1):

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.¹⁰¹

General Comment 31 effectively rewrote Article 2(1), turning “all individuals within its territory *and* subject to its jurisdiction” into “all persons who may be within its territory *or* all persons subject to its jurisdiction.”¹⁰² Under this interpretation, the ICCPR applies outside a nation’s borders to anyone in its control.¹⁰³ It also applies, according to the committee, to armed conflicts “such as forces . . . assigned to an international peace-keeping or peace-enforcement operation.”¹⁰⁴ This

97. U.S. DEP’T OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (July 1994).

98. See *General Comment 31, supra* note 47, at 12-25.

99. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 41 (1993).

100. *General Comment 31, supra* note 50; see also Satterthwaite, *supra* note 64, at 1359.

101. Lopez Burgos *supra* note 50, ¶ 10 (*emphasis added*).

102. *General Comment 31, supra* note 50 (*emphasis added*).

103. *Id.*

104. *Id.*

opinion is a reaffirmation of the UNHRC's prior opinion in General Comment 29.¹⁰⁵

In General Comment 29, the UNHRC implicitly rejected the U.S. view on the application of the ICCPR to armed conflicts:

During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if . . . the situation constitutes a threat to the life of the nation.¹⁰⁶

Implicit in General Comment 29 is that the ICCPR applies to armed conflicts.¹⁰⁷ If the ICCPR did not apply, there would be no need to derogate under Article 4 from the Covenant. The UNHRC reaffirmed both these views explicit in its UNHRC decisions.

2. UNHRC Decisions

The UNHRC has issued several committee decisions addressing the extraterritorial application of the ICCPR. Perhaps its most notable decision is *Lopez-Burgos v. Uruguay* issued in 1981.¹⁰⁸ In *Lopez-Burgos*, the UNHRC applied the ICCPR to a nation's actions outside its territory, despite the language of Article 2(1). The UNHRC heard a case from a citizen of Uruguay claiming he was tortured by the Uruguayan military while he was in Argentina.¹⁰⁹ Uruguay defended the claim in part, by stating that the ICCPR does not apply to its actions outside of Uruguay. Uruguay cited Article 2(1), saying the actions were not "within its territory" even if the citizen was "subject to their jurisdiction."¹¹⁰

The UNHRC disagreed, and found that Uruguay's actions outside its borders could violate the ICCPR. According to the opinion, Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."¹¹¹

105. U.N. Hum. Rts. Comm., *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001) [hereinafter *General Comment 29*].

106. *Id.* ¶ 3.

107. *Id.*

108. *Lopez Burgos supra* note 50.

109. *Id.* ¶ 12.

110. ICCPR, *supra* note 2, art. 2(1).

111. *Lopez Burgos supra* note 50, ¶ 12.3.

The UNHRC argued “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹¹² The UNHRC then found that Uruguay violated the ICCPR, in part for actions its agents took in Argentina.¹¹³

The UNHRC reaffirmed this view in 1999, when it found that the ICCPR applied to Israel’s occupation of the West Bank and Gaza Strip.¹¹⁴ Israel argued the traditional view, that the ICCPR’s language restricted it to “within a State’s territory” and also that the ICCPR, a human rights treaty, cannot apply during an armed conflict.¹¹⁵ The UNHRC rejected both arguments.¹¹⁶ The UNHRC noted “the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the [ICCPR].”¹¹⁷ The UNHRC then found that the ICCPR applied to Israel’s actions in the West Bank and Gaza Strip, even though the actions took place outside of the territory of Israel.¹¹⁸

These UNHRC decisions have consistently applied the ICCPR outside a State’s territory and during armed conflicts. These persistent rulings, despite objections by the United States¹¹⁹ and Israel,¹²⁰ have shaped international opinion on the application of the ICCPR. However, the UNHRC is not acting alone. The ICJ has come to similar conclusions, finding that human rights treaties can apply during armed conflicts.

C. *The Impact of the International Court of Justice*

The ICJ addressed the applicability of the ICCPR to armed conflict in an advisory opinion in 1996. Under its implementing statutes, the ICJ

112. *Id.*

113. *Id.* ¶ 13.

114. U.N. Hum. Rts. Comm., *Concluding observations of the Human Rights Committee: Israel*, ¶ 11, UN Doc. CCPR/CO/78/ISR, (Aug. 21, 2003) [hereinafter, *Israel 2003*].

115. *Id.*; see also U.N. Hum. Rts. Comm., *Concluding Observations on Israel*, UN Doc. CCPR/C/79/Add. 93, ¶ 10 (1999).

116. *Israel 2003*, *supra* note 114.

117. *Id.*

118. *Id.*

119. See U.N. Hum. Rts. Comm., *supra* note 9, at 12–25 (considering U.S. report submitted July 29, 1994); see also U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of States Parties Due in 1995: Addendum: United States of America*, 183–88, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (considering U.S. report submitted Oct. 15, 1999).

120. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 226.

can issue advisory opinions at the request of the UNGA.¹²¹ In 1995, the Secretary-General of the U.N., acting with the approval of the UNGA, requested that the ICJ issue an advisory opinion on whether it was ever lawful to use, or even threaten to use, nuclear weapons under international law, considering the ICCPR states that “no one shall be arbitrarily deprived of life.”¹²²

To answer that question, the ICJ first had to address whether the ICCPR applied in times of armed conflict. Rejecting the traditional view, the ICJ advised that the ICCPR does apply during armed conflict.¹²³ The Court advised that the ICCPR “does not cease in times of war, except by operation of Article 4 of the [ICCPR].”¹²⁴ The ICJ arrived at this decision by embracing the emerging view of *lex specialis*.

