

Human Rights: Time for Greater Judge Advocate Understanding

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I. Introduction

For any Army judge advocate, and for judge advocates of other services as well, the instruction provided by the International and Operational Law Department at The Judge Advocate General's Legal Center and School follows a familiar pattern, whether provided in the Judge Advocate Officer Basic Course, the Judge Advocate Officer Graduate Course, or short courses, such as the Operational Law of War seminar. After a refresher on general public international law topics and the history of the law of war, a presentation outlines the legal bases for the use of force, or *jus ad bellum*. Turning to *jus in bello*, blocks of instruction are devoted to treatment of non-combatants as set forth by the various Geneva Conventions, followed by a longer individual block on means and methods of warfare, which discusses all aspects of the law related to weapons and targeting. The law of war instruction ends with a class devoted to war crimes. Depending on the course, the instruction then shifts to various operational law topics, such as rules of engagement, rule of law, and information operations.

Sandwiched somewhere in there will be a short block of instruction on human rights law. It contains all the information a judge advocate needs to know to understand the U.S. position on human rights. As discussed below, the class boils down to a few simple points, the overarching one being that human rights law has little to no applicability to operations on the ground, and, therefore, is not a topic about which the average judge advocate need be concerned.

However, the time is coming, if it has not already arrived, when judge advocates will require a more sophisticated knowledge of human rights law, not merely in an academic sense, but also as a practical aspect of operations. This article is offered in the hope of spurring greater interest in this important area of the law.

II. The United States and Human Rights

Human rights is fundamental to the fabric of the United States, and has been since its inception. The Declaration of Independence begins with the well-known words, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and

the pursuit of Happiness."¹ Here was a ringing expression of human rights, applicable to all persons merely as a result of their being human. The Declaration goes on to present a view of government as the guarantor of those rights: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."² While the final clause expresses the preference for a democratic form of government, the preceding clause expresses the Lockean view that a legitimate government has responsibilities to secure human rights to its own people.

The subsequent Constitution was concerned mostly with constructing the governmental apparatus of a representative democracy; the amendments comprising the Bill of Rights were designed to ensure that the Federal Government did not transgress any of the rights expressed therein. Compared to the Declaration's "life, liberty, and the pursuit of happiness," the enumerated rights in the Bill of Rights were necessarily more circumscribed by being specifically defined (though still in very general language); the guarantees inherent in those rights were also limited, both for being applicable only to the Federal Government and being exercised only by citizens. Nevertheless, our constitutional guarantees were great innovations of their day, and as they have been applied and expanded through additional amendments and court interpretations, have become a domestic human rights regime without peer. We should be justifiably proud of our human rights guarantees.

In the immediate aftermath of World War II, the image of government as the benevolent guarantor of the rights of its people—to the extent that this image was ever widely shared—was seriously reconsidered. One need only recall the horrors of Nazi Germany to realize that governments had often become the prime violator of rights. The *jus ad bellum* and *jus in bello*, both of which pre-dated World War II, were appreciably strengthened by the U.N. Charter and 1949 Geneva Conventions, respectively, as a result of the experience. Still, neither of these legal regimes specifically protected citizens from actions of their own government. International human rights law was born for just that purpose. The United States, secure in its domestic guarantees against these abuses, was a leading proponent of the human rights movement. Our satisfaction with the U.S. Constitution led, paradoxically, to the United States becoming party to few of the human rights treaties which it

¹ The Declaration of Independence para. 1 (U.S. 1776).

² *Id.*

helped to negotiate: Why become bound to an international convention with unknown consequences when the Constitution is perfectly adequate (with known consequences) to protect those same rights?

The United States has also made the observance of human rights a matter of foreign policy significance.³ The U.S. State Department has long studied and commented on the human rights records of other countries, and foreign aid is often conditioned upon the receiving government's "grade."⁴ Quite apart from foreign aid, the human rights comments by the United States could potentially spawn a level of human rights activism both within and without the country in question, which might lead to other human rights improvements. The State Department reports are no longer alone in the field, as non-governmental organizations, such as Amnesty International, Human Rights Watch, Freedom House, and others, publish regular reports of the human rights records of all countries.⁵

These latter organizations' efforts, by often highlighting shortcomings in the United States' own human rights record, have in many ways forced the United States onto the defensive regarding human rights. The United States is accused, rightly or wrongly, with enforcing a double standard when it comes to human rights.⁶ The many uncomfortable questions with which we have to deal include, "Why should we in Country X have to listen to you (the United States) lecture us about human rights when your record isn't that good?"; "Why do you lecture us about human rights when you are not party to the relevant treaties?"; and "If you're a party, why do you make so many reservations to the treaties or disclaim having to follow the rules outside the United States?" There are answers to all these questions, as discussed below, but merely providing a sterile legal answer to these questions neither advances the cause of human rights in general nor U.S. engagement interests in particular. Putting the United States back on the

³ See 22 U.S.C. § 2151n (LEXIS 2010) (providing that no assistance may be provided under portions of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424, codified at 22 U.S.C. §§ 2151–2431, to countries which "engage in a consistent pattern of gross violations of internationally recognized human rights."). *Id.* § 2151n(a).

⁴ See U.S. Dep't of State, *Human Rights Reports*, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited June 3, 2010) (containing country reports dating back to 1999). The reports are prepared in accordance 22 U.S.C. § 2151n(d), which requires the Secretary of State to prepare and submit to Congress "a full and complete report regarding . . . the status of internationally recognized human rights" for countries that receive U.S. foreign assistance and those that do not.

