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ARTICLES

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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ORDER OUT OF CHAOS: DOMESTIC ENFORCEMENT OF THE LAW OF INTERNAL ARMED CONFLICT

MAJOR ALEX G. PETERSON[1]

I. Introduction

> *It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents.*[2]

States are structured social orders.[3] They serve to bring about the comprehensive coordination of individual energies. For "those affairs which a state cannot deal with exclusively within their own boundaries" there exists international law.[4] International law stabilizes the interna-

1. Judge Advocate, United States Marine Corps. Presently assigned as the Staff Judge Advocate, U.S. Marine Corps Forces, South, Miami, Florida. LL.M., 2001, The Judge Advocate General's School, United States Army; J.D., 1992, University of Utah, School of Law; B.S., 1989, University of Oklahoma. Formerly assigned as Judge Advocate Occupational Field Manager, Judge Advocate Division, Headquarters Marine Corps, 1998-2000; Marine Corps Aide de Camp to the Navy Judge Advocate General, Office of The Judge Advocate General, 1996-1998; Trial Counsel/Special Assistant, U.S. Attorney, Marine Corps Recruit Depot, San Diego, California, 1995-1996; Legal Assistance Officer, Chief, Legal Assistance, Marine Corps Recruit Depot, San Diego, California, 1994-1995; Series Commander, India Company, 3rd Recruit Training Battalion, Recruit Training Regiment, Marine Corps Recruit Depot, San Diego, California, 1993-1994. This article was submitted as a thesis in partial completion of the Master of Laws requirements of the 49th Judge Advocate Officer Graduate Course.

2. James Madison, A Memorial and Remonstrance, Address to the General Assembly of the Commonwealth of Virginia (June, 20 1785), http://worldpolicy.org/americas/religion/madison-remonstrance.html.

3. GERHART NIEMEYER, LAW WITHOUT FORCE, THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 313 (1941).

4. *Id.* at 24.

tional system so that states and individuals can have effective transnational relationships. Similar to the function of any legal system, international law attempts to mitigate, to the greatest extent possible, the impact of disputes.[5] Where this goal is unattainable, the law seeks the safe "channeling" of disputes, which might otherwise be disruptive and damaging to the international system.[6]

This need to mitigate disputes is a valid reason for states to support and abide by international law.[7] By ensuring law-abiding behavior in themselves and their citizens, each state, collectively and severally, furthers its interest in providing an environment that maximizes its opportunities.[8] For this reason, "[t]he international legal system is supported not only by states' interests in promoting individual rules, but also by their interest in preserving and promoting the system as a whole."[9] In this way, international law imposes its authority through necessity.[10] So even though individual states or parties within the state may attain short-term advantages in violating the law, compliance with the system better serves their long-term interests.[11]

These same precepts underlie both the law of war and human rights regimes. Both of these legal regimes seek to minimize the consequences of conflict. The law of war does so in governing conflicts between states, while human rights law does so in disputes between states and their citizens. Recognizing the role of the state as the unitary structure of social order, both regimes rely on the state for their implementation. Recently, these two regimes have converged.

These confluences, the humanitarian pressures on the law of war, the escalation of internal armed conflicts, and the growing recognition of universal fundamental human rights, have all played a part in the development

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5. Karl N. Llewellyn, *The Normative, the Legal and the Law Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1376 (1940) (explaining that the function of law is to "get enough of it done to leave the group a group").

6. *Id*. at 1376. Professor Llewellyn also reminds that "the lines the channeling is to take will in part condition the effectiveness of the channeling." *Id.* at 1383.

7. HENRY MANNING, THE NATURE OF INTERNATIONAL SOCIETY 106-07 (1962).

8. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 532-33 (1993) (discussing the development of universal norms to address global concerns).

9. *Id.*

10. NIEMEYER, *supra* note 3, at 325.

11. Charney, *supra* note 8, at 532-33 (discussing the development of universal norms to address global concerns).

of a new international law regime, the "law of internal armed conflict."[12] This article examines the historical roots of this new legal regime, and then explores how this regime has drawn on the experience of the human rights traditions for its continued growth. With the broad parameters of the law of internal armed conflict identified in distinct sources of law, the article then offers a brief look into the future of this regime.

Two trends in international law evidence the future of the law of internal armed conflict: the growing recognition for international humanitarian standards in all armed conflicts, and the growing criminalization of violations of international humanitarian standards. By linking these trends, many commentators see the possibility of enforcing minimum humanitarian standards in internal armed conflicts.[13]

A variety of tools have been used to examine the conduct of internal armed conflicts, such as truth commissions,[14] amnesty laws,[15] international criminal tribunals,[16] and domestic prosecutions.[17] Some commentators suggest that greater reliance on international institutions paves the way for rebuilding these torn societies and re-establishing the rule of law.[18]

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12. As a descriptive term and title, the author uses "law of internal armed conflict" for this emerging area of law. Other authors have also used this term to speak descriptively about this area of law, although not as a title for a separate and distinct body of law. The term's true origins, perhaps like the term "law of war," is mostly irrelevant. The current parameters of this area of law as well as its confluence with human rights will be further outlined in the discussion that follows. The author proposes that norms from the law of war and human rights have migrated to internal conflicts via customary and conventional law. These norms consist of the law of internal armed conflict.

13. *See Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999) (discussing the application of minimum humanitarian standards using various legal theories such as positivist, policy-oriented, and international legal process).

14. Republic of South Africa Promotion of National Unity and Reconciliation Bill (As submitted by the Portfolio Committee on Justice (National Assembly)), 1994, Bill 30-95, ch. 2 (legislation establishing South African Truth Commission). *See* Peter A. Schey, *Addressing Human Rights Abuses: The Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325 (1997) (discussing structure of South African truth commissions); Justin M. Swartz, *South Africa's Truth and Reconciliation Commission: A Functional Equivalent to Prosecution*, 3 DEPAUL DIG. INT'L L. 13 (1997) (providing an excellent discussion of history of South African truth commission).