According to the ICJ, the ICCPR applies; however, it must be interpreted through the *lex specialis* of international humanitarian law. The ICJ reasoned that the ICCPR guaranteed that “[n]o one shall be arbitrarily deprived of his life” and as a result did apply during armed conflicts.¹²⁵ However, states would have two options to ensure they do not violate this right. First, the states could derogate from the ICCPR under Article 4.¹²⁶ Or, the states could apply the same provision under the lens of the international humanitarian law. In other words, applying the *lex specialis* of international humanitarian law during an armed conflict would establish that the killing of a person, even a civilian non-combatant, is not an “arbitrary deprivation of life” if it is specifically permitted under international humanitarian law.¹²⁷ No matter the outcome, the ICJ’s view is clear: the ICCPR applies during armed conflict.¹²⁸

The ICJ continues to support this view of *lex specialis*, but it has also adopted the emerging view on the extraterritorial application of the

121. Statute of the International Court of Justice, I.C.J. Acts & Docs. art. 65.

122. G.A. Res. 49/75, 5, U.N. Doc. A/RES/49/75 (Jan. 9, 1995); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 226, 227; see ICCPR *supra* note 2, art. 6.

123. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240.

124. *Id.* ICCPR Article 4 allows for States to temporarily disregard its obligations under the ICCPR because of a national emergency. *Id.*; see ICCPR *supra* note 2, art. 4. To “derogate” under Article 4, a State must have a national emergency which affects its ability to enforce the ICCPR, and it must also provide notice that it is “derogating” from the ICCPR. See ICCPR *supra* note 2, art. 4.

125. ICCPR, *supra* note 2, art. 6(1); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240.

126. ICCPR, *supra* note 2, art. 4.

127. See discussion *supra*, Section III-A.

128. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240.

ICCPR.¹²⁹ In what has become known as the “Wall Opinion,” the ICJ addressed the relationship between international humanitarian law and international human rights law.¹³⁰ The UNGA requested an advisory opinion on the legal consequences “arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory.”¹³¹ In answering the question, the ICJ addressed the issue of whether the ICCPR applied outside of a State’s territory.

In the 2004 Wall Opinion, the ICJ found that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹³² The court addressed the language in Article 2, paragraph 1, and stated that the ICCPR applies to “all individuals within its territory and subject to its jurisdiction.”¹³³ “This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction.”¹³⁴ The ICJ then decided that the ICCPR applies outside a State’s territory when States “exercise jurisdiction outside their national territory.”¹³⁵

The ICJ reasoned that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.”¹³⁶ The ICJ also found support in the UNHRC’s “constant practice” of finding the ICCPR applicable when a “State exercises its jurisdiction on foreign territory.”¹³⁷ This constant practice includes the *Lopez-Burgos* decision, among others.¹³⁸ In short, the ICJ agreed completely with the UNHRC and adopted the emerging view that a human rights law “does not cease in case of armed conflict”¹³⁹ and that the ICCPR can apply extraterritorially.

The ICJ’s opinions, building on the UNHRC opinions and comments, apply the ICCPR to State’s actions outside its territorial boundaries. Although the United States has persistently objected to these positions and is not bound by the two ICJ rulings, the rulings cannot be

129. *Id.* (stating that the protections of the ICCPR, a human rights treaty, applies during times of armed conflict).

130. The Wall Opinion, 2004 I.C.J. at 136, 178.

131. *Id.* at 141.

132. *Id.* at 180.

133. ICCPR, *supra* note 2, art. 2(1).

134. The Wall Opinion, 2004 I.C.J. at 179.

135. *Id.*

136. *Id.*

137. *Id.*

138. Lopez Burgos, *supra* note 50; *see* discussion, *supra* notes 102-07.

139. The Wall Opinion, 2004 I.C.J. at 178.

ignored.¹⁴⁰ These opinions may bind many nations that are, or will be, a coalition partner with the United States in future armed conflicts. Therefore, the United States must consider these views in its military actions abroad.

These views do not merely affect the United States' dealings with the ICJ; they also affect the United States' relationship with regional organizations. The ICJ opinions and the UNHRC comments have influenced regional human rights organizations, particularly the Inter-American Commission on Human Rights ("IACHR") and the European Commission on Human Rights ("ECHR"). The views of these regional bodies impact the United States directly, as with the detainees held at Guantanamo Bay, and indirectly, because they apply to U.S. coalition partners in armed conflicts around the world.

D. The Impact of Regional Human Rights Organizations

The UNSC, UNGA, UNHRC, and the ICJ do impact U.S. military operations, as they impact U.S. partners in military engagements. However, they are not the only international bodies which interpret human rights treaties. In addition to the ICCPR, there are regional human rights treaties that apply human rights law internationally and extraterritorially. These regional treaties outline basic human rights protections that complement the ICCPR, along with regional courts and commissions to respond to any alleged violations.