⁵ See Part IV.2 *infra*.

⁶ See Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365 (1998). The connection between human rights and a perceived double standard is not confined to the United States. See Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 LAW & INEQ. J. 467 (2007) (noting that those states against which human rights charges are levied often claim that they are being held to a different standard than others).

human rights "offensive" will require an effort as much political as legal.⁷

III. Explaining the U.S. Legal Position

A. General History of Human Rights Treaties

The U.N. Charter, while primarily a *jus ad bellum* instrument, also recognizes the need for human rights. Accordingly, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" was included among the Purposes and Principles⁸ of the Charter and, using a similar formulation, a matter which the U.N. itself⁹ and individual members¹⁰ each pledged to promote. Needless to say, the extreme generality of the underlying rights, and the responsibilities of states to observe them, make these provisions little more than indicators of future steps.

Shortly after the formation of the United Nations, human rights instruments of greater specificity were developed. The U.N. Human Rights Commission, headed by Eleanor Roosevelt, prepared the Universal Declaration of Human Rights (UDHR).¹¹ In its thirty articles, the UDHR sets forth simple declarative rights ranging from those that are fundamental (the right to life, freedom from torture, equality before the law) to those that are more aspirational (favorable conditions of work, acceptable standards of living). Notably absent is any explicit obligation for states to observe these rights, though for many of the rights, the only possible violators are clearly states. The UDHR was accepted unanimously by the General Assembly in 1948.¹² It is not, however, a treaty.¹³

⁷ See Harold Hongju Koh, *Repairing Our Human Rights Reputation*, 31 W. NEW ENG. L. REV. 11 (2009). Koh, previously Dean of Yale Law School, is now the Department of State Legal Adviser. His article, written well prior to his becoming Legal Adviser, prescribes mostly policy changes in order to cure the problems he notes with the U.S. human rights reputation.

⁸ U.N. Charter art. 1, para. 3.

⁹ *Id.* art. 55, para. c.

¹⁰ *Id.* art. 56.

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

¹² There were eight abstentions: the Soviet Union and several of its then-satellite states, Saudi Arabia, and South Africa. See Note, *The Declaration of Human Rights, The United Nations Charter and Their Effect on the Domestic Law of Human Rights*, 36 VA. L. REV. 1059, 1066 (1950).

¹³ Writing contemporaneously with the adoption of the Declaration, Professor Lauterpacht observed: "The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed." H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 356 (1948). For a detailed examination on whether the Declaration has attained the status of customary international law, and therefore become

While the U.N. Human Rights Commission was working on the UDHR, the General Assembly developed the Genocide Convention,¹⁴ which was adopted by the General Assembly in 1948 and came into force in 1951. The United States ratified the Convention in 1988. This single-purpose instrument is relatively simple in its conception and execution: the crime of genocide is defined, and states are obligated to criminalize it. Interestingly, the Genocide Convention does not by itself provide for universal jurisdiction over the crime of genocide, but it does require extradition to states that have jurisdiction to prosecute¹⁵ and contemplates that jurisdiction might be vested in international tribunals through other means.¹⁶ Concerning the latter point, specialized international tribunals, such as those addressing conflicts in the former Yugoslavia¹⁷ and Rwanda,¹⁸ have been vested with the jurisdiction to punish individuals who committed genocide, and it is also within the competence of the International Criminal Court to do the same.¹⁹

The next effort sought to turn the UDHR into binding treaty obligations. As memories of the atrocities of World War II began to fade and as many new states emerged into a world that had become increasingly polarized by the Cold War, this took longer than first anticipated. Through long negotiation, two instruments appeared in 1966: the International Covenant for Civil and Political Rights (ICCPR)²⁰ and the International Covenant for Economic, Social, and Cultural Rights (ICESCR).²¹ As suggested by

binding, see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317 (1995). Hannum presents an exhaustive survey of the pronouncements of states, courts, and commentators since 1948 on the status of the Declaration, concluding only that the Declaration has greatly contributed to whatever customary international law of human rights exists. *Id.* at 353.

¹⁴ Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹⁵ *Id.* art. 7.

¹⁶ *Id.* art. 6.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Id.

¹⁷ Statute of the International Criminal Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1192.

¹⁸ Statute of the International Criminal Tribunal (Rwanda) art. 2, Nov. 8, 1994, 33 I.L.M. 1602.

¹⁹ Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90.

²⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

their titles, the ICCPR contains most of the fundamental civil rights contained in the UDHR, while the ICESCR contains many of those that could be considered more aspirational in nature. Together, they capture all the rights in the UDHR and impose on states the obligation to observe the rights. The United States ratified the ICCPR in 1992 subject to a number of reservations;²² it signed, but has yet to ratify, the ICESCR. The ICCPR is the single most important and comprehensive human rights treaty, and its significance will be discussed below.

