

MILITARY LAW REVIEW

Volume 227
Issue 4

HUMAN RIGHTS CONVERGENCE AND FUTURE DETENTION OPERATIONS IN THE INDO-PACIFIC

COLONEL RYAN B. DOWDY*

I. Introduction

The Indo-Pacific Command (USINDOPACOM) Area of Responsibility (AOR) is comprised of thirty-six nations and over half of the world population, some of the world's largest militaries, and a significant portion of the world's maritime commerce.¹ Much of the international community is inextricably tied to this region through commerce, politics, and security interests. These activities are governed by international law, primarily developed through treaties established as

* Judge Advocate, United States Army. Presently assigned as the Staff Judge Advocate (SJA), 4th Infantry Division and Fort Carson. Masters in Strategic Studies, 2019, Army War College, Carlisle Barracks, PA; LL.M., 2008, The Judge Advocate General's Legal and Center School (TJAGLCS); J.D., 1999, Norman Adrian Wiggins School of Law, Campbell University, NC; B.A., Economics, 1996, University of North Carolina – Chapel Hill, NC; Graduate, 2012, Command General Staff College, Fort Leavenworth, KS. Previous assignments include SJA, 8th Theater Sustainment Command, Fort Shafter; Professor and Chair of the International and Operational Law Department, TJAGLCS; Deputy SJA, 82d Airborne Division; Boards, Plans and Assignments, Office of the Judge Advocate General Personnel Plans and Training Division; Chief, Administrative Law, U.S. Army Special Operations Command; Trial Defense, Fort Bragg, NC; Trial Counsel and Operational Law Attorney, Heidelberg, Germany. Member of the North Carolina Bar. This article is part of a larger research paper submitted in partial completion of the Masters requirement for the Senior Service College.

¹ *USINDOPACOM Area of Responsibility*, U.S. INDO-PACIFIC COMMAND HOME PAGE, www.pacom.mil/About-USINDOPACOM/USPACOM-Area-of-Responsibility/ (last visited Jan. 15, 2019).

part of the post-World War II international order under the United Nations (U.N.).²

The complexity of the USINDOPACOM AOR makes armed conflict likely in the near future.³ While international law governs armed conflict, the debate as to which bodies of international law apply in armed conflict is not settled.

The U.S. view is that the Law of War (LOW) is *lex specialis*, displacing laws that normally apply in peace.⁴ Many other states, to include several U.S. allies and key partners in the USINDOPACOM AOR, either expressly reject this view, or, through their own official statements and jurisprudence, indicate a propensity to reject this view.

Generally, the opposing view asserts that states' legal obligations during peace, specifically those pertaining to human rights, continue during armed conflict without being wholly displaced by the LOW. This opposing view is commonly referred to as the legal concept of convergence, and the body of law is generally referred to as International Human Rights Law (IHRL).⁵ The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), among other key human rights treaties, instruments, and customary international law (CIL), make up IHRL.⁶

The complexities of this debate are myriad, and arguments for and against convergence have been litigated and made the subject of numerous publications. The purpose of this article is not to argue the virtues of the

² U.N. Charter (1945).

³ *Statement of Admiral Harry B. Harris Jr., U.S. Navy Commander, U.S. Pacific Command Before the House Armed Services Committee on U.S. Pacific Command Posture*, 115th Cong. (2018).

⁴ DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 7-10 (2016) (noting that the DoD Law of War Manual, paragraph 1.6.3.1, provides that during armed conflict human rights treaties continue to apply to matters that are within their scope of application and that are not addressed by the law of war).

⁵ *E.g.*, Geoffrey Corn, *Mixing Apples and Hand Grenades – The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 INT'L HUMAN. LEGAL STUD. 52 (2010); Naz Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critic of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 U.S. NAV. WAR C. INT'L L. STUD. SERIES 349 (2010).

⁶ UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en (last visited Jan. 15, 2019).