Two regional treaties have particular influence on U.S. military actions abroad: the American Convention on Human Rights (ACHR)¹⁴¹ and the ECHR.¹⁴² The opinions of these regional organizations impact the international view of the application of human rights treaties to the

140. Although the United States accepted compulsory jurisdiction of the ICJ in 1946, it terminated compulsory jurisdiction in 1986. For a discussion on the termination of compulsory jurisdiction, see Manley O. Hudson, *The Twenty-Fifth Year of the World Court Declaration of President Harry Truman Accepting Compulsory ICJ Jurisdiction*, 41 AM. J. INT'L L. 9-14 (1947); and see also *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67 (Jan. 1986). However, the United States can agree to jurisdiction on a case-by-case basis and has agreed to be bound by decisions by this Court. See Memorandum from President George W. Bush to the Att'y. Gen: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005). Therefore, the opinions of the ICJ are still important to the United States, in addition to its binding nature on those nations who still have agreed to compulsory jurisdiction.

141. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 art. 25 (1992) [hereinafter ACHR].

142. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 3, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

United States military in its actions abroad. These opinions can also indirectly affect United States interests by binding coalition partners.

1. Inter-American Commission on Human Rights View

The ACHR is a regional human rights treaty that was organized by states in Central and South America.¹⁴³ The treaty created the IACHR, a body that hears and investigates violations of the Convention.¹⁴⁴ The United States has signed, but not ratified, this treaty.¹⁴⁵ However, twenty-four states in Central and South America have ratified the treaty.¹⁴⁶

The IACHR has applied human rights law to a state's actions outside its borders. In fact, the IACHR held that human rights law applies to detainees held by the United States at Guantanamo Bay in 2002.¹⁴⁷ In the opinion, the IACHR found that the detainees at Guantanamo Bay were under the "authority and control" of the United States, and as a result, were protected by human rights treaties.¹⁴⁸ The Commission stated that it is "well recognized that international human rights law applies at all times; in peacetime and in situations of armed conflict."¹⁴⁹ The IACHR applied the human rights treaty to the United States' detention of combatants seized on battlefields in Afghanistan and transported to Cuba. In the IACHR's view, there is no argument that combatants are denied the protections of human rights laws or the claim that human rights laws do not apply during armed conflicts.¹⁵⁰ As will be seen below, the ECHR also believes the protections of human rights law, like the ICCPR, applies to detainees seized during armed conflicts.

2. The European Commission on Human Rights

The British House of Lords, citing the ECHR has applied human rights treaties to a state's actions outside its jurisdiction.¹⁵¹ In *Al-Skeini & Others v. Secretary of State for Defence*, the high court addressed an appeal where the families of Iraq detainees were attempting to sue the British government for human rights violations allegedly committed by

143. ACHR, *supra* note 141.

144. *See, e.g.*, ACHR, *supra* note 141, art. 25, 62(3).

145. ACHR, *supra* note 141, app. B-32.

146. *Id.*

147. *Detainees in Guantanamo Bay*, *supra* note 64; *see Satterthwaite*, *supra* note 64, at 1373-75.

148. *Detainees in Guantanamo Bay*, *supra* note 64; *see Satterthwaite*, *supra* note 64, at 1375.

149. *Detainees in Guantanamo Bay*, *supra* note 64, at 532-33.

150. *Id.*

151. *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26.

the British military during detention operations in Iraq.¹⁵² Bringing human rights one step closer to the battlefield, the House of Lords applied the ECHR to British operations at a detention facility in Iraq.¹⁵³ The ruling held that the ECHR, an international human rights treaty, applied to British operations in Iraq.¹⁵⁴

This decision was based on the European treaty, not the ICCPR, but the rights protected in both treaties are very similar.¹⁵⁵ There is, however, a notable difference between the jurisdictional language of the ICCPR and the ECHR. The ICCPR applies to a state “within its territory and subject to its jurisdiction.”¹⁵⁶ The ECHR differs, stating that each state shall “secure to everyone within their jurisdiction the rights and freedoms” outlined in the Convention.¹⁵⁷ This difference, while significant to the United States, may mean little to the U.N., the UNHRC, or those who espouse the emerging view. The difference did not appear significant to the House of Lords, for it relied on ICCPR precedent by citing the UNHRC’s decisions in *Lopez-Burgos*.¹⁵⁸

In fact, there were other arguments in favor of applying the ECHR only within Europe. But like the UNHRC, the British Court ignored these historical preferences that applied human rights treaties only domestically. Traditionally, the ECHR has had territorial restrictions, which has limited its applications to within the territory of its member states. For example, prior European Court opinions have described the ECHR as being “essentially regional” and that the ECHR operated “in an essentially regional context and notably in the legal space . . . of the contracting states.”¹⁵⁹ Iraq was not a “contracting state” so, under this preference, it would not apply to British military operations in Iraq. But, like the UNHRC and the ICJ, the British Court disregarded the territory and focused solely on whether the British military had jurisdiction over the Iraqi detainees.

Al-Skeini was not the only opinion which applied the European treaty outside its territory. The ECHR, created to adjudicate disputes

152. *Id.*

153. *Id.*

154. *Id.*

155. Compare ECHR, *supra* note 142, sec. I, art. 2 (right to life), art. 3 (prohibition against torture), art. 5 (right to liberty and security), art. 6 (right to a fair trial), art. 8 (right to privacy) and art. 9 (right to freedom of thought and religion), with ICCPR, *supra* note 2, art. 6 (right to life), art. 7 (prohibition against torture), art. 9 (right to liberty and security), art. 14 (right to a fair trial), art. 17 (right to privacy) and art. 18 (right to freedom of thought and religion).

156. ICCPR, *supra* note 2, art. 2(1).

157. ECHR, *supra* note 142, art. 1.

158. *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26.