15. *See* Jo M. Pasqualucci, *The Whole Truth And Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B. U. INT'L L.J. 336 (1994) (extensive overview and evaluation of some Latin American countries' amnesty laws).

16. *See* Prosecutor v. Tadic, No. IT-94-1-AR72 (Oct. 2, 1995) (international tribunal discussing criminal conduct during internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

This reflects the growing use of international institutions to examine these internal armed conflicts under either law of war or human rights regimes. This effort has been hampered, however, by the limits of each of these legal regimes.[19] Because of these limitations, international regulation of internal armed conflicts has been less than satisfactory.[20]

A renewed emphasis on domestic tribunals offers the best alternative to enforce minimum humanitarian standards in internal armed conflicts. [21] The resort to external systems, such as international criminal tribunals, should rarely occur. These selectively imposed tribunals add chaos to a society ravaged by internal armed conflict, and they do not represent the community which they judge.[22] Rather, the focus of international law after an internal armed conflict should be stabilization through the rule of law. This can be done through the presumptive reliance on domestic tribunals to enforce minimum humanitarian standards.

Drawing from the law of war and human rights regimes, the law of internal armed conflict should focus responsibility for enforcement on states and parties to an internal armed conflict. If the law demands that the

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17. *See* Scott Wilson, *Colombian General Convicted in Killings*, WASH. POST, Feb. 14, 2001, at A19 (reporting General Uscategui's conviction for failing to stop a massacre by paramilitary forces.); Leon Lazaroff, *Ex-Argentine Dictator Ordered Arrested in Disappearance of Spaniards*, ASSOCIATED PRESS, Mar. 25, 1997, 1997 WL 4859107 (reporting Spanish court order to arrest General Galtiere, who is still in Argentina, but Argentina has indicated it will not release him to Spanish courts.) *But see* Anthony Faiola, *Argentina Amnesty Overturned*, WASH. POST, Mar. 7, 2001, at A19 (reporting on an Argentine judge's ruling striking down amnesty laws and paving the way for trials of soldiers involved in the country's "Dirty War").

18. *See* M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998) (conference with various speakers including President Charles N. Brower, American Society of International Law, Dean Claudio Grossman, Washington College of Law, and The Honorable David J. Scheffer, former United States Ambassador-at-Large for War Crimes Issues, supporting the use of international criminal tribunals).

19. *See* discussions *infra* Section II (The Law of Internal Armed Conflict), and Section III (discussing the relationship between law of war and human rights).

20. *See* discussion *infra* Section IV (The Future of the Law of Internal Armed Conflict).

21. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 703. pt. VII, ch. 1 (1986) [hereinafter RESTATEMENT (THIRD)] (reporters' note six discussing need to exhaust domestic remedies for human rights violations before using international remedies); *see also id.* § 902, cmt. k (discussing exhaustion of local remedies before seeking a claim for a violation of an international obligation).

22. *See* discussion *infra* Section V (Domestic Enforcement of the Law of Internal Armed Conflict).

parties legitimize their conduct according to international humanitarian standards, then the effectiveness of domestic institutions will likely increase. Ultimately, supporting domestic tribunals that rely on the law of internal armed conflict rebuilds the state through the rule of law. For these reasons, this article advocates reliance on domestic institutions to enforce minimum humanitarian standards.

II. The Law of Internal Armed Conflict

> *A foreign war is a scratch on the arm; a civil war is an ulcer which devours the vitals of a nation.*[23]

At first glance, international law may appear to have no place in internal conflicts. International law typically concerns events that are transnational in nature, although exceptions exist under customary international law and conventional law. For example, both the law of war and human rights law can apply to purely domestic situations.[24] This is not to suggest that these regimes apply in entirety to internal armed conflicts, but rather to illustrate that some international law can apply to a purely domestic situation.

This section broadly examines the law of internal armed conflict. The examination starts by exploring the law of war and its expansion—a

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23. THE MILITARY QUOTATION BOOK 43 (1990) (quoting Victor Hugo).

24. The law of war is also known as international humanitarian law and the law of armed conflict. International humanitarian law seems to be the preferred modern term. It has gained growing acceptance because of the humanitarian concerns underlying this area of the law. It has also increasingly been applied, however, to describe both the law of war and human rights regimes that might apply to an armed conflict. The more traditional term, the law of war, is unambiguous in its scope. Additionally, the traditional name recalls the true nature of the subject matter and more clearly delineates the body of law. *See* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 14 (1995).

The law of war applies international rules to solve problems arising from international or internal armed conflicts. *See* Jean Pictet, *International Humanitarian Law*: *Definition*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW xix n.1 (1988). Generally, the law of war governs the relationship between states or belligerents in times of armed conflict. Separate from it is human rights, which generally governs the relationship between a state and its citizens. *See* Paul Kennedy & George J. Andreopoplos, *The Laws of War: Some Concluding Reflections*, *in* THE LAWS OF WAR 214, 220 (1994); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 INT'L REV. OF THE RED CROSS 409, 410 (1998).

response to humanitarian concerns—into the law of internal armed conflict. The section then turns to the general conventional and customary parameters of the law of internal armed conflict.[25]

This section clearly distinguishes between the law of war and the law of internal armed conflict. They are similar because the law of war is the primary source of the law of internal armed conflict. As will be shown, however, the law of internal armed conflict remains unique in both its scope (the ability to reach into purely domestic matters) and its breadth (the type of conduct it regulates).