Continuing this chronological survey, the effort to advance human rights has generally turned to refining the rights enumerated in the UDHR and ICCPR/ICESCR, and providing some mechanism for adjudicating those rights. Article 7 of the ICCPR contains a general prohibition on torture and other cruel, inhuman, or degrading treatment;²³ the Torture Convention²⁴ of 1984 defines torture in greater detail and also requires states to widely criminalize torture, though it, like the Genocide Convention, does not go so far as to provide for universal jurisdiction. The United States ratified the Torture Convention in 1994. Similar treaties defining specific rights abound, as a short perusal of a comprehensive site such as the University of Minnesota Human Rights Library²⁵ will attest. Of the many, the United States is party to few: the Convention Concerning the Abolition of Forced Labour;²⁶ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);²⁷ the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;²⁸ and the Optional Protocol to the

²² The U.N. Treaty Database contains the status of all human rights treaties (including the ICCPR), and the reservations entered to each, at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. The United States entered five reservations, five understandings, four declarations, and one proviso to its instrument of ratification for the ICCPR. Compare William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995) (examining each of the U.S. reservations, and concluding that they are incompatible with the ICCPR and therefore invalid), with Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 31 U. ST. THOMAS L. J. 311 (2005) (arguing that the quantity and quality of the U.S. RUDs (reservations, understandings, and declarations) are consistent with those of other parties to the ICCPR).

²³ ICCPR, *supra* note 20, art. 7.

²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112.

²⁵ University of Minnesota, Human Rights Library, <http://www1.umn.edu/humanrts/index.html> (last visited June 3, 2010).

²⁶ Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 292. The Convention entered into force in 1959, and the United States ratified it in 1992.

²⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. The Convention entered into force in 1969, and the United States ratified it in 1994.

²⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. Doc. A/RES/54/263, Annex I. The United States ratified the Protocol, and it also came into force, in 2002.

Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.²⁹ These others have little practical application for a practicing judge advocate, and no more will be said about them here.

B. The International Covenant for Civil and Political Rights

The ICCPR contains the bulk of the universally recognized human rights protections. Apart from the listing of rights, the ICCPR contains two other aspects that are critical to understanding the U.S. position. The first relates to the obligations accepted by states party. The operative language is in paragraph 1 of article 2, which provides,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁰

Note the highlighted language, which is presented in the conjunctive. By the plain text, a state is bound to observe these rights only for those individuals who fulfill both conditions. The Covenant was initially drafted with the only condition being that the individual be subject to the state's jurisdiction. The United States proposed adding the words "within its territory," making it clear that it did not want an extraterritorial effect given to the rights. The matter was debated intensely, but the U.S. position—or, at least, the U.S.-proposed text—was adopted.³¹

Were this provision a part of a domestic statute interpreted by a domestic court, the result would be clear: the plain meaning of the text would govern, and both conditions in article 2 would have to be satisfied to impose the obligation on a state. The court would have no reason to consult any of the legislative history. However, treaties are different from domestic statutes. The Vienna Convention of Treaties³² makes this clear in part III, section 3, on

²⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, May 25, 2000, U.N. Doc. A/RES/54/263, Annex II. The United States ratified the Protocol, and it also came into force, in 2002.

³⁰ ICCPR, *supra* note 20, art. 1 (emphasis added).

³¹ See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123 (2005).

³² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has signed, but not yet ratified the Vienna Convention. When submitting the Convention to the Senate for its advice and consent, President Nixon included a Department of State report which declared that although "not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty

"Interpretation of Treaties." Article 31 announces the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."³³ The relevant difference from domestic interpretation rules is that for treaties, the "object and purpose" are given roughly equal weight with the text. Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31."³⁴ Together these provisions indicate that an international body interpreting a treaty is freer than a domestic court to consult sources outside of the text.

This leads to the second relevant aspect of the ICCPR. Part IV of the Covenant is devoted to creating a body called the Human Rights Committee and defining its role and powers.³⁵ In short, the Committee is empowered to collect reports periodically submitted by states party concerning their implementation of the rights contained within the ICCPR. After studying the reports, the Committee prepares its own report and "such general comments as it may consider appropriate,"³⁶ distributing both to all states party. The Committee serves to both advance the cause of human rights under the Covenant and to publicize those shortcomings it notes in the performance of the states party. It has no defined enforcement powers. Additionally, nothing in the Covenant ascribes to the Committee the power to authoritatively interpret the Covenant, though the Committee has purported to do so on many occasions.

For present purposes, the most important occasion came through General Comment 31,³⁷ in which the Committee discussed the obligations assumed by states party under article 2. Specifically, the Committee opined,

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

law and practice." Vienna Convention on the Law of Treaties Transmitted to the Senate, Sec'y Rodgers Report on the Vienna Convention on the Law of Treaties, *reprinted in* 65 DEP'T STATE BULL. 684, 685 (1971).

³³ Vienna Convention, *supra* note 32, art. 31.

³⁴ *Id.* art. 32.

³⁵ ICCPR, *supra* note 20, pt. IV (arts. 28–45).

³⁶ *Id.* art. 40(4).

³⁷ U.N. Hum. Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

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, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, 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.³⁸

In short, the Committee interprets the language “within its territory *and* subject to its jurisdiction” of article 2 to really mean “within its territory *or* subject to its jurisdiction.” Per the example provided in the last sentence quoted above, the ICCPR, in the Committee’s view, has clear extraterritorial effect.

The United States strenuously disagrees with the position of the Human Rights Committee on this interpretation and has done so publicly over the years. Most recently, the United States responded,

The United States takes this opportunity to reaffirm its long-standing position that the Covenant does not apply extraterritorially. States Parties are required to ensure the rights in the Covenant only to individuals who are (1) within the territory of a State Party and (2) subject to that State Party’s jurisdiction. The United States Government’s position on this matter is supported by the plain text of Article 2 of the Covenant and is confirmed in the Covenant’s negotiating history (*travaux preparatoires*). Since the time that U.S. delegate Eleanor Roosevelt successfully proposed the language that was adopted as part of Article 2 providing that the Covenant does not apply outside the territory of a State Party, the United States has interpreted the treaty in that manner. . .