159. *Banković v. Belgium*, (2001) 11 B.H.R.C. 435; see also *Al-Skeini v. Secretary of State for Defence*, 2007 UKHL 26.

under the ECHR, has also determined that a state could be liable for its actions in other states.¹⁶⁰

[A] state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating—whether lawfully or unlawfully in the latter state. . . . Accountability in such situations stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.¹⁶¹

In *Issa*, the Court cited the UNHRC's opinion in *Lopez Burgos* almost verbatim as support for its decision that the ECHR could apply outside a state's territory.¹⁶²

The UNHRC, the ICJ, the courts for the IACHR and the ECHR, and even the British House of Lords all have found that international human rights treaties can apply to a nation's actions outside its borders. They have even extended human rights treaties to military operations in Iraq and Guantanamo Bay, Cuba.

These ruling are binding on many U.S. coalition partners.¹⁶³ Many of the traditional coalition partners of the United States are parties to these regional treaties.¹⁶⁴ These decisions also reflect the emerging view that international human rights treaties apply outside a state's borders and during armed conflicts. However, international human rights bodies are not the only groups that have begun to apply the ICCPR and other human rights treaties to military operations. The U.S. military is now revising its doctrine to encourage the application of human rights protections during military operations. The U.S. military is not adopting the emerging view. Instead, the U.S. military sees a strategic benefit to applying human rights protections consistent with the emerging view during some types of military operations.

160. *Issa v. Turkey*, 41 Eur. Ct. H.R. 567 (2004).

161. *Id.* ¶ 71 (citations omitted).

162. *Id.* (citations omitted).

163. Twenty-four nations in Central and South America are part of the IACHR. ACHR, *supra* note 141, app. B-32. Forty seven Nations are members of the ECHR. ECHR, *supra* note 142. Sixty-six nations accept compulsory jurisdiction of the ICJ. International Court of Justice, *Declarations Recognizing the Jurisdiction of the ICJ as Compulsory*, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Mar. 15, 2009).

164. Parties to the ACHR include Mexico, El Salvador, Honduras, Guatamala and Peru. ACHR, *supra* note 141, app. B-32. Parties to the ECHR include the United Kingdom, France, Germany, Ireland, Italy, Poland and Turkey. ECHR, *supra* note 142.

V. U.S. POLICY ENCOURAGES THE MILITARY TO APPLY HUMAN RIGHTS TREATIES OVERSEAS

Despite its public assertions, parts of the U.S. government have begun to apply international human rights treaties, such as the ICCPR, both extraterritorially and during armed conflicts. Surprisingly, the U.S. military has led the application of human rights outside the boundaries of the traditional view.

In response to the Global War on Terror, the United States has significantly altered its doctrine on military operations.¹⁶⁵ In recognizing the increased use of the U.S. military to build or stabilize foreign governments before, during, and after armed conflict, the United States has added “stability operations” to its core doctrine.¹⁶⁶ Stability operations now maintain equal status with offensive and defensive military operations. The United States has also emphasized military operations targeted at establishing the rule of law and defeating insurgencies. In each of these areas, the United States has outlined the need to study, follow, and enforce human rights. This new emphasis on human rights, especially while the U.S. Government is arguing against applying human rights abroad, is worth exploring. This doctrine can be found in joint publications, Department of Defense Directives, and in various publications by the individual military services.

A. *Joint Publication-1 and the Support for Human Rights Around the World*

The Department of Defense’s Joint Publication-1 (“JP-1”) is the “capstone publication for all U.S. joint doctrine.”¹⁶⁷ The JP-1 applies to all of the military services and establishes the doctrine for all joint military operations.¹⁶⁸ JP-1 addresses many topics including the strategic security environment; fundamentals of U.S. military power; and operations within the military, with other U.S. agencies, and with other nations.¹⁶⁹ JP-1 also addresses the application of international law to joint operations.¹⁷⁰

165. See U.S. DEP’T OF ARMY, FIELD MANUAL 3.0, OPERATIONS (Feb. 27, 2008) foreword (calling the doctrine change “a revolutionary departure from past doctrine”) [hereinafter FM 3.0].

166. U.S. DEP’T OF DEFENSE, JOINT PUBLICATION 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES, I-5 (Nov. 14, 2000) [hereinafter JP-1].

167. *Id.* at Message from the Chairman of the Joint Chiefs of Staff.

168. *Id.* at i.

169. *Id.* at iii-iv.

170. *Id.* at I-5.

In JP-1, the United States reaffirms its commitment to international humanitarian law.¹⁷¹ JP-1 acknowledges that “the United States adheres to domestic and international law governing warfare.”¹⁷² The fact that the United States commits to following the law of war in its joint publication governing warfare is to be expected. But, JP-1 also discusses the application of international human rights law to joint military operations.

JP-1 emphasizes the need to follow human rights law during joint military operations worldwide.¹⁷³ In this doctrine, JP-1 declares that the United States “conforms to domestic and international legal conventions and prescriptions supporting human rights.”¹⁷⁴ The doctrine also reaffirms the United States support for human rights abroad.¹⁷⁵ “The United States also supports human rights worldwide, and conforms to customary international law and those international legal conventions and prescriptions supporting human rights to which it is a party. These considerations apply to the Armed Forces of the United States across the full range of military operations.”¹⁷⁶ The JP-1 doctrine emphasizes both the importance of human rights to all U.S. military operations and the need for the U.S. military to follow international human rights law.