A. Applicability of the Law of War

The law of war has expanded gradually to encompass internal armed conflicts. This makes sense because conduct that is barbaric or reprehensible in an international armed conflict is no less deplorable when it occurs in the context of an internal armed conflict.[26] "There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars."[27] The entire body of the law of war, however, has not been transplanted to internal armed conflicts; rather, minimum humanitarian standards are being created.[28]

One must understand the parameters of the law of war to appreciate fully its limited application to the law of internal armed conflict because, despite these limits, the law of war helps define the law of internal armed conflict. A broad overview of the law of war is sufficient to begin this dis-

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25. The rules governing internal armed conflict have primarily grown out of the body of law governing international armed conflict, the law of war. This source of the law of internal armed conflict is discussed more fully *infra* Section II. The impact of human rights law in this area is not ignored, and is discussed more fully *infra* Section III.

26. Prosecutor v. Tadic, No. IT-94-1-AR72 para. 97 (Oct. 2, 1995) (discussing application of law of war principles to internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

27. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995) (examining the trend criminalizing conduct in internal armed conflicts).

28. *See Tadic*, No. IT-94-1-AR72, paras. 116, 126 (illustrating that a full and mechanical transplant of the rules has not occurred; rather a corpus of general basic humanitarian principles and norms exist), *reprinted in* 35 I.L.M. 32 (1996). *See* discussion *infra* Section II.

cussion before turning to the enforcement of the law of internal armed conflict.[29]

1. Source of the Law of War

Continually developing, the law of war includes that body of rules that generally applies to international armed conflict.[30] It has deep historical roots, and there are many examples of ancient civilizations regulating war.[31] Like most international law, some of these rules were self-imposed by states, while others grew out of treaties between states.[32] The law of war regulated both the initiation and conduct of hostilities,[33] and a broad range of values motivated its growth.[34] Most recently, the desire to lessen the tragedies associated with modern warfare has driven the growth in the law of war.[35]

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29. The author expects the reader is familiar with the law of war. The discussion that follows merely identifies the basis of the law of war and some critical definitions, which influence the more detailed discussion on the law of internal armed conflict and its enforcement.

30. *See* I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS AND THE LAW OF WAR 3 (Leon Friedman ed., 1972) [hereinafter I THE LAW OF WAR] (for a detailed historical discussion of the law of war).

31. *See* DONALD R. DUDLEY, THE CIVILIZATION OF ROME 95 (1962); Josiah Ober, *Classical Greek Times*, *in* THE LAWS OF WAR 12, 13-14 (Michael Howard et al. eds., 1994) (exploring the rules of war between Greek city-states including forbidden attacks, when battles were to be fought, and the protection of non-combatants); *see also* JAMES E. BOND, THE RULES OF RIOT—INTERNAL CONFLICT AND THE LAW OF WAR 5-12 (1974) (discussing the historic code of chivalry governing the use of arms by knights against each other).

32. *See* LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 12 (1956) (providing more historical background on the development of the law of war).

33. *See* ROBERT C. STACEY, *The Age of Chivalry*, *in* THE LAWS OF WAR 27, 30 (Michael Howard et al. eds., 1994) (discussing *jus ad bellum*, permitting resort to war, and *jus in bellum*, the permissible means and methods of warfare).

34. Many commentators have eloquently discussed a broad range of reasons for the growth and development in the law of war. For a positivist view, see CARL VON CLAUSEWITZ, ON WAR (Anotol Raport ed., Pelican Books 1968) (1832) (value of the law of war is represented in its expression of national policy). For a realist view, see GEOFFREY BEST, HUMANITY IN WARFARE 1-27 (1980) (law of war has value because it has a real effect on parties). For a modern critical legal view, see Roger Normand & Chris A.F. Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994) (law of war is used to justify actions). Finally for the Utilitarian view, see TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970) (law of war is a tool to justify moral outcome).

The law of war arises from two primary sources.[36] The first is customary international law. A rule becomes customary international law when it is reflected in both state practice and *opinio juris*.[37] Importantly, these criteria require state affirmation, factually, as evidenced by practice, and legally, as evidenced by recognition of the norm in the state's law.[38] Customary international law applies generally to all states, except for those that have persistently objected.[39] Certain customary norms, *jus cogen* norms, however, are non-derogable and states cannot avoid their binding effect even through persistent objection.[40]

Conventional law provides the second source for the law of war, and it typically includes those rules defined by treaties, conventions or agreements between states.[41] Although a broad range of treaties govern the law of war, the Hague[42] and Geneva[43] Conventions address this area of the law most comprehensively.[44] These conventions apply to all cases of declared

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35. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (Professor Meron discusses how the law of war has been acquiring a more humanitarian orientation under the influence of the human rights movement.).

36. *See* RESTATEMENT (THIRD), *supra* note 21, § 102 (sources of international law).

37. *Opinio juris* is the recognition by the state of the legal force of the rule and the state's willingness to be bound by the rule. *Id.* cmt. c.

38. Factual recognition is found in state practice. *See id.* cmt. b. Two sources for factual recognition are the military manual of the state and the implementation of those military regulations in the state's armed forces. These may serve as both factual and legal evidence of recognition.

39. *See id.* cmt. d (discussing dissenting views and impact on new states).

40. *See id.* cmt. k (discussing preemptory norms of international law such as the U.N. Charter's prohibition on the use of force).

41. *See id.* § 102 (detailing sources of international law).

42. *See* Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations (Hague Convention No. IV), signed 18 Oct. 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631.

43. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (known collectively as Geneva Conventions I-IV). *See generally* I THE LAW OF WAR, *supra* note 30, at 3 (for detailed background on growth, development and application of these conventions).