LOW vis-à-vis IHRL, or re-hash this well documented discourse. The purpose of this article is to survey our Indo-Pacific region allies' legal obligations in detention operations and identify areas of divergence with the U.S. Department of Defense (DoD) view. Specifically, this article focuses on the likely friction that will arise regarding the detention of individuals that the United States classifies as "unprivileged belligerents."⁷ This issue, if not addressed now between the United States and its allies and partners in the Indo-Pacific AOR, will create legal vulnerabilities caused by lawfare or lack of inter-operability.

For example, Russia's use of "irregulars" in Ukraine, China's militarization of their civilian fishing vessels, and the activities of rogue states and Violent Extremist Organizations (VEOs) indicate their proclivity to operate in legal grey zones during competition activities and low intensity armed conflict.⁸ This practice has become known as conducting "lawfare."⁹ Identifying and addressing areas of divergence now is essential to reducing the risk of disruption through lawfare.

The operational impact of convergence is not theoretical. United States Central Command (USCENTCOM) encountered hurdles in conducting coalition detention operations in Iraq and Afghanistan.¹⁰ Lawsuits brought against U.S. ally the United Kingdom (U.K.) compounded these hurdles. Specifically, human rights lawsuits brought before the European Court of Human Rights (ECtHR) and within the U.K. against the British Armed Forces severely disrupted the U.K.'s ability to conduct detention operations.¹¹

⁷ LAW OF WAR MANUAL, *supra* note 4, at 102-03 and 160-62.

⁸ HARRIS STATEMENT, *supra* note 3; *Statement of General Curtis M. Scaparrotti, United States Army Commander, United States European Command to the United States Senate Committee on Armed Services in the EUCOM's 2018 Posture Statement*, 115th Cong. (2018).

⁹ See John Carlson & Neville Yeomans, *Whither Goeth the Law - Humanity or Barbarity*, THE WAY OUT - RADICAL ALTERNATIVES IN AUSTRALIA (M. Smith & D. Crossley, eds., Melbourne: Lansdowne Press 1975); Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Conference), <http://www.duke.edu/~pfeaver/dunlap.pdf> (last visited Nov. 15, 2019).

¹⁰ See generally, INVASION-INSURGENCY-CIVIL WAR, 2003-2006: THE U.S. ARMY IN THE IRAQ WAR 228-29, 428 (Joel D. Rayburn & Frank K. Sobchak, eds., 2019).

¹¹ Richard Norton-Taylor, "Military chiefs lead charge against Human Rights Act," *The Guardian Online* (April 8, 2015), <https://www.theguardian.com/news/defence-and-security-blog/2015/apr/08/military-chiefs-lead-charge-against-human-rights-act> (last visited February 10, 2019); *Al-Skeini and Others v. The United Kingdom*, App. No.

Furthermore, it is important to note that unlike the USCENTCOM AOR, the maritime nature of the USINDOPACOM AOR will present our competitors and adversaries an opportunity to manipulate IHRL as a form of lawfare beyond land domain operations. For example, the United Nations Convention on the Law of the Sea (UNCLOS), which addresses, among other things, rights of those detained at sea, may potentially serve as a new legal platform to challenge future coalition detention operations in the USINDOPACOM AOR.¹²

In order to frame the discussion on potential areas of divergence between the United States and its allies, this article first briefly reviews the European line of cases against the U.K. These cases will likely serve as persuasive authority for our allies and partners in the USINDOPACOM AOR. Then, this article considers the current legal posture of those allies in the Indo-Pacific region who appear to take a convergent approach by reviewing the official government statements, applicable laws, and open source military regulations and policies of Australia, Japan, the Philippines, and the Republic of Korea.