The JP-1 doctrine does not state the United States is “bound by” international human rights law. Instead, it states the United States “conforms to” international human rights law. This is a subtle but significant distinction. It allows the United States to continue to argue that international human rights treaties like the ICCPR, do not apply to the United States outside its borders and during armed conflicts. But the fact that this military doctrine emphasizes human rights at all is significant. The primary military doctrine for joint warfare requires the U.S. military to “conform” to human rights law worldwide.

The juxtaposition of the United States support for “human rights worldwide” and its obligation to conform to its own human rights conventions suggests that it would conform to the ICCPR “worldwide.”¹⁷⁷ Even if it did not conform to the requirements of the ICCPR worldwide, the JP-1 creates some difficulty for the United States to promote worldwide support for human rights, while at the same time claiming it does not have to follow the prescriptions of the ICCPR in its worldwide actions.

171. JP-1, *supra* note 166.

172. *Id.*

173. *Id.*

174. *Id.* at vi.

175. *Id.*

176. JP-1, *supra* note 166, at I-5.

177. *Id.*

B. The Increased Emphasis on Building Stable Governments that Respect Human Rights

Department of Defense Directives (“DODD”) and Army Field Manuals (“FM”) have developed a new doctrine to recognize the increased use of the U.S. military to create, rebuild, and stabilize foreign governments.¹⁷⁸ These publications have recognized that the military can help stabilize governments by ensuring that foreign governments are following fundamental human rights.¹⁷⁹ The shift in doctrine to reflect the current status of military operations began in 2000 with a Department of Defense Directive.

DODD 3000.05 acknowledged a significant change in U.S. military operations.¹⁸⁰ Recognizing the U.S. military’s role in stabilizing foreign governments, DODD 3000.05 declared that stability operations were a “core U.S. mission” which “shall be given priority comparable to combat operations.”¹⁸¹ This declaration was a major shift in military doctrine, elevating the importance of building stable governments to equal status with combat operations. In defining “stability operations,” the directive states that the U.S. military must be prepared to “provide the local populace with security, restore essential services, and meet humanitarian needs.”¹⁸² The directive also stressed the importance of using the military to establish “the rule of law.”¹⁸³ Although DODD 3000.05 did not define “humanitarian needs” to specifically include complying with international human rights treaties, it did lay the framework for future doctrine. This new doctrine included revisions to two Army Field Manuals, which defined this new core concept of “stability operations.”¹⁸⁴

In 2008, FM 3.0, the Army’s “capstone operations manual,” implemented DODD 3000.05 by adding stability operations to the Army’s two prior core responsibilities: offensive and defensive operations.¹⁸⁵ This new emphasis on stability and support operations will require new and expanding Army doctrine to define how to rebuild or stabilize a government once offensive operations have subsided.

178. See U.S. DEP’T OF DEFENSE DIRECTIVE 3000.05 (Nov. 28, 2005) [hereinafter DODD 3000.05]; FM 3.0, *supra* note 165; FM 3.07, *supra* note 10.

179. See FM 3.07, *supra* note 10, at 1-7.

180. DODD 3000.05, *supra* note 178.

181. *Id.* at 2.

182. *Id.*

183. *Id.*

184. See FM 3.0, *supra* note 165; FM 3.07, *supra* note 10.

185. FM 3.0, *supra* note 165, at viii and 3-2 (“full spectrum operations—simultaneous offensive, defensive, and stability or civil support operations—is the primary theme of this manual.”).

Success in future conflicts will require the protracted application of all the instruments of national power—diplomatic, informational, military, and economic. Because of this, Army doctrine now equally weighs tasks dealing with the population—stability or civil support—with those related to offensive and defensive operations. This parity is critical; it recognizes that 21st century conflict involves more than combat between armed opponents. While defeating the enemy with offensive and defensive operations, Army forces simultaneously shape the broader situation through nonlethal actions to restore security and normalcy to the local populace.

....

Within the context of current operations worldwide, stability operations are often as important as—or more important than—offensive and defensive operations.¹⁸⁶

Stability operations include building, or at times rebuilding, the “political, legal, social and economic institutions” as well as supporting the “transition to legitimate local governance.”¹⁸⁷ These institutions will need a legal framework to establish laws and procedures, as well as basic rights and privileges. International human rights law, like the ICCPR, provides internationally agreed upon fundamental protections for political, social, and legal rights. In FM 3.07, the Army recognized the value of using the international human rights treaties in stability operations.¹⁸⁸

Field Manual 3.07 expands on this new core doctrine of stability operations.¹⁸⁹ The FM states that one of the primary goals of a stability operation is to establish “legitimacy” of the local government and of the mission.¹⁹⁰ One aspect of legitimacy is a government’s compliance with international human rights laws.¹⁹¹

A legitimate government acts in accordance with human rights laws and ensures that citizens have access to state resources in a fair and equitable manner. It respects the rights and freedoms reflected in the Universal Declaration of Human Rights and abides by human rights treaties to which it is a party.¹⁹²

186. *Id.* at vii.

187. *Id.* at 3-12.

188. FM 3.07, *supra* note 10, at 1-7.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

Once again, FM 3.07 acknowledges that the application of international human rights law can further U.S. military interests by helping legitimize a foreign government.¹⁹³ However, this new U.S. military doctrine is at odds with U.S. government policy on the application of human rights treaties. On the one hand, the U.S. military wants to encourage foreign governments to apply human rights laws to those under its jurisdiction. On the other hand, the U.S. government states that those same human rights treaties do not apply to the U.S. military operations in that same country.