44. Those limited portions of the law of war that are directly applicable to internal armed conflict will be discussed *infra* Section II.B (The Emerging Law of Internal Armed Conflict).

war or to any other international armed conflict that may arise between two or more of the state parties.[45] Similar to customary international law, these rules require state affirmation to give them legal value.[46] Unless the treaty or its provisions have become custom, however, conventional law binds only its signatories.[47]

2. Triggering the Law of War

According to conventional law, there must be an armed conflict between two recognized parties to trigger the full body of the law of war. This requires two determinations: first, whether an armed conflict exists, and second, whether that conflict is internal or international. The "trigger" is important because it implements a broad range and scope of legal responsibilities.[48] Consequently, when the law of war is not triggered, the law of internal armed conflict or another legal regime may apply.

Historically, an armed conflict meeting the four-element test for "war" triggered law of war application.[49] After World War II and the implementation of the Geneva Conventions, the test for armed conflict evolved to "any difference arising between two States and leading to the intervention of armed forces . . . . It makes no difference how long the conflict lasts, or how much slaughter takes place."[50] The modern test for armed conflict is "whether such force constitutes an armed attack, in the

45. *See* Geneva Conventions I-IV, *supra* note 43.

46. *See* RESTATEMENT (THIRD), *supra* note 21, § 301 (discussing requirement for state intention to be bound and to consent to be bound).

47. *See id.* § 321 cmt. a (discussing principle of *pacta sunt servanda*: to be bound by a treaty a state must be a party to that treaty). Some commentators suggest that the new International Criminal Court may attempt to circumvent this conventional rule. It may apply even to those states, which are not signators. This unusual growth was one of the primary concerns expressed by the United States over this court. For further discussion, see generally Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is and the Way Ahead*, 41 VA. J. INT'L 204 (2000); Gregory P. Noone & Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112 (1999) (discussing the background to the creation of the International Criminal Court).

48. The triggering mechanism is implemented under Geneva Convention Common Article 2. *See G*eneva Conventions I-IV, *supra* note 43, art. 2.

49. The four historic elements were: (1) a contention, (2) between at least two nation-states, (3) wherein armed force is employed, (4) with an intent to overwhelm. *See* I THE LAW OF WAR, *supra* note 30, at 3. Accordingly, some nations asserted that the law of war was not triggered by all instances of armed conflict. As a result, the applicability of the law of war could depend upon the subjective national classification of a conflict. *See* WALTER GARY SHARP, SR., CYPERSPACE AND THE USE OF FORCE 55 (Aegis Res. Corp. 1999).

context of its scope, duration and intensity."[51] This distinction is useful because force may or may not reach the level of armed conflict.

The next determination is whether the conflict is internal or international;[52] to apply, the law of war generally requires state-on-state conduct.[53] International law establishes four criteria, which remain the clearest evidence of statehood: territory, population, government, and the conduct of international relations.[54] State recognition may continue even during an occupation, invasion, or insurrection where the state's internal affairs become anarchic for an extended period.[55] Statehood carries with it a fundamental right, territorial inviolability.[56] It also imparts an obliga-

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50. COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 17-21 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY ON THE GENEVA CONVENTION IV]. The International Committee of the Red Cross Commentary on Common Article 2 spelled out a threshold definition of armed conflict by emphasizing three criteria: (1) scope, (2) duration, and (3) intensity. *See id.* Although each case will be fact-dependent, under this definition, any use of force—regardless of its scope, duration, or intensity—occurring between members of the armed forces of two states might be characterized as the existence of *de facto* hostilities. This definition has not been accepted by the United States. *See* SHARP, *supra* note 49, at 66.

51. *See* SHARP, *supra* note 49, at 66-67.

52. Additional Protocol I, Article 1(4) expanded the definition of international armed conflict to include conflicts against racists regimes, colonial domination, and alien occupation in addition to the customary inter-State definition. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977).

53. *See* Geneva Convention I-IV, *supra* note 43, arts. 1, 2. Common Article 2 applies to all cases of armed conflict between *two* or more parties. *See id*.

54. RESTATEMENT (THIRD), *supra* note 21, § 201. The test for statehood is summarized by the Restatement of Foreign Relations as

> (a) defined territory (which can be established even if one of the boundaries is in dispute or some of the territory is claimed by another state); (b) a permanent population (the population must be significant and permanent even if a substantial portion is nomadic); (c) the state must be under the control of its own government; and (d) the capacity to conduct international relations.

Id.

55. *See id.* § 202 (Reporter's note 4 discusses the recognition of a state, whose viability is doubtful because of internal armed conflict.).

56. *See id.* § 206 cmt. b (discussing sovereignty and the idea that a state's lawful control over its territory is exclusive as to other states). The duty among states to respect the territorial sovereignty of other states is also reflected in the UN Charter. *See* U.N. CHARTER art. 2(7).

tion to comply with and assume the responsibilities of international law.[57] If the conflict does not involve multi-state conduct, however, it generally does not trigger international obligations under the law of war.

The law of war generally requires an armed conflict between states. Once satisfied, the entire body of the law of war is triggered.[58] If the law of war is not triggered, then other international regimes may apply, including the law of internal armed conflict.

3. Expansion of the Law of War

The law of war continues to grow from its historical roots. In modern times, this growth has been characterized as a movement from a state-focused to an international human-centric approach.[59] This change has affected the enforcement of the law of war, and consequently, the enforcement of the law of internal armed conflict.

Historically, domestic tribunals prosecuted law of war violations.[60] A shift from domestic tribunals to international tribunals recognized that, in an international dispute, a party neutral to the conflict provided balance, while preserving and respecting the sovereignty of the parties to the con-

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57. *See* RESTATEMENT (THIRD), *supra* note 21, § 206 cmt. e (discussing generally the rights and duties of states imposed by international law and agreements). *See also* Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (copy on file with author) ("[T]he rights and duties of international law attach principally to entities that have those element of sovereignty that allow them to be held accountable for the actions, and the resources to fulfill their obligations.").