Accordingly, the United States respectfully disagrees with the view of the Committee that the Covenant applies extraterritorially.³⁹

The dispute between the United States and the Human Rights Committee will not be resolved here, nor need it be. It is important for a judge advocate to know the basis of the dispute, but more importantly, to be able to enunciate U.S. policy: *treaty-based human rights law does not apply extraterritorially.*

C. *Lex Specialis*

The second major issue critical to the U.S. position on human rights involves the relationship between human rights law and the law of war.⁴⁰ Prior to the advent of human rights law, the law of war promoted and protected rights that, in many ways, are indistinguishable from rights subsequently recognized under human rights law, though with two main differences. First, the law of war is not merely a humanitarian code: it recognizes, through the principle of military necessity, that death and destruction are inevitable results of any armed conflict. Accordingly, it balances humanitarian principles against military necessity, occasionally favoring one over the other.⁴¹ Second, the law of war is applicable in a limited set of circumstances. More specifically, the law of war is only “triggered” during situations defined by Common Article 2 of the Geneva Conventions; that is, periods of war, international armed conflict, or occupation.⁴²

³⁹ U.S. Dep’t of State, U.S. Government’s 1-year Follow-up Report to the Committee’s Conclusions & Recommendations 1–2 (Oct. 10, 2007) (emphasis in original) (internal footnote omitted), available at <http://2001-2009.state.gov/documents/organization/100845.pdf>.

⁴⁰ The law of war is increasingly referred to as international humanitarian law, or IHL; the two terms are interchangeable, though the U.S. military continues to prefer the former term. One of the problems with IHL is that, for those new to the area, it is easy to confuse it as being concerned with human rights law.

⁴¹ See U.S. DEP’T OF ARMY, FIELD MANUAL, 27-10, THE LAW OF LAND WARFARE para. 3 (18 July 1956) (C1, 15 July 1976), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

⁴² Article 2 is common to all four Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Common Article 2 states,

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall

³⁸ *Id.* ¶ 10.

Human rights law, by contrast, is of much more general application. It is applicable to persons at all times, not just during periods of conflict. Many of the rights are stated in absolute terms, with no balancing against military considerations, and although certain protections may be suspended during times of national emergencies, these do not include the most fundamental rights.⁴³

Using this quick sketch of the two legal regimes, the law of war is clearly the more specialized set of rules, and human rights law the more generalized, though both share common humanitarian concerns. Lawyers often turn to the maxim *lex specialis derogat legi generali*, meaning special law prevails over general law, as an interpretive rule to be used when faced with two applicable but competing rules. To explain its operation in simple terms, assume there is a law establishing that no vehicle may travel faster than sixty-five miles per hour. A separate statute regulating heavy commercial trucks decrees that no commercial truck may travel faster than fifty-five miles per hour. It is easy to see that the special rule (for trucks) should control over the general rule. The same argument underlies general U.S. policy: in situations where the law of war applies, the law of war (*lex specialis*) prevails over human rights law (*lex generalis*).⁴⁴

IV. Why This Area Requires Greater Study

In a law of war program of instruction that contains a great deal of material, we have considered that the graduating judge advocate who can enunciate the U.S. policy on human rights—non-extraterritoriality and the *lex*

also apply to all cases of partial or total occupation of the territory of a High Contracting Party.

GC IV, *supra*, art. 2.

⁴³ See ICCPR, *supra* note 20, art. 4. Derogation is possible in time of “public emergency which threatens the life of the nation.” *Id.* art. 4(1). The state derogating must officially proclaim the situation to other state parties through the U.N. Secretary-General. *Id.* art. 4(3). By art. 4(2), the state may not fail to observe certain rights contained in the Covenant, even in time of emergency. These rights include arbitrary deprivation of life, torture, and slavery and servitude.

⁴⁴ The U.S. policy is stated very generally, implying that the law of war, when applicable, completely displaces human rights law. While it is easy to teach and subsequently apply such a bright-line rule, the truth is that the U.S. position is much more nuanced, though finding a comprehensive U.S. policy pronouncement is difficult. The *lex specialis* argument is more typically deployed by the United States to discrete factual circumstances. See, e.g., Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Detainees: Fuzzy Thinking All Around?*, 12 ILSA J. INT’L & COMP. L. 460, 472 (2005) (arguing that as regards the detention of combatants, the *lex specialis* of the law of war should trump human rights law). Dennis, an attorney-advisor within the State Department’s Office of the Legal Adviser, is a prolific author defending the U.S. position on extraterritoriality and *lex specialis*. See also Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISR. L. REV. 453 (2007). He makes clear, however, that his writings are presented in his personal capacity.

specialis/lex generalis distinction—is a success. After all, there are only so many hours of instruction available, and even if there were more, students can be expected to learn and remember only so much. For new judge advocates in the Basic Course and those attending short courses, we might not expect to do more. However, for students in the Graduate Course and for those seeking independent studies and continuing development as a judge advocate, human rights law is an area that deserves a much greater depth of knowledge, for some of the following reasons.