Worth particular analysis is New Zealand's legal posture. The U.S. military and the New Zealand Defense Forces (NZDF) continue to participate in coalition operations despite the suspension of the U.S.'s collective security obligations to New Zealand under the Australian-New Zealand-United States (ANZUS) security agreement.¹³ Furthermore, the United States and New Zealand are "Five Eye" partners, and technically remain parties to the Southeast Asia Treaty, a multi-lateral collective defense agreement still in effect despite the dissolution of the treaty's

55721/07 Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105606> (last visited Jan. 15, 2019); *Al-Jedda v. The United Kingdom*, App. No. 27021/08 Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105612> (last visited Jan. 15, 2019); *Hassan v. The United Kingdom*, App. No. 29750.09 Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-146501> (last visited Jan. 30, 2019); *Serdar Mohammed v. Ministry of Defence* (2017) UKSC 2 <https://www.supremecourt.uk/cases/docs/uksc-2014-0219-judgment.pdf> (last visited Jan. 15, 2019).

¹² United Nations Convention on the High Seas arts. 10, 11, 19, Apr. 29, 1958, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea arts. 94, 97, 101, 107, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹³ U.S. Dep't of State, Bureau of East Asian and Pacific Aff., U.S. Relations With New Zealand (2018); HARRIS STATEMENT, *supra* note, 3 at 37, 45.

North Atlantic Treaty Organization (NATO)-like enforcement organization, Southeast Asia Treaty Organization (SEATO).¹⁴

II. The European Model

Convergence is real, the significance of which is best illustrated through what our ally, the United Kingdom, endured in over a decade of litigation on these issues. Several cases from Europe stemming from British operations in Afghanistan and Iraq highlight the legal complexity of coalition detention operations: *Al-Skeini v. The United Kingdom*; *Al-Jedda v. The United Kingdom*; *Hassan v. The United Kingdom*; and *Serdar Mohammad v. The Ministry of Defence*.

This litigation occurred in both the European Court of Human Rights (ECtHRs) and the U.K.'s domestic judicial system.¹⁵ In aggregate, these cases stand for the extra-territorial application of human rights obligations, and although states must accommodate the LOW, they must also complement it with IHRL. Of particular note, the ECtHR rather explicitly disregarded Common Article 3 (CA3) as providing independent authority to detain or constituting relevant law under any modern armed conflict scenario.¹⁶

Our allies in the Indo-Pacific AOR are not members of a regional human rights convention like the European Convention on Human Rights (ECHR). However, the European model will likely serve as persuasive authority in Indo-Pacific regional domestic courts considering their countries' human rights obligations during armed conflict.

III. Allies and Partners in the Indo-Pacific

A. Australia

¹⁴ U.S. Dept' of State, Bureau of East Asian and Pacific Aff., U.S. Relations With Thailand (2018); HARRIS STATEMENT, *supra* note, 3 at 37-8.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁶ *Hassan v. The United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. (2014) 33, 96-107 <http://hudoc.echr.coe.int/eng?i=001-146501> (last visited Jan. 19, 2019); Diane Webber, *Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict?*, 19 AM. SOC'Y OF INT'L L. 7 (2015).

Australia signed the ICCPR in 1972 and incorporated it into the law of the commonwealth in 1980.¹⁷ The Australian delegation did not express any reservations at that time with respect to application of the ICCPR in armed conflict. However, in a 2009 response in the U.N.'s Universal Periodic Review process by the U.N. Human Rights Council, Australia's representatives stated that the LOW is the *lex specialis* in armed conflict. The Australian officials then described what is actually a complementary approach to the interplay of the LOW and IHRL. Specifically, the Australian officials acknowledged that certain aspects of Australia's obligations under the ICCPR extended to its activities in armed conflict when the two laws were not in conflict.¹⁸ This view mirrors the accommodation approach applied by the U.K. Supreme Court in *Serdar*.