58. Deceptively simple, this analysis continues to pose challenges to international jurists. *See generally* Meron, *supra* note 35, at 239. Professor Meron discusses the continuing debate on applying the law of war in internal armed conflicts and four continuing problem areas. *See id.* at 274. The specific law of war rules applicable to internal armed conflict will be discussed *infra* Section II.B. Generally, the law of war scheme was devised for international conflict resolution.

59. *See* Meron, *supra* note 35, at 240 (Professor Meron traces the evolution of the law of war from an inter-state to an individual human-centric perspective.).

60. *See* Roberts, *supra* note 24, at 21 (discussing the assumption of domestic tribunal responsibility for the enforcement of the law of war). "The overwhelming majority of legal cases in conection with the laws of war have been national, not international, courts." *Id*. at 20.

flict.[61] This furthered the international regulation of law of war violations by successfully balancing states' interests in sovereignty, international interests in stability, and emerging humanitarian interests.

Despite this trend, domestic tribunals remain the primary enforcement mechanism of the law of war.[62] This presumption is reflected by recent efforts in Kosovo and East Timor, where domestic tribunals were reestablished with the assistance of the international community.[63] Similarly, the proposed hybrid-domestic court of Cambodia, with its mixture of domestic and international jurists, demonstrates support for domestic tribunals.[64]

The law of war was traditionally state-centric, and its protections were not viewed as creating individual rights.[65] Rather, it was assumed that the rights and obligations of the law of war flowed only to states.[66] The law of war today imposes certain rights and obligations that inure to

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61. This idea of a neutral party is embodied in the Geneva Conventions by the establishment of Protecting Powers "whose duty it is to safeguard the interests of the Parties to the conflict." *See* Geneva Convention I, *supra* note 43, art. 8; Geneva Convention II, *supra* note 43, art. 8; Geneva Convention III, *supra* note 43, art. 8; Geneva Convention IV, *supra* note 43, art. 9. The idea of a neutral institution is also inherent in the International Court of Justice's resolution of disputes between state parties. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (where the International Court of Justice served as an arbiter); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), Request for the Indication of Provisional Measures, 1992 I.C.J. 115, 125 (April 14) (the International Court of Justice served as a neutral forum to resolve a dispute between states over providing a terrorist for trial).

62. Meron, *supra* note 27, at 555 ("National systems of justice have a vital, indeed, the principal, role to play here.").

63. *See* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 51-53 (2001) (discussing the UN-led efforts to reestablish a domestic judiciary).

64. *See Letter from the Prime Minister of Cambodia to the Secretary-General*, UN Doc A/53/866, S/1999/295 (Mar. 24 1999) ("To ensure that the [Khmer Rouge] trial by the existing national tribunal of Cambodia meets international standards, the Royal Government of Cambodia welcomes assistance in terms of legal experts from foreign countries.").

65. *See* Meron, *supra* note 35, at 251. "The treatment to be accorded to persons under the Conventions was not necessarily seen as creating a body of rights to which those persons were entitled." *Id.*

66. *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 341 (Hersch Lauterpacht ed., 8th ed. 1955).

individuals as well as states.[67] While the national courts of either the individual or his captor once prosecuted law of war violations, today prosecution is possible even where the individual is not from a state-party to the conflict.[68] The law of war also recognizes prosecution by third-party countries under the principal of universal jurisdiction.[69] In addition, under the Geneva Conventions, signatory states have a duty to prosecute or extradite persons alleged to have committed violations of the law of war, regardless of whether the state was involved in the underlying conflict.[70]

In effect, the obligations between states under the law of war have become obligations to protect individuals.[71] The substitution of "international humanitarian law" for the terms "law of war" and "law of armed conflict" descriptively reflects this movement.[72] "Although the term 'international humanitarian law' initially referred only to the four 1949 Geneva Conventions, it is now increasingly used to signify the entire law

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67. The Nuremburg Principle, the applicability of universal jurisdiction to international crimes, has been widely accepted. *See* Judicial Decisions, *International Military Tribunal (Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947); *see also* George Aldrich, *Individuals as Subjects of International Humanitarian Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 851, 853 (Jerzy Makarczyk ed., 1996) ("the development of international humanitarian law since the second world war has made individual criminal liability an explicit part of the law"); Meron, *supra* note 27, at 555 (discussing the protection of individual rights by universal jurisdiction for law of war violations).

68. *See* Meron, *supra* note 35, at 253.

69. *See* Meron, *supra* note 27, at 562-63 (discussing when a treaty does not specify who is competent to exercise jurisdiction over an offense, interpretation of that treaty may lead to the conclusion that third party states are permitted to exercise jurisdiction). *See also* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 1 (Martinus Nijhoff Publishers 1996) (Chapter 8 discusses generally the prosecution of breaches of the law of war.).

70. *See* Geneva Convention I, *supra* note 43, art. 49, 6 U.S.T. at 3146; Geneva Convention II, *supra* note 43, art. 50, 6 U.S.T. at 3250; Geneva Convention III, *supra* note 43, art. 129, 6 U.S.T. at 3418; Geneva Convention IV, *supra* note 43, art. 146, 6 U.S.T. at 3616 (describing the duty of state parties to enact criminal domestic laws against violating the law of war and when to extradite persons). *See also* Meron, *supra* note 35, at 1 (discussing this duty to prosecute).

71. *See* Aldrich, *supra* note 67, at 853.

72. *See* BEST, *supra* note 34, at 21; Meron, *supra* note 35, at 239.

of armed conflict."[73] The modern focus of the law of war has thus broadened from solely protecting states' interests to increasingly protecting individuals' interests.[74]

4. Conclusion

Historically, the law of war governed conduct between states in an international armed conflict. It has grown to regulate individual conduct in an international armed conflict as well.[75] Pressure for humanitarian protections for all individuals regardless of state roles or circumstances has also expanded the law of war.[76] Even though it now inures to the benefit of individuals, the law of war remains generally limited to international armed conflict.