The U.S. military, under this new doctrine, will apply and enforce human rights during its stability operations.¹⁹⁴ By doing so, the U.S. military will encourage the foreign government to apply and enforce human rights. At the same time, the official U.S. policy will be that the U.S. military need not follow international human rights treaties. In short, the U.S. military will be encouraging foreign governments to apply human rights treaties to circumstances in which the United States may officially argue they do not apply.

This new military doctrine, found in DODD 3000.05, FM 3.0, and FM 3.07, applies international human rights law to U.S. military actions during stability operations. Other U.S. military doctrines have gone even further and emphasized the benefits of enforcing human rights protections during offensive and defensive military operations.

C. *The Army and Marine Corps Counterinsurgency Manual—Using Human Rights to Defeat Insurgencies*

The U.S. Army and Marine Corps collaborated on a field manual devoted to fighting insurgencies around the world.¹⁹⁵ FM 3-24 focuses on counterinsurgency, also known as COIN operations. The purpose of FM 3-24 is to “prepare Army and Marine Corps leaders to conduct COIN operations anywhere in the world.”¹⁹⁶ The manual has sections on everything from integrating civilian and military operations to leadership and ethical issues in COIN operations.¹⁹⁷ It includes several appendices, including one on legal considerations during a counterinsurgency.¹⁹⁸

Much of the legal appendix focuses on the application of international humanitarian law to counterinsurgency operations. But once again, this military manual emphasizes the need to follow human

193. See FM 3.07, *supra* note 10, at 1-7.

194. See *id.*

195. FM 3-24, *supra* note 11.

196. *Id.* at ix.

197. *Id.* at iii-v.

198. *Id.* app. D.

rights law. According to FM 3-24, establishing the “rule of law” is one element to defeating counterinsurgency.¹⁹⁹ And a key element of the rule of law is ensuring that fundamental human rights are met.²⁰⁰ The manual goes further, and cites specific human rights treaties that are useful in counterinsurgency operations.

FM 3-24 also demonstrates that protecting fundamental human rights is important in any counterinsurgency operation.²⁰¹ “The United Nations Declaration on Human Rights and the International Convention for Civil and Political Rights provide a guide for applicable human rights.”²⁰² The FM 3-24 acknowledges that the ICCPR is a guide for determining what human rights should apply during counterinsurgency operations.²⁰³ The manual also states that failure to follow the ICCPR (by derogating from its provisions) can provide “an excuse for insurgent activities.”²⁰⁴ The FM 3-24 encourages the U.S. military to assist the host nation in providing “the full panoply of human rights.”²⁰⁵ Once again, U.S. doctrine has placed its military in the position of encouraging a host nation to apply human rights treaties when the United States argues they do not apply to U.S. actions in that host country.

D. Army Judge Advocate General Corps Manuals Emphasizing the Application of International Human Rights Law to Military Operations

The U.S. Army Judge Advocate General’s (“JAG”) Corps has also developed publications attempting to identify the role of, and the benefit of, international human rights law to U.S. military operations. Two publications are of special note: the Army FM 27-100, *Legal Support to Military Operations*, and the U.S. Army JAG School’s *Rule of Law Handbook*.²⁰⁶

FM 27-100 outlines how the Army JAG Corps provides legal support to military operations.²⁰⁷ A section of this manual focuses on the application of international law to military operations.²⁰⁸ The manual, in

199. *Id.* app. D-8.

200. FM 3-24, *supra* note 11, app. D-8.

201. *Id.*

202. *Id.* app. D-8 to D-9.

203. *Id.* (citing the United Nations Declaration on Human Rights and the International Covenant for Civil and Political Rights as “guide[s] for the applicable human rights.”).

204. *Id.*

205. FM 3-24, *supra* note 11, app. D-8 to D-9.

206. U.S. DEP’T OF ARMY, *FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS* (Sept. 2006) [hereinafter *FM 27-100*]; U.S. DEP’T OF ARMY, *RULE OF LAW HANDBOOK* (2007) [hereinafter *RULE OF LAW HANDBOOK*].

207. *Id.*

208. *Id.* at 4-40, 6-12.

discussing the application of international humanitarian law to different conflicts, recognizes that the “International Covenant of Civil and Political Rights and other human rights treaties, as well as various host nation laws according individual rights to citizens may also apply in a given situation.”²⁰⁹ Once again, an Army manual looks to the ICCPR as potentially applicable during military operations.

The Army JAG School has also written and revised a “Rule of Law Handbook”²¹⁰ to support the U.S. military’s increased emphasis on establishing and rebuilding the rule of law. One entire chapter is devoted to the International Legal Framework for Rule of Law.²¹¹ In this chapter, special emphasis is made on the value of human rights laws in formulating policy.²¹²

U.S. forces should model behavior for, and encourage actions by, the host nation government that will encourage the host nation to adopt and practice strong human rights norms. . . . [T]he . . . procedures adopted by US forces during the post-conflict phase may serve as a model for the administrative . . . procedures that the host nation adopts for domestic use, and, as a matter of policy, should consequently comply with international human rights norms.²¹³

The Rule of Law Handbook encourages U.S. forces to adopt human rights laws after armed conflicts in the hopes that these policies can be transferred to the emerging host nation government.²¹⁴

The Rule of Law Handbook is yet another example of how the military is looking to international human rights treaties, such as the ICCPR, to establish basic human rights protections that host nations can build upon when stabilizing their governments, battling insurgencies and developing their own rule of law.