Under domestic law, Australia's treaty obligations do not constitute a direct source of individual rights or government obligations absent incorporation into its legislature. However, the High Court of Australia (High Court) made clear in its 1995 decision in *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* that treaties signed by Australia's executive are highly persuasive and shall apply when consistent with domestic law.¹⁹ The High Court emphasized that treaty obligations serve as a "positive statement . . . to the world" that Australia's "executive government and its agencies will act in accordance" with its treaty obligations.²⁰

The High Court's opinion established what is now referred to as the "legitimate expectation" principle, a principle followed by its courts and by Australia's Human Rights Commission.²¹ The Australian Human Rights Commission interprets this principle to mean that Australia has

¹⁷ *Status of Treaties*, UNITED NATIONS TREATY COLLECTION HOME PAGE, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Dec. 20, 2018),

¹⁸ Bruce Oswald, *Interplay as Regards Dealing with Detainees in International Military Operations*, CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 81 (Erika De Wet & Jann Kleffner eds., 2014).

¹⁹ Laitai Tamata, *Application of the Human Rights Conventions in the Pacific Islands Courts*, 4 J. OF S. PACIFIC L.2000 (2017).

²⁰ Human Rights and Equal Opportunity Commission, *Australia's Human Rights Obligations, A LAST RESORT? NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION* 90, (2004), https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf.

²¹ *Id.* at 90, 92, 100-1.

agreed to adhere to the international system of law created through its treaty obligations, to include its ratification of the ICCPR.²²

Australia's 2009 expression of the interplay of the LOW and the ICCPR invites extraterritorial application of IHRL obligations to Australian detention operations in instances of handling unprivileged belligerents. Furthermore, under the "legitimate expectation" principle, Australia's judiciary would likely grant standing for consideration of relief under the ICCPR to any detainee held by Australian Defense Forces under the auspices of CA3 and Additional Protocol I (API) or Additional Protocol II (APII).

B. Japan

Japan is a party to ten U.N. human rights-based instruments including the ICCPR, which it ratified in 1979. Japan ratified the ICCPR without reservations regarding the treaty's application in armed conflict.²³ Japan's Constitution provides that Japan's treaties constitute domestic law.²⁴ Furthermore, Japan's criminal code generally prohibits warrantless detention, and its Habeas Corpus Act allows any individual detained to sue for release for due process violations.²⁵ Specifically, authorities may detain individuals for up to seventy-two hours without indictment, but then a judge must review the case.²⁶

Japan's Self Defense Force (JSDF) is an armed force but structured primarily to defend Japan's air, sea, and land.²⁷ Under a self-

²² *Id.*

²³ *Ratification Status of Japan*, UNITED NATIONS HUMAN RIGHTS COMMISSION, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=87&Lang=EN (last visited Feb. 10, 2019).

²⁴ Replies of Japan to the List of issues in relation to the sixth periodic report of Japan 1, U.N. Human Rights Committee, CCPR/C/JPN/Q/6/Add.1 (July 2014), <https://www.mofa.go.jp/files/000449793.pdf>

²⁵ International Committee of the Red Cross, *Japan - Practice Relating to Rule 99, Deprivation of Liberty*, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_jp_rule99 (last visited Feb. 10, 2019).

²⁶ U.S. Dept' of State, Bureau of Democracy, H.R. and Lab., Japan 2015 Human Rights Report, 7 (2015).

²⁷ Cent. Intelligence Agency, East Asia/Southeast Asia: Japan: The World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Feb. 10, 2019); YOSHIKAZU WATANABE, ET AL., THE U.S.-JAPAN ALLIANCE AND ROLES OF THE JAPAN SELF-DEFENSE FORCES 1-8 (2016).

defense construct, Japan's domestic law strictly governs the JSDF and Japan's Ministry of Defense (MOD).²⁸ Japan's MOD utilizes a "national response framework" designed under Japan's laws for responding to "armed attack."²⁹ These laws place a number of requirements on the MOD, including implementation of fundamental principles of International Humanitarian Law (IHL), also referred to as the LOW, in an armed attack.³⁰