A. Human Rights Law Is Expanding

Except for some treaties related to specific weapons, the law of war has not changed appreciably in decades or more; for example, rules announced in the 1907 Hague Regulations⁴⁵ still form the basis of much of the law related to means and methods of warfare. Human rights law, though later to develop than the law of war, has blossomed since. New treaties are being proposed all of the time; bodies such as the Human Rights Committee continually issue general comments on the interpretation and execution of their particular treaties; and courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, regularly issue opinions which, while technically applicable only to those parties to their underlying treaties, have wide-spread persuasive weight. Keeping up with all of the changes is a full-time job and is neither possible nor desirable for a practicing judge advocate. The point here is not necessarily on the substance of the changes, but rather on the focus of the international community to continually expand human rights law. That focus is unlikely to change in the near future. The practicing judge advocate who ignores the growth of human rights law will eventually find that he or she is forfeiting the opportunity to participate in the formation and execution of relevant law.

B. Human Rights Advocates Have Been Successful

The International Committee of the Red Cross (ICRC) has always had the preminent role as the guarantor of and advocate for the law of war,⁴⁶ or, in their terms, international

⁴⁵ Regulations Respecting the Laws and Customs of War on Land, Annexed to the Convention (IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539. Many of the Hague Regulations were updated, in detail if not in principle, by Additional Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Note that Additional Protocol I is now over thirty years old, with no successor treaty in sight.

⁴⁶ See INT’L COMM. OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK (2009), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/html/all/p0963/\\$File/ICRC_002_0963.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/all/p0963/$File/ICRC_002_0963.PDF). In short, the Geneva Conventions provide the ICRC a mandate to conduct its humanitarian missions during

humanitarian law. Their role continues undiminished today. Nevertheless, much of their work is out of the public eye; in return for being granted special access to governmental areas and facilities, they agree to a degree of confidentiality in their correspondence with that government regarding their findings and opinions. The ICRC does maintain a robust public information campaign, as a quick perusal of their website (www.icrc.org) confirms. But lacking the ability to highlight spectacular and very specific findings of abuse, their presence in the public consciousness is muted.

The same cannot be said for those organizations advocating human rights. Unshackled by any special agreements with governments (and also rarely permitted access to facilities in which human rights abuses may occur), they are free to publish their findings to as wide an audience as possible. Having no enforcement powers over governments, publicity is their most effective, and maybe only, tool to encourage states to comply with human rights norms. Insofar as official bodies are concerned, their pronouncements reach a relatively small audience; it is unlikely that the average American citizen has even heard of the Human Rights Committee, much less read any of its general comments. Non-governmental organizations such as Amnesty International and Human Rights Watch have been much more successful in broadening their audience. Dependent as they are on private funding, mostly from individual membership dues and contributions, wide publicity also ensures the continued viability of the organization. Average citizens are still unlikely to have read the latest report by Amnesty International or Human Rights Watch, but they are likely to be exposed to media stories that incorporate aspects of those reports or comments from the organizations' representatives. Human rights advocacy has been especially effective at raising the general level of awareness of human rights practices around the world.

Allied with this is their special emphasis, and maybe over-emphasis, on U.S. human rights practices, including those of its military forces. Some of that results from the transparency associated with many of our military operations. Reporting on the military's human rights activity is relatively easy, and such reports are given greater credibility if the reporter is permitted to view, and even participate, in the operation. Much of the emphasis also relates to the reality that detailing human rights abuses by a regime such as North Korea is not news; detailing human rights abuses by the United States fits into the category of "man bites dog." For whatever reason, human rights advocates have been largely successful in changing the public discourse such that human rights are now the prism through which all military operations are viewed and judged. There is a significant hurdle to reorienting the discussion back to the law of war. Explaining issues of non-extraterritoriality or *lex specialis* doesn't fit into a sound bite

periods of armed conflict and the right to offer its services during periods of noninternational armed conflict. *Id.* at 7.

if the United States is accused of violating human rights in Iraq or Afghanistan.

C. Extraterritoriality Increasingly the Norm

The stand-off between the United States and the Human Rights Committee on the extraterritorial application of the ICCPR will not be resolved soon. The position of the United States, based as it is on the plain text of the ICCPR, is eminently reasonable. Nevertheless, the movement seems to be toward that espoused by the Human Rights Committee. For example, in the International Court of Justice's *Wall Advisory Opinion*,⁴⁷ Israel maintained the same non-extraterritorial application of the ICCPR as has the United States. The court initially assumed without discussion, that the meaning of "in the territory and subject to its jurisdiction" in article 2 of the ICCPR was ambiguous, and after noting that the Human Rights Committee had maintained its position for a number of years and after stating in conclusory fashion that the *travaux préparatoires* supported the conclusion, the court adopted the Human Rights Committee interpretation.⁴⁸ Although the court's analysis was singularly unconvincing in the case, the court's view has weight around the world, even if not in U.S. policymaking circles.

Those states party to the European Convention on Human Rights⁴⁹ (ECHR) have also had to confront extraterritoriality. Under that convention, the state must observe the rights of all persons "within their jurisdiction";⁵⁰ there is no explicit requirement that individuals be within the state's territory, which is the case under the ICCPR. In the seminal *Banković* case,⁵¹ the Grand Chamber of the European Court of Human Rights determined that the NATO bombing of Kosovo did not subject individuals on the ground to the jurisdiction of those NATO states party to the Convention. The court reasoned that "jurisdiction" is primarily a territorial concept and that extraterritorial application of jurisdiction, while possible, is an extraordinary exercise of jurisdiction,⁵² which the facts in *Banković* did not support. A subsequent case, decided by a panel of the same court, cast *Banković* into some doubt. In *Issa v. Turkey*,⁵³ the court opined that victims (shepherds in northern Iraq) could sustain a claim under the ECHR if Turkey (a state party) was shown to be operating in that

⁴⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

⁴⁸ *Id.* paras. 108–11.