As can be seen from the points above, U.S. military doctrine has acknowledged that establishing internationally recognized human rights (1) is essential to establishing the rule of law in a state, (2) is a tool for defeating an insurgency, and (3) is necessary in any stability operation to ensure that a peaceful government continues to thrive.

Nevertheless, the United States continues to argue that international human rights law, and particularly the ICCPR, does not apply to U.S. actions during armed conflicts or outside the U.S. territories. As a result, the United States publicly supports a domestic application of human

209. *Id.* at 4-40 and 6-12 (stating human rights treaties may apply to the treatment of civilians).

210. *Id.*

211. RULE OF LAW HANDBOOK, *supra* note 206, ch. IV.

212. *Id.*

213. *Id.* at 80.

214. *Id.*

rights treaties to its own actions while its military is steadily working to ensure other nations protect fundamental human rights around the world.

VI. THE UNITED STATES MUST RECONCILE ITS OFFICIAL POSITION ON THE APPLICATION OF HUMAN RIGHTS TO CONFORM WITH U.S. MILITARY DOCTRINE

The international community criticizes the United States for its position on the application of international human rights law outside the United States and to armed conflicts.²¹⁵ But as we have seen, U.S. military doctrine encourages the military to apply international human rights treaties like the ICCPR to U.S. military operations. The United States should alter its official position to conform to its current practices. The United States should concede that international human rights law can apply before, during, and after armed conflicts. The United States should also agree that, despite the plain language of Article 2(1), the ICCPR can apply outside its territory to persons subject to U.S. jurisdiction. The benefits of adopting this position will outweigh the concerns opponents have raised over expanding the reach of international human rights law.²¹⁶

A. *The United States Must Concede that the ICCPR Can Apply Extraterritorially*

The United States should move beyond its original objections to applying the ICCPR outside U.S. territories. It should forego its long held argument that Article 2(1) was placed into the ICCPR by the U.S. delegation for the specific purpose of limiting its affect to within the United States.²¹⁷ Although there is a legal basis for these objections to the emerging view, the U.S. military's experience outlined in the revisions to military doctrine show that embracing the extraterritorial application of the ICCPR can further U.S. interests.

The United States can also justly argue that any changes to this language should not come from the UNHRC, or from states that have differing views on what the provision means. Opponents suggest that change should come through adoption of an additional protocol or new resolution, which is signed and ratified by the member states.

While these arguments provide a legal basis for the U.S. position, they overlook what the United States can gain from changing its official

215. See, e.g., *General Comment 31*, *supra* note 50 (criticizing the U.S. position).

216. Hansen, *supra* note 45, at 22.

217. BOSSUYT, *supra* note 28, at 52-56; see U.N. ESCOR Hum. Rts. Comm., *supra* note 3 (Stating U.S. position that it intended the ICCPR to be limited to within its territory). See discussion, *supra* Section III.

position. The United States will join many members of the international community that have adopted the emerging view of the application of the ICCPR outside a state's territory. By doing this, the United States will once again become a driving force behind the development and enforcement of international human rights. It will also make the United States view consistent with its traditional coalition partners, allowing for better legal continuity in joint military operations. Finally, it will allow the military to lead by example in its stability operations, counterinsurgency operations and rule of law efforts. The U.S. military will encourage foreign governments to apply human rights by conceding that, when the United States operates in their country, the U.S. will be bound by the same international treaties.

B. The United States Should Concede that International Human Rights Law Can Apply During Armed Conflicts

The United States should adopt the emerging view on *lex specialis* and agree that international human rights law can apply before, during, and after armed conflicts. Conceding that international human rights law can apply will not require that international human rights law must always apply. *Lex specialis* will still be used to resolve conflicts between specific provisions.

Some may argue that applying human rights law is inconsistent with military operations.²¹⁸ First, opponents to the emerging view argue that applying international human rights law, particularly the ICCPR, to U.S. military operations could prohibit future U.S. military operations. They also argue it will make the legal regime much more complicated for those conducting military operations. Finally, they fear the possibility of lawsuits against the U.S. military. Each of these arguments are examined below.

Opponents to the emerging view argue that agreeing to be bound by the ICCPR would prohibit certain military operations.²¹⁹ Put another way, the military involves killing people and breaking things. This idea is incorporated in international humanitarian law, but not international human rights law. The Geneva Conventions and the Hague Conventions recognize that armed conflict includes killing opponents and destroying property, and even recognizes that innocent civilians may occasionally be killed so long as the deaths are not disproportionate to the military

218. See Hansen, *supra* note 45.

219. See Hansen, *supra* note 45, at 55-7.

objective gained.²²⁰ International humanitarian law also permits the prolonged detention of prisoners of war without criminal charges.²²¹ The ICCPR, on the other hand, includes the principle of right to life which cannot be derogated,²²² and prohibits prolonged or arbitrary detentions.²²³

The provisions of the ICCPR can be reconciled with armed conflict. Agreeing that international human rights law *can* apply to armed conflicts does not mean that the ICCPR *must* apply during all armed conflicts. As discussed in Section III.A, the doctrine of *lex specialis*, as applied under the emerging view, would still apply. When certain provisions of the ICCPR, such as the right to life conflict with specific provisions of the Hague or Geneva Conventions, then the specific provisions of international humanitarian law would trump human rights law.