With respect to detention operations, Japan's "Prisoner of War Law" applicable in armed attack is designed to guarantee adherence to IHL.³¹ It establishes the scope and application of the law, defines categories of those captured, and provides the process for handling detainees. Interestingly, with respect to IHL, the Prisoner of War Law draws entirely from the Third Geneva Convention and API and defines the categories of those that may be interned as spies, saboteurs, and members of enemy armed forces that fail to adhere to their obligations under API.³² Except for making a reference to "enemy armed forces" including "other similar organizations," the Japanese Prisoner of War Law is silent as to instances of Non-International Armed Conflicts (NIACs) and does not mention CA3 or APII.³³

The relevance of Japan's self-defense legal framework is that it is primarily constructed to address international armed conflict and does not address the legal rights of members of organized armed groups or civilians directly participating in hostilities. Therefore, Japan will likely extend their IHRL and domestic human rights obligations in instances of detaining those categories of unprivileged belligerents.

²⁸ *Id.* at 8.

²⁹ Ministry of Defense of Japan, Framework for Activities of the SDF and others after the Enforcement of the Legislation for Peace and Security: Defense of Japan (2018), http://www.mod.go.jp/e/publ/w_paper/pdf/2018/DOJ2018_2-3-2_web.pdf.

³⁰ Ministry of Defense of Japan, Framework for Responses to Armed Attack Situations: The Basics of Japan's Defense Policy 130 (2006) http://www.mod.go.jp/e/publ/w_paper/pdf/2006/2-3-1.pdf

³¹ Ministry of Defense of Japan, *supra* note 29 at 240.

³² Act on the Treatment of Prisoners of War and Other Detainees, Act No. 117 of 2004, art. 3 (Japan) *translated in*

www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=1866.

³³ *Id.*

C. The Philippines

The Philippines ratified the ICCPR in 1986.³⁴ The Philippines delegation did not register any interpretive limitations with respect to the scope and application of the ICCPR and has incorporated the ICCPR into its domestic laws.³⁵

The Human Rights Commission (HRC) of the U.N., throughout periodic reviews, has raised a number of concerns regarding the Philippines' perceived lack of adherence to their human rights obligations in counter-terrorism operations.³⁶ Despite these concerns of actual compliance, the Philippines' official position in its response is that it applies a convergent approach to the military detention activities. Specifically, in the Philippines' 2012 response to the HRC, the Philippine Government reaffirmed that its obligations under the ICCPR constituted the "law of the land" and applied to all aspects of its government activities.³⁷

With respect to military governance, the Armed Forces of the Philippines (AFP) are authorized to conduct counter-terrorism operations pursuant to the Republic Act No. 9372, entitled *An Act to Secure the State and Protect Our People from Terrorism* and referred to as the *Human Security Act of 2007*.³⁸ Pursuant to Section 3 of this Act, terrorism includes piracy, insurrection, and coups, and therefore would likely apply to NIACs. Additionally, the Act is not limited by geography and therefore applies to domestic and extraterritorial operations as written.

Furthermore, in Section 2, Declaration of Policy, the Act mandates that government activities, to include that of its military, "shall not prejudice respect for human rights which shall be absolute."³⁹

³⁴ *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited Mar. 11, 2019).

³⁵ *Id.*

³⁶ *Human Rights by Country*, UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER HOME PAGE, <https://www.ohchr.org/en/countries/asiaregion/pages/phindex.aspx> (last visited Mar. 11, 2019).

³⁷ Republic of the Philippines, Reply to List of Issues, Reporting Status for the Philippines, U.N. Human Rights Committee (2012).

³⁸ An Act to Secure the State and Protect Our People from Terrorism, Rep. Act No. 9372, (2007) (Phil.).