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73. Meron, *supra* note 35, at 239. This would include the Hague rules and the various treaties and conventions limiting the methods and means of warfare. *Id.* Some commentators also include human rights obligations in the term international humanitarian law. *See* CHADWICK, *supra* note 69, at 5 (discussing international humanitarian law as including human rights law); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 24 (1996) (defining human rights law as including the law of war).

74. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 10 (1989) (discussing that while the law of war protects the rights of states, it also protects individuals).

75. The Nuremburg Principle, the applicability of universal jurisdiction to international crimes is widely accepted. *See* Judicial Decisions, *International Military Tribunal (Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947). *See generally* Kaufman, *Judgment at Nurnber—An Appraisal of its Significance*, 40 GUILD PRAC. 62 (1983) (providing historical discussion of the origins of the Nuremburg principles). For a recent application of the principle see *Prosecutor v. Tadic*, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing individual criminal responsibility in international armed conflict), *reprinted in* 35 I.L.M. 32 (1996).

76. Meron, *supra* note 35, at 253; Aldrich, *supra* note 67, at 853. *See also* Declaration of Minimum Humanitarian Standards, *adopted at* Abo Akademi University Institute for Human Rights in Turku/Abo, Finland (December 2, 1990) (non-binding declaration made at international conference as a model that states could adopt), *reprinted in* 89 AM. J. INT'L L. 218-223 (1995). This is an example of the continuing human rights pressure to expand the law of war to cover areas it has not traditionally applied to. *See* discussion *infra* Section III (regarding the confluence between the law of war and human rights).

B. The Emerging Law of Internal Armed Conflict

Prohibitions once reserved to international conflicts are gradually being extended to non-international armed conflicts.[77] Given that an international armed conflict triggers the law of war, it may seem axiomatic to suggest that the law of war applies to internal armed conflicts. Limited specific rules developed, however, to extend some of the law of war's protections to the unique situation of internal armed conflict.[78] These limited rules were intended to provide some of the same tempering of conflict that the law of war brought to international armed conflict, while respecting the sovereignty of the state embroiled in the internal armed conflict.[79] This expansion of the law of war gave rise to a new international legal regime, the law of internal armed conflict.[80]

Like the law of war, the law of internal armed conflict derives from conventional law[81] and customary international law.[82] Similarly, the law of internal armed conflict continues to grow in recognition of humanitarian concerns. While the law of war serves as the primary historical source of the law of internal armed conflict, the two should remain as distinct legal regimes.[83]

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77. *Tadic*, No. IT-94-1-AR72, para. 128 (discussing the gradual migration of international armed conflict regulations to internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996). *See* Meron, *supra* note 27, at 574.

78. Common Article 3 to the Geneva Convention embodies these rules. *See* Geneva Conventions I-IV, *supra* note 43, art. 3. *See infra* text accompanying note 86 (dealing more completely with Common Article 3, common to all four conventions).

79. *See* COMMENTARY ON GENEVA CONVENTION IV, *supra* note 50, at 34 (Common Article 3 "merely provides for application of the principles of the Convention and not for the application of specific provisions.").

80. It is interesting to note that the most comprehensive rules governing an internal armed conflict, the Lieber Codes of the U.S. Civil War era, served as a basis for developing the law of war. These codes, however, have not yet been used as a separate historical basis for the law of internal armed conflict. Although, they do serve as an example of an internal armed conflict humanely regulated and domestically enforced. *See* F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, *reprinted in* THE LAWS OF ARMED CONFLICTS 3-23 (Schindler & Toman eds., 3d ed. 1988).

81. *See* discussion *infra* Section II.B.1 (Conventional Law of Internal Armed Conflict).

82. *See* discussion *infra* Section II.B.2 (Customary Law of Internal Armed Conflict).

83. *See* discussion *infra* Section V.A (The Need for a Distinct International Legal Regime).

1. Conventional Law of Internal Armed Conflict

Various treaties and conventions govern internal armed conflict, most of which attempt to limit the conduct of conflicting parties. This effort, however, has met with limited success because of states' continuing concerns about regulation of internal matters by an outside authority.[84] As one commentator explained, the states "feared that any outside encroachments on their sovereignty might be a possible attempt on their territorial integrity and political independence."[85]

While this intrusion on state sovereignty continues to channel development in this area of the law, the application of these conventional law sources governing internal armed conflicts, even in limited circumstances, has served as a basis for growth in the law. The conventional law sources of the law of internal armed conflict include Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions, miscellaneous treaties affecting the means and method of warfare, and certain human rights treaties.

a. Geneva Conventions, Common Article 3

Common Article 3 (common to all four Conventions) of the Geneva Conventions is perhaps the original statement of the law of internal armed conflict.[86] In general, all four Geneva Conventions deal primarily with the conduct of international armed conflicts.[87] Only Common Article 3 deals specifically with "the case of armed conflict not of an international char-

84. Hernan Salinas Burgos, *The Application of International Humanitarian Law as Compared to Human Rights Law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tensions, or Public Emergency, with Special Reference to War Crimes and Political Crimes, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 1 (Frits Kalshoven & Yves Sandoz eds., 1989). *See also* BEST, *supra* note 34, at 20-21.

85. A. Cassese, *La Guerre Civile ie le Droit International* [*International Law in Civil Wars*], 90 *Revu Generale de Droit International Public* 554, 569 (1986).

86. *See* Geneva Conventions I-IV, *supra* note 43, art. 3.