Further, many of the provisions under the ICCPR can be derogated, that is, a state can announce that an emergency exists which allows it to temporarily ignore the requirements of the ICCPR.²²⁴ The United States could depart from the ICCPR by providing notice pursuant to the convention.²²⁵ Derogation can be achieved absent a conflict with international humanitarian law, as long as the requirements of ICCPR Article 4 are met.²²⁶

A third alternative exists. Since the United States almost always acts with U.N. authority, a derogation approval could be sought at the same time the United States seeks approval for the use of force from the UNSC. This action would allow the United States to ignore all derogable provisions of the ICCPR, with international approval. The non-derogable provisions that are inconsistent with the law of war can be excised under the doctrine of *lex specialis*. In this manner, the United States could fully comply with its international obligations without significantly impacting U.S. military operations.

Finally, opponents argue that the United States may be subject to lawsuits for its actions overseas for violation of international human rights treaties. Currently, the United States claims the ICCPR does not apply outside its territory. If so, it cannot successfully be sued in U.S. courts for its overseas actions. Should that policy change, foreign

220. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 48-49, U.N. Doc. A/32/144, (June 8, 1977).

221. See GPW, *supra* note 16.

222. ICCPR, *supra* note 2, art. 6.

223. *Id.* art. 9.

224. *Id.* art. 4 (permitting derogation of many provisions of ICCPR in “times of public emergency”).

225. *Id.*

226. *Id.*

plaintiffs may sue the United States and its citizens under the Alien Tort Statute.²²⁷

It is possible that the Alien Tort Statute could be used to bring suit against U.S. servicemembers for torture or other breaches of international human rights law.²²⁸ But this would only bring U.S. servicemembers to parity with the rest of the world.²²⁹ Right now, citizens of other nations can be sued in U.S. courts for violations of the ICCPR, but U.S. persons cannot be sued.²³⁰ Putting U.S. citizens on parity with foreign citizens in U.S. courts may be a benefit to the U.S. diplomacy. For example, allowing U.S. courts to be used for a civil suit against Specialist Charles Graner and others involved in the abuses at Abu Ghraib would provide a significant example to the international community that the United States is committed to protecting human rights.

If, however, there is a concern about subjecting U.S. servicemembers to civil law suits for their overseas service, there is a simple solution. Congress can amend the Alien Tort Statute to exclude jurisdiction over U.S. servicemembers acting outside U.S. territories. That is a far better solution than arguing the U.S. should fail to apply international human rights abroad because of concerns from a U.S. statute.

The benefits of joining a growing emerging view on the application of human rights treaties outweigh the potential impacts on U.S. military operations. Adopting the emerging view will create a common body of international law to apply with coalition partners. It will also treat U.S. persons the same as foreign citizens in U.S. Courts. But the strongest argument in favor of the emerging view comes from the U.S. military's revised doctrine. Applying international human rights treaties can help win wars, particularly those against insurgents, can help stabilize governments, and can help develop the rule of law in foreign nations.

VII. CONCLUSION

The United States must adopt the emerging view and agree that the ICCPR can apply to its actions outside the United States and even during armed conflicts. Doing so will reestablish the United States as a leader in the promotion of human rights around the world. After World War II, the United States was a driving force in the development and passing of the Universal Declaration of Human Rights ("UDHR"). The UDHR led

227. 28 U.S.C. § 1350 (2007).

228. *See id.*; John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. OF TRANSNAT'L L. 2 (2009).

229. Bellinger, *supra* note 228, at 8.

230. *Id.*

to the creation and enactment of the ICCPR, a comprehensive human rights treaty. The UDHR and ICCPR created a foundation for the development of a broad and comprehensive body of law to protect human rights around the world.

While the United States began to limit its view on when human rights treaties apply, the international community began to build on the foundation of human rights principles set forth in the UDHR and the ICCPR. The U.N., through the UNGA, UNSC, and the UNHRC, has expanded human rights protections to apply during armed conflicts and around the world. Regional human rights organizations have followed suit. Courts have also agreed; both the ICJ and the British House of Lords have applied human rights treaties beyond a state's territory and to armed conflicts. Individual nations that endorse this view include many of the United States' traditional coalition partners, including Great Britain.

Contrary to its stated policy, the United States already incorporates international human rights treaties in its military operations. In multilateral military operations, it considers human rights treaties because they bind U.S. coalition partners fighting alongside the United States. Even in unilateral U.S. military action, the United States has begun to consider human rights law during military operations. The U.S. military has emphasized that protecting human rights is an important goal in its efforts to stabilize governments, to establish the rule of law war-torn states, and to defeat insurgents.

Despite the change in the international community, the change in the views of coalition partners and the recent change in U.S. policy, the official U.S. position remains that human rights treaties, like the ICCPR, do not apply to military operations abroad. The U.S. military is stuck in the middle, and must adopt a "do as we do, not as we say" attitude towards the U.S. position. The United States' view on the application of the ICCPR must change.

The United States must adopt the emerging view. Doing so will force the international community to stop criticizing U.S. policy and start looking at U.S. actions, which incorporate human rights protections in military operations. The United States can reassert its preeminence in human rights enforcement and assure the world that it will protect human rights around the world just as carefully as it protects them within the United States. By fighting for, and with, human rights, the United States can do what Secretary of State Rice promised; lay the foundation for lasting peace.