³⁹ *Id.*

Specifically, the Act proscribes rigorous compliance with law enforcement and judicial processes associated with principles of human rights. Sections 7 through 18 of the Act establish additional protections pertaining to surveillance, searches and seizures, and the requirement for judicial review within three days of apprehension.⁴⁰

D. The Republic of Korea

The Republic of Korea (ROK) is a state party to ten international human rights instruments including the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴¹ The U.N. HRC has expressed concerns about the ROK's domestic laws and, in application, its conformity with IHRL with respect to "arrests and detentions."⁴²

In its official responses to the U.N. HRC, however, ROK officials reassured the HRC of its intent to comply with its international human rights obligations. First, the ROK argued that its Constitutional Court protects against arbitrary application and violations of due process within its domestic criminal system.⁴³ Second, the ROK pointed out that its National Assembly incorporated the Rome Statutes into its domestic law, criminalizing, among other grave breaches of international law, crimes against humanity.⁴⁴

The ROK's domestic criminal laws criminalize armed aggression against the ROK. Specifically, the *Criminal Act* and the *National Security Act* criminalize taking part in insurrection or providing material assistance to foreign aggression against the Republic.⁴⁵ Jurisdiction under these acts

⁴⁰ *Id.*

⁴¹ *Ratification Status for the Republic of Korea*, UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER HOME PAGE, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=141&Lang=EN (last viewed Feb. 11, 2019).

⁴² Comm. Against Torture, *List of issues prior to the submission of the combined third to fifth periodic reports of the Republic of Korea*, CAT/C/KOR/Q/3-5, 45th session (Nov. 1-19, 2010) 1-2.

⁴³ Republic of Korea, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure – Republic of Korea, at the U.N. Comm. against Torture (Feb. 29, 2016) in the Fourth Periodic Report at 3).

⁴⁴ *Id.*

⁴⁵ Criminal Act, Act No. 11731, Part II, Chapters I-II, National Assembly of the Republic of Korea (2013), *translated in* Criminal Act, Korean Law Translation Center ,

applies within the territory of the ROK and on any ROK sea or air vessel.⁴⁶ Furthermore, the *Criminal Act* extends jurisdiction extraterritorially over Korean nationals and aliens that commit certain acts of aggression or insurrection abroad against the ROK.⁴⁷

The key to understanding the ROK's approach under its domestic criminal law is to see that individuals considered unprivileged belligerents by the U.S. under the LOW would likely fall under the purview of the ROK's *Criminal Procedure Act*.⁴⁸ The *Criminal Procedure Act* is comprehensive and details the investigative and judicial procedures including the rights of the accused from arrest through the judicial appeal process. Of note, the Act extends a number of protections that align with fundamental principles of human rights with respect to judicial guarantees and protections against arbitrary detention.

Specifically, the Act places a time limit on detention prior to the initiation of formal prosecution, a ten-day period of which may only be extended once by a district judge.⁴⁹ Furthermore, the suspect must be immediately informed of the basis of detention, and be provided access to an attorney.⁵⁰ The *National Security Act*, *Criminal Act*, and *Criminal Procedure Act* do not align with the U.S. view that the LOW permits indefinite detention of unprivileged belligerents for imperative security reasons.

https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019); National Security Act, Act No. 11042, National Assembly of the Republic of Korea (2011), *translated in* National Security Act, Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=26692&lang=ENG (last visited Jan. 14, 2019).

⁴⁶ Criminal Act, Act No. 11731, Part I, Chapter I, National Assembly of the Republic of Korea (2013), *translated in* Criminal Act, Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019); Criminal Procedure Act, Act No. 14179, Art. 4, National Assembly of the Republic of Korea (2009) *translated in* Criminal Procedure Act, Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG (last visited Jan. 14, 2019).

⁴⁷ Criminal Act, Act No. 11731, Part I, Chapter I, Art. 3-5, National Assembly of the Republic of Korea (2013), *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019).

⁴⁸ Criminal Procedure Act, Act No. 14179, National Assembly of the Republic of Korea (2009) *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG (last visited Jan. 14, 2019).

⁴⁹ *Id.* at arts. 202, 203, 205.

⁵⁰ *Id.* at arts. 88, 90.