87. *See id.*

acter."[88] The protections are minimal.[89] It is significant, however, because what was previously a domestic matter is now subject to international law. This intrusion is limited, however, as Common Article 3 strongly reflects a concern for state sovereignty.[90]

Notwithstanding its limitations, Common Article 3 forms the primary basis for the conventional law of internal armed conflict by setting out the fundamental principles of humanity that apply in internal armed conflicts.[91] These minimum safeguards have been applied to all citizens

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88. *See id.* art. 3. It is important to note that there are three situations of internal armed conflict where the entire body of the law of war is still triggered. These are: (1) partial or total occupation of a territory of a High Contracting Party; (2) the armed forces of State X is assisting rebels in State B (this raises the question of armed conflict between two States); and (3) conflicts in which people are fighting for their right to self-determination under Article 1(4) of Protocol I. *See* Francoise Hampson, *Human Rights and Humanitarian Law in Internal Conflicts*, *in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 66 (Brit. Inst. Int'l & Comp. L 1989).

89. Common Article 3 provides the following protections.

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arm and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humility and degrading treatment;
> (d) 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.
> (2) The wounded and sick shall be collected and cared for.

See Geneva Conventions I-IV, *supra* note 43, art. 3.

90. Common Article 3 specifically provides that "[t]he application of the proceeding provisions shall not affect the legal status of the Parties to the conflict." *Id.* This limitation denies international legal status to insurgents, thus eliminating a possible basis for third-country intervention. It also denies combatant immunity to insurgents, thus eliminating legal protection for insurgent actions.

within a country during internal armed conflicts.[92] Common Article 3 also binds each "party to the conflict," including insurgents and rebels.[93] It requires no minimum threshold of violence to trigger its application.[94]

The parties to the Geneva Conventions were concerned that, by providing these limited protections, legitimacy might inure to the benefit of the participants in the internal armed conflict.[95] Specifically, no state wanted international law recognition to confer legitimacy to rebels or insurgents within their territorial boundaries, and thus possibly justify another state's intervention.[96] Additionally, states were concerned about

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91. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June). Common Article 3 principles are elementary considerations of humanity that cannot be breached in any armed conflict, internal or international. *See id.*

92. *See, e.g.*, Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 103, 126 (Oct. 2, 1995) (discussing broad scope of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

93. *See* Geneva Conventions I-IV, *supra* note 43, art. 3 (this is different from Common Article 2 which binds each party to the Convention). *See also* COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1960) [COMMENTARY ON I GENEVA CONVENTION] (discussing need for insurgents to possess an organized military force, with an authority responsible for its action, acting within a determinate territory, and respecting and complying with the law of war); Pictet, *supra* note 24, at xix n.1 (discussing scope of parties covered by Common Article 3).

94. Common Article 3 speaks of armed conflicts, but does not define them. Designed to supplement Common Article 3, Protocol II defines armed conflict and excludes certain types of violence. This might suggest that Common Article 3 may not apply to such situations either. *See supra* notes 106-26 and accompanying text. In practice, however, it has been suggested that "Common Article 3 applies to all situation of a non-international character whatever the level of violence." *See* Hampson, *supra* note 88, at 67-68. *But see* COMMENTARY ON I GENEVA CONVENTION, *supra* note 95, at 49-50 (discussing the need for insurgents to possesses an organized military force, with an authority responsible for its actions, acting within a determinate territory, and respecting and complying with the law of war).

95. JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTIONS OF WAR VICTIMS 56 (1975). *See also* Burgos, *supra* note 84, at 2-3 (discussing the need to balance state interest in fighting rebels and basic humanitarian standards).

96. COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 44. Common Article 3 "meets the fear . . . that the application of the Convention, even to a limited extent, in cases of civil war may interfere with the *de jure* Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority and power, upon the adverse Party." *Id.*

granting combatant immunity to rebels trying to destroy a state from within.[97]

Common Article 3, however, was not intended to confer legitimacy or combatant immunity on any party to an armed conflict.[98] The drafters of Common Article 3 clearly stated that "[t]he application of the proceeding provisions shall not affect the legal status of the Parties to the conflict."[99] Rather, Common Article 3 was meant only to establish fundamental humanitarian standards, not to define status.[100]

In effect, the significance of lack of status is two-fold. First, Common Article 3 does not prevent a state from punishing people subject to its jurisdiction for committing crimes under the domestic law of that state.[101] The rebel, insurgent or citizen who kills a politician, policeman or soldier can be treated as a murderer.[102] Common Article 3 does not prevent condemning the murderer to death, provided the process is conducted under the article's minimum guarantees.[103] While states can consider rebels or insurgents as criminals,[104] the same could be said for government forces.

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97. Combatant immunity is a blanket immunity for warlike acts (such as murder, maiming, kidnapping, sabotage) that members of the armed forces will do to the opposing armed forces. "In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts." Geoffrey S. Corn & Michael L. Smidt, *"To Be or Not to Be, That is the Question" Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW. June 1999, at 14 (discussing status of captured service members in recent Kosovo conflict). In effect, upon capture of an opposing soldier, the captor state could not then accuse and try that soldier for the earlier killing of a captor state's soldier during the normal course of battle. *See id.*

98. *See supra* note 96. Without legal status as combatants, insurgents cannot claim combatant immunity for their warlike acts. *See supra* note 97.

99. *See* Geneva Conventions I-IV, *supra* note 43, art. 3.

100. COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 36. "It merely demands respect for certain rules," it does not "increase in the slightest the authority of the rebel party." *Id.*

101. *See id.* (discussing that Common Article 3 imposes no additional obligations on the state, that are not already observed in the prosecution of "common criminals").

102. Burgos, *supra* note 84, at 6.

103. *Id.*; *see also* COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 36 (dealing with internal enemies, the government need apply only those essential rules that it in fact observes daily, under its own laws). "There is nothing in [Common Article 3] to prevent a person presumed to be guilty from being arrested . . . and [Common Article 3] leaves intact the right of the State to prosecute, sentence and punish according to the law." *Id.* at 39.

104. *See* Robert Kogod Goldman, *Internal Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L & POL'Y 49, 57-58, 61 (1993).