⁴⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

⁵⁰ *Id.* art. 1.

⁵¹ *Banković v. Belgium*, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333.

⁵² *Id.* para. 61.

⁵³ *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 567 (2004).

area, even though the conduct occurred outside the territory of Turkey.⁵⁴ Subsequent courts have struggled to reconcile the two decisions. In *al-Skeini*,⁵⁵ the British House of Lords faced the issue in a suit by several Iraqis alleging violation of the ECHR by British soldiers in Iraq. The Lords chose to follow *Banković*, distinguishing *Issa* and similar cases, in finding that military operations in another country did not *per se* trigger jurisdiction under the Convention; however, in the case of one of the claimants, who had been killed while in a British detention facility, the Lords agreed that he was within British jurisdiction and that the claim could go forward. The issue of extraterritorial jurisdiction remains an unsettled one in the European system, and no attempt will be made to resolve it here. The point is merely that the issue is unsettled, but the consensus is moving toward extraterritorial applications of human rights responsibilities.

Clearly, these court decisions have no direct bearing on U.S. practice; decisions of the International Court of Justice technically have no precedential weight,⁵⁶ and the United States is not party to the European Convention. Nevertheless, simply citing their inapplicability does not justify ignorance of the developments. Human rights advocates will continue to press for the extraterritorial application of relevant treaties and are bound to experience successes here and there. Maintaining an absolute, though principled, position on non-extraterritoriality, as the United States does, will certainly subject that position to greater scrutiny as other states move in the opposite direction. (Commentators and human rights advocates have completed their movement. They already call for absolute extraterritorial application of human rights norms.)⁵⁷ Judge advocates will be well positioned to help their commanders withstand the scrutiny once they become more conversant with the issues.

⁵⁴ After reviewing the facts, the court determined that the evidence was not sufficient to show that Turkish forces were actually operating in the area, and it therefore dismissed the claim. *Id.*

⁵⁵ *Al-Skeini v. Sec'y State for Def.* [2007] UKHL 26.

⁵⁶ See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031, 1055 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

⁵⁷ See, e.g., Shane Darcy, *Human Rights Protections During The “War on Terror”*: *Two Steps Back, One Step Forward*, 16 MINN. J. INT’L L. 353 (2007).

There is now a growing jurisprudence of various international and regional human rights and judicial bodies confirming that human rights law can apply extraterritorially and during wartime. And as one commentator has put it, “the resisters [to this development] are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict.”

Id. at 358 (quoting Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 738 (2005)).

D. Understanding Our Coalition Partners

Coalition operations are the norm today. Especially among NATO countries, a degree of standardization has developed allowing for effective and nearly unified operations. However, as is well known, each participating nation still brings along its own laws and practices, which continues to make coalition operations challenging. For example, the United States is not a party to Additional Protocol I⁵⁸ or the Ottawa Treaty⁵⁹ on anti-personnel landmines, while nearly all of our coalition partners are. With this in mind, our coalition partners may not be permitted to conduct an operation, or conduct it in the same manner, as the United States.⁶⁰ Human rights law is another area that can affect operations among coalition members with different legal obligations. As already discussed, the British must observe the ECHR in their detention facilities. Should the United States choose to operate a joint detention facility with the British (such as the NATO-run International Security Assistance Force facilities in Afghanistan), they must be run in accordance with the ECHR. At the very least, U.S. judge advocates should appreciate the constraints under which our allies (and sometimes we) operate. Judge advocates will also find that their legal peers among coalition forces are much more aware of human rights developments. This is to be expected given their nations’ human rights obligations. In discussions about human rights, U.S. judge advocate will typically be the “odd man out,” which, while not very serious, is uncomfortable for a legal professional.

E. *Lex Specialis* Under Attack

As noted above, *lex specialis* is an interpretative canon, one born in domestic jurisprudence. Given two equally clear statutes, the more specific should be preferred over the more general. However, like all canons of interpretation, another canon will often counsel the opposite result. For example, a reasonable case can be made to apply a later-in-time general statute over an early specific one.⁶¹ Applied to the law of war–human rights law dilemma, *lex specialis* favors the application of the law of war, while a later-in-time analysis mostly favors human rights law. Again, the purpose here is

⁵⁸ Additional Protocol I, *supra* note 45.

⁵⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty), Sept. 18, 1997, 2056 U.N.T.S. 211.

⁶⁰ See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killings*, 15 DUKE J. COMP. & INT’L L. 281 (2005) (discussing the differing obligations assumed by Canada by being party to Additional Protocol I and the Ottawa Treaty and highlighting the challenges of coalition operations with the United States).

⁶¹ See Vienna Convention, *supra* note 32, art. 30(3), which provides that when successive treaties relate to the *same* subject matter, the later treaty controls over incompatible provisions of the earlier treaty.

not to suggest a resolution, but only to suggest that the *lex specialis* argument is no longer as unassailable as it once was, and to stress that judge advocates must appreciate some of the argument's other weaknesses discussed below.