E. New Zealand

In 1948, New Zealand's Prime Minister Peter Fraser took a lead role in the creation of the UDHR.⁵¹ Today, New Zealand is a signatory to seven U.N. human rights treaties, and has incorporated much of its international obligations in its domestic law.⁵² Specifically, with respect to the ICCPR, New Zealand's Bill of Rights Act of 1993 incorporates many of the enumerated rights of the ICCPR and requires its government agencies to abide by these obligations.⁵³ During the process for making reservations to the ICCPR, New Zealand did not express any limitations as to the application of the ICCPR with respect to armed conflict.⁵⁴

The NZDF is obligated to comply with New Zealand's international and domestic legal obligations.⁵⁵ The NZDF's recently updated 2019 Manual of the Armed Forces Law reinforces this point. The Manual provides that the LOW is the *lex specialis* in the conduct of war and applies specifically to those issues it was intended to address, for example POWs.⁵⁶ However, the Manual also applies a complementary approach. It emphasizes that NZDF's legal obligations "include[] aspects" of IHRL, and in cases of "overlapping provisions," the NZDF must comply with all binding provisions.⁵⁷

Chapter 12 of the Manual, titled "Persons Deprived of Their Liberty," covers NZDF detention operations. This chapter categorizes persons deprived of their liberty as prisoners of war, retained personnel, internees, and detainees.⁵⁸ New Zealand's category for "detainees" mirrors what the U.S. DoD considers unprivileged belligerents.⁵⁹ Specifically, in section

⁵¹ *Human Rights*, NEW ZEALAND HUMAN RIGHTS COMMISSION HOME PAGE, <https://www.hrc.co.nz/your-rights/> (last visited Mar. 21, 2019).

⁵² *International Human Rights - Constitutional Issues and Human Rights*, NEW ZEALAND MINISTRY OF JUSTICE HOME PAGE, <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/> (last visited Jan. 15, 2019).

⁵³ HUMAN RIGHTS COMMISSION, *supra* note 50.

⁵⁴ MINISTRY OF JUSTICE, *supra* note 51.

⁵⁵ New Zealand Defence Force, *Legitimacy and Force*, NEW ZEALAND DEFENCE DOCTRINE NZDDP-D, 39-40 (4th ed. 2017).

⁵⁶ Directorate of Legal Services, *Section 2 – The Nature of the Law of Armed Conflict*, in DEFENCE MANUAL 69 – MANUAL OF ARMED FORCES LAW – LAW OF ARMED CONFLICT 3-5 (4th ed. 2019).

⁵⁷ *Id.* at 2-4, 3-5, 3-6.

⁵⁸ *Id.* at 12-1.

⁵⁹ *Id.* at 12-1.

12.2.3, the Manual classifies a detainee as a person not entitled to POW, retained personnel, or internee status, and who is detained for any reason in an International Armed Conflict (IAC) or a NIAC.⁶⁰

Like the U.S., the NZDF derives its authority to capture a detainee from the LOW.⁶¹ However, the U.S. DoD and the NZDF positions diverge as to the legal basis, or at least the scrutiny associated with the legal basis, for continued detention. Specifically, the NZDF Manual provides that a “more specific legal basis is necessary” for continued detention other than the fact that hostilities are on-going.⁶² The difference in approaches is substantive in that the NZDF Manual cites to the “ICRC Customary IHL rule 99 – Arbitrary deprivation of liberty prohibited” as its source, a rule that draws heavily from IHRL and the ICCPR.⁶³

F. Rome Statute of the International Criminal Court

On a related matter, it is also important to note that our security agreement allies discussed in this paper, except for the Philippines and Thailand, are parties to the Rome Statute.⁶⁴ The Philippines was a signatory of the Rome Statute but gave notice of withdrawal on March 17, 2018, a decision that became effective one year later.⁶⁵ Therefore, except for the Philippines and Thailand, U.S. allies in the region have given legal effect to the Rome Statute within their domestic law and have ceded a portion of their judicial sovereignty to the International Criminal Court (ICC).⁶⁶

⁶⁰ *Id.* at 12-6.