The law of war and human rights law, dependent on multilateral treaties and customary international law, do not share the specificity of domestic statutes.⁶² They are often intentionally unclear in their application and rely on vague language to attract states as parties. Frequently conventional law also addresses problems incrementally. An early treaty may establish broad norms that later treaties are expected to supplement, and until such time, if ever, that later treaties come into effect, parties must operate under the broad norms. When human rights law was in its developmental stages, the law of war was easily preferred over it; the law of war's longer lineage permitted more detailed treaty norms to develop, while human rights law was still based largely on the Universal Declaration of Human Rights. But the continued development of human rights law has arguably eclipsed that of the law of war. As already discussed, courts and expert bodies refine human rights law all the time, and new expressions of human rights norms continue to be raised as potential areas of treaty law. By comparison, the law of war is standing still. Areas remain where the law of war addresses an issue more completely than human rights law—the treatment of prisoners of war⁶³ is one such area—but in general, human rights law is becoming the more specific regime.⁶⁴

Were the law of war truly comprehensive, *lex specialis* would also have considerable weight, yet it is difficult to argue that the law of war has an answer to every question. What happens when the law of war is silent on an issue? There are three options. The most ardent *lex specialis* adherents would argue that *no* binding law addresses the issue, other than general principles, such as those of the Martens clause,⁶⁵ and that states are free to do as they please so long they do not violate other positive obligations. Others, disliking a legal vacuum, might construct a binding rule within the parameters of the law of war, arguing by

⁶² See Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 381 (2007) (noting that “the nature of international law makes it a poor environment for the application of the *lex specialis* principle”).

⁶³ See GC III, *supra* note 42.

⁶⁴ It should be recalled that these human rights law developments are generally not binding on the United States, as it has ratified few among the proliferation of human rights treaties.

⁶⁵ See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000). Professor Meron traces the development of the Martens clause from its original appearance in 1899 through its most modern incarnation in Additional Protocol I: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.” Additional Protocol I, *supra* note 45, art. 1(2).

analogy to other positive rules the law of war, or suggesting that customary international law fills the void. The third group denies the applicability of *lex specialis* to the situation at all—what special law is applicable if there is no law to apply?—and therefore looks outside of the law of war to the more general rules contained within human rights law for a resolution.

But what about the case where both the law of war and human rights law have something relevant to say about a particular issue? Here the International Court of Justice has endorsed a partial *lex specialis* view. As applied to intentional killings, the Court noted that the human rights norm against arbitrary killings by the State must be interpreted in light of the law of war rules related to distinction and proportionality. In a provision from the *Nuclear Weapons*⁶⁶ case that is frequently quoted, the Court said:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁶⁷

In other words, a killing that complies with the law of war will not be arbitrary under human rights law. Note that the Court is calling for a complementary application of the two bodies of law, not one excluding the other. This view seems to have been adopted by most commentators,⁶⁸ making the

⁶⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

⁶⁷ *Id.* para. 25.

⁶⁸ See, e.g., Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict* (forthcoming 2010). Corn reviews the literature and notes the trend toward complementary application. He argues, however, that such a complementary application is most logical in the treatment of non-

strict *lex specialis* argument increasingly difficult to maintain.

F. What Is There to Fear from Human Rights Law?

The discussion to this point has characterized the law of war and human rights law as being essentially antagonistic: in the fight for law, one body of law must prevail over the other. But need it be? Many commentators believe it to be so, and their apocalyptic pronouncements for the consequences of choosing one body of law over the other appear to make a compromise position impossible.⁶⁹

Yet when looked at dispassionately, the two bodies of law are not all that different in their protections. The fundamental protections against cruel and inhuman treatment in Common Article 3⁷⁰ are not inferior to the same protections granted by human rights instruments.⁷¹ Trial rights are another example. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”;⁷² the judicial guarantees are further developed in Article 75 of Additional Protocol I.⁷³ These instruments contain nearly

combatants (“post-submission treatment of operational opponents,” in his terms); the law of war alone should govern for issues related to targeting (“pre-submission”), especially as it relates to the killing of opponents.

⁶⁹ Compare Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict*, 194 MIL. L. REV. 1 (2007) (the title accurately portrays the argument) with Dr. Saby Ghoshray, *When does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679 (2008) (questioning the continued validity of the military principles of military necessity and proportionality in light of human rights norms).

⁷⁰ Like article 2, article 3 is common to all the Geneva Conventions. See GC I, *supra* note 42, art. 3; GC II, *supra* note 42, art. 3; GC III, *supra* note 42, art. 3; GC IV, *supra* note 42, art. 3 [hereinafter Common Article 3]. Although by its terms Common Article 3 applies only to armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,” the Commentary makes clear that these same standards were intended to apply to all armed conflicts. The Commentary states:

The value of the provision [sub-paragraph (1) of Common Article 3] is not limited to the field within Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in international armed conflicts proper, when all the provisions of the Convention are applicable. For ‘the greater obligation must include the lesser,’ as one might say.

COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 38 (Jean S. Pictet ed., 1958).

⁷¹ See ICCPR, *supra* note 20, art. 7 (also prohibiting cruel, inhuman, or degrading treatment).

⁷² Common Article 3, *supra* note 70, para. 1(d).

⁷³ Additional Protocol I, *supra* note 45, art. 75. Article 75 states that any conviction must be “pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial

everything granted to defendants by the ICCPR.⁷⁴ If the scheme of complementary application suggested by the International Court of Justice, discussed above, is adopted, there may be very little practical difference in operations.

Two concerns remain, however, with an uncritical embrace of the application of human rights during times of war. The first is enforcement. In the European system, a person who has suffered a human rights violation may seek damages, but those suffering current or potential future violations may seek injunctive relief.⁷⁵ The specter of a domestic, super-national, or international court involving itself in real-time battlefield decisions, under the rubric of human rights, is a legitimate fear. The law of war contains no intrinsic mechanism for real-time assessment; where such assessment occurs, if at all, is in *post hoc* investigations or prosecutions of war crimes. However, the fear of court involvement may be overblown. In the U.S. human rights architecture, human rights treaties are generally non-self-executing, meaning courts do not have the ability to adjudicate claims based on the treaties absent implementing legislation. Also, U.S. human rights are essentially co-extensive with the Constitution, and the courts have never shown a willingness to get involved with Constitutional claims that have battlefield effects.⁷⁶ Given the near-infinite creativity of the plaintiff’s bar, newer arguments will likely be made, and will occasionally prevail, in levying judgments for damages due to human rights abuses, but few arguments will successfully change the execution of decisions made by commanders to any greater degree than already exists with the law of war.

The second concern is with the bases upon which each body of law rests. Both share a motivation to increase

procedure,” and then goes on to provide a non-exhaustive list of such judicial procedures. *Id.* para. 4. Article 75 is generally considered by the United States to be customary international law, and therefore, binding on the United States. See Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 427 (1987); *Hamden v. Rumsfeld*, 548 U.S. 557, 633 (2006) (recognizing the lack of a U.S. objection to article 75).

⁷⁴ See ICCPR, *supra* note 20, art. 14. Article 14 contains a right to counsel, in paragraphs 3(b) and 3(d), that is lacking in Common Article 3 and article 75 of Additional Protocol I. Since U.S. practice is to provide counsel to defendants in any law of war fora, this disparity between the legal regimes is inconsequential. See UCMJ art. 38(b) (2008) (providing right to counsel in courts-martial); Military Commissions Act of 2009, § 1802 (§ 949c); 10 U.S.C. § 949c (2006) (providing right to counsel in military commissions).

⁷⁵ A prime example, with a connection to the United States, is *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). In that case, the European Court of Human Rights prevented the United Kingdom from extraditing Soering to the United States to face trial in Virginia for capital murder, deciding that the “death row phenomenon,” should he be convicted, violated Soering’s rights under the European Convention.

⁷⁶ The series of cases culminating in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008), might indicate a trend in the opposite direction, though they may also be explained by the persons in question having been in U.S. custody for several years, far removed from the battlefield.

humanitarian protections, but the law of war's equal emphasis on military necessity is much stronger than the limited derogation provisions in human rights law. To raise only the most obvious example, the law of war prohibits the intentional targeting of civilians, but permits a certain number of civilian deaths, euphemistically characterized as "collateral damage," if the value of the military objective targeted is sufficiently great.⁷⁷ Within human rights law, government-initiated killings are permissible in only the most limited circumstances. The danger of shifting the terms of the argument to one entirely based in human rights is that the rules associated with military necessity will become increasingly difficult to defend, resulting in potentially unwelcome and unwise constraints.

V. Caveats

The discussion above was designed to highlight some of the complexities associated with human rights law and to suggest that the topic is worthy of greater study. Several caveats are in order, though.

First, the U.S. position on the application of human rights law extraterritorially and during war is the result of careful policy analysis. Judge advocates are not in a position to apply a different policy: our job is to be able to enunciate and defend the current U.S. policy. As discussed earlier in the paper, the U.S. policy is rather easy to state; defending it with any degree of sophistication is difficult given the limited academic instruction provided to judge advocates on the topic. Judge advocates who do investigate this area of law are welcome participants in academic discussions of the policies when it is clear that those views, to the extent that they diverge from official policy, are presented as private and not official pronouncements. At more senior levels, judge advocates may be able to participate in policy review and formation. But in the end, judge advocates are policy implementers, and therefore must know the policy in order to implement it.

Second, the current U.S. policy is reasonable and benefits from having been consistently applied over many years. The preceding discussion of the policy was designed to highlight potential weaknesses of the policy. Every position has weaknesses, and to acknowledge them does not signal defeat. Rather, an advocate must fully understand the weaknesses of a position in order to better argue its strengths.

Third, discussing the problems with the law is not as important as following the portions of the law with which we all agree. In other words, the contentious issues should not blind us to the reality that the great bulk of human rights law is not contentious and that the United States remains an important and effective advocate for the promotion of human rights worldwide. We can, and should, press aggressively for advancing human rights around the world, and we need not let some of the issues discussed above deter us from that worthy goal.

VI. Conclusion

Human rights is a huge topic, made to mean so many things that it occasionally means almost nothing. This article has attempted to focus on specific treaty obligations under both human rights law and the law of war, and the intersection of the two. These are topics squarely within the range of issues with which a practicing judge advocate should be conversant. Being familiar with the U.S. position is an absolute "must know." This article has provided a mere sketch of additional areas in the law that judge advocates are encouraged to explore and for which their interest will be amply repaid.

⁷⁷ The rule of proportionality is stated in Additional Protocol I, *supra* note 45, art. 51(5)(b).