⁶¹ *Id.* at 12-8.

⁶² *Id.* at 12-36.

⁶³ *Id.* at 12-36; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES, Int’l Comm. of the Red Cross (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press 3d ed. 2009) (2005).

⁶⁴ *State Parties to the Rome Statute*, THE HAGUE INTERNATIONAL CRIMINAL COURT HOME PAGE, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 12, 2019).

⁶⁵ *ICC Statement on The Philippines’ notice of withdrawal*, INTERNATIONAL CRIMINAL COURT HOME PAGE, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> (last visited Mar. 22, 2019).

⁶⁶ Rome Statute of the International Criminal Court, Preamble art. 1, 4, July 17, 1998, 2187 U.N.T.S. 90); Preliminary Examination – Republic of Korea, OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT HOME PAGE, <https://www.icc-cpi.int/korea> (last visited Feb. 12, 2019).

The ICC is a court of complementary jurisdiction to a state party's court and is charged with investigating and trying cases of alleged grave breaches of international law, to include crimes against humanity.⁶⁷ The Rome Statute provides that deprivation of liberty in "violation of fundamental rules of international law" is a crime against humanity.⁶⁸ Therefore, the ICC would have complementary purview over detention operations conducted by our allies, except for Thailand and the Philippines, and would apply IHRL norms if granted jurisdiction over a complaint.

IV. Conclusion

Conducting coalition detention operations in the USINDOPACOM AOR will be legally complex. Without a plan, the interplay of the LOW and IHRL will be disruptive to the operations. Proper planning is imperative because the joint force has a responsibility to account for "special considerations" that will impact detention operations.⁶⁹ While the Army is the DoD-designated Executive Agent for the detainee operations program, the future of coalition detention operations in the Indo-Pacific AOR is a joint force problem, especially considering the maritime nature of the theater.

Consensus between the U.S. and our allies will be essential to conducting effective, interoperable coalition detention operations. A potential starting point for planning for and achieving consensus would be to use "The Copenhagen Process on the Handling of Detainees in International Military Operations" (Copenhagen Process) as a starting point.⁷⁰

The Copenhagen Process provides principles and guidelines for the handling of detainees that the U.S. considers unprivileged. However, the

⁶⁷ *How the Court Works*, INTERNATIONAL CRIMINAL COURT HOME PAGE, COMMENT Rule 18.2.2.b.ii, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Feb. 12, 2019).

⁶⁸ Rome Statute, *supra* note 64, at art. 7.

⁶⁹ JOINT STAFF, JOINT PUBLICATION 3-63, III-1, para. 2, (2014)

⁷⁰ Denmark Ministry of Foreign Affairs, *The Copenhagen Process: Principles and Guidelines*, (2012).); Bruce Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16 ASIL INSIGHTS ONLINE 39 (2012), <https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees> (last visited Feb. 10, 2019); DoD LAW OF WAR MANUAL, *supra* note 4, at 513-4.

Copenhagen Process has its limitations and really is just a potential starting point. First, of the U.S.' security agreement allies in the Indo-Pacific, only Australia is a party to this process. Second, the Copenhagen Process was only intended to apply to a NIAC and not an IAC. An IAC, especially with respect to asymmetric threats, does not preclude the inevitability that states will detain belligerents that fall within the grey area between the LOW and IHRL. Finally, the parties to the process did not reach consensus as to the application of IHRL to detention operations in armed conflict.⁷¹

Despite these limitations, without planning and consensus, interoperable coalition detention operations will not be feasible. Furthermore, absent proper planning, key challengers in this region, specifically Russia, China, the Democratic People's Republic of Korea, and VEOs will exploit vulnerabilities and leverage IHRL to conduct lawfare through fraudulent lawsuits.

⁷¹ Bruce Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16 ASIL INSIGHTS ONLINE 39 (2012), <https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees> (last visited Feb. 10, 2019).