A state actor who kills innocent bystanders, a rebel's family member, or even a rebel may claim combatant immunity, but similarly runs the risk of investigation and trial, conducted under the minimum-stated guarantees.[105] Second, if the rebels or insurgents lacked international legal status, the right to intervene in that state's domestic affairs by another state would be diminished.

The challenge regarding Common Article 3 is the refusal by parties to apply it, even in situations where it is clearly applicable.[106] As discussed, states demand a high level of deference to state sovereignty. Meanwhile, insurgents or rebels, especially those who view terrorism as an essential combat technique, refuse to deem themselves bound through any obligatory legal mechanisms designed to humanize the conflict.[107]

Even given these challenges, Common Article 3 remains the original conventional statement of the law of internal armed conflict. Balancing minimum protections with state sovereignty, it remains a primary source of the law of internal armed conflict. Moreover, the challenges to its implementation fostered the next major attempt to codify the law of internal armed conflict.

b. Additional Protocol II of the Geneva Convention

In 1974, the international community called for another Geneva Convention to modernize the law of war.[108] This led to Additional Protocol II

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105. *See* Burgos, *supra* note 84, at 6; *see also* Faiola, *supra* note 17, at A19; Wilson, *supra* note 17, at A19.

106. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 599 (1983) (citing George Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 A.S.I.L. PROC. 141, 142 (1973)). *See also* CHADWICK, *supra* note 69, at 211 (discussing the unwillingness to utilize the law of war legal regime when circumstances justify it).

107. *See* CHADWICK, *supra* note 69, at 129-33. *See also* Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Convention of 1949 and Other Human Rights Instruments: The American Red Cross—Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983*, 33 AM. U. L. REV. 9, 14 (1983) ("antigovernment forces in armed conflicts have not always been eager to invoke Common Article 3 either, probably because they are reluctant to be bound by its provisions").

108. *See* THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (Howard S. Levie ed., 1987) (providing a historical discussion of the background leading to the 1974 Geneva Conventions).

of the Geneva Convention (Protocol II), which further develops the law of internal armed conflict.[109] Like Common Article 3, Protocol II covers combatants and non-combatants.[110] It requires that all parties to a conflict "shall in all circumstances be treated humanely, without any adverse distinction."[111]

While Protocol II applies to all armed conflicts not covered by Protocol I,[112] it remains distinct from Common Article 3. First, Protocol II has a narrower application than Common Article 3.[113] Protocol II establishes an upper and lower limit for armed conflict that did not exist before. At the upper end of the spectrum of conflict, it excludes those conflicts where rebel forces have reached a belligerent status. Such conflicts are governed by Protocol I,[114] which triggers the entire body of the law of war even though these conflicts remain internal in nature.[115]

At the lower end of the spectrum of conflict, Protocol II does "not apply to situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, [not regarded as] armed conflicts."[116] This suggests that Protocol II requires an ongoing and sustained conflict similar to that required by the law of war.[117] Arguably, this threshold of application may be so high that only full-scale

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109. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Additional Protocol II].

110. *See id.* art. 2

111. *See id.* art. 4.

112. *See id.* art. 1.

113. *See* Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. RED CROSS 473, 481 (1997) ("[I]t was not possible to give Protocol II a field of application comparable to that of [Common] Article 3.").

114. *See* Additional Protocol II, *supra* note 109, art. 1. (applies "to all armed conflicts not covered by" Protocol I).

115. *See supra* note 52 (discussing scope of Protocol I). This could make states even more reluctant to support the application of the Protocols.

116. *See* Additional Protocol II, *supra* note 109, art. 1(2). As discussed *supra* note 94, Common Article 3 did not specifically define "armed conflict." This new language, similar to language found in the Commentary to the original Geneva Protocols, is now codified. *See* COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 36.

117. *See supra* text accompanying note 49 (regarding definition of armed conflict).

civil wars qualify for protection.[118] If a full-scale civil war occurs, this may trigger Protocol I and the entire body of the law of war. In effect, therefore, Protocol II may be so narrowly tailored that it eliminates its usefulness. Protocol II also fails to clarify whether dissident armed forces must apply the Protocol or if their mere capacity to apply it is sufficient to trigger Protocol II's protections.[119] This ambiguity arguably permits one party to an internal conflict to disregard Protocol II's application if an opposing party has already done so.[120]

Compared to Common Article 3, Protocol II has a higher threshold for application, and its provisions lend themselves to strict interpretation that could nullify the Protocol.[121] Still, Protocol II has value. Like Common Article 3, it prohibits collective punishments, slavery, and pillage.[122] It also specifically prohibits certain forms of violence and outrages upon personal dignity.[123] These prohibitions apply at all times and all places, provided the conflict satisfies the Protocol's requirements.[124]

Protocol II also attempts to allay states' fear that rebel forces or insurgents will be granted legitimacy and combatant immunity. Protocol II states that "[n]othing in the Protocol, shall be invoked for the purpose of

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118. *See* Analytical Report of the Secretary-General, Submitted Pursuant to Commission on Human Rights Resolution 1997/21, paras. 79-80, U.N. Doc. E/CN.4/1998/87; THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (Howard S. Levie ed., 1987); John R. Crook, *Strengthening Legal Protection in Internal Conflicts: Introductory Remarks: Panel on Internal Conflicts*, 3 ILSA J. INT'L & COMP. L. 491 (1997); Burgos, *supra* note 84, at 9; L.C. Green, *Low Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493 (1997); Meron, *supra* note 106, at 599 (all discussing the thresholds of application created by Additional Protocol II).

119. *See* Additional Protocol II, *supra* note 109, art. 1(1) (requiring that dissident armed forces be sufficiently organized "as to enable them" to implement this protocol). *See also* Hampson, *supra* note 88, at 66-67. "It is not clear whether the dissident armed forces must manifest the ability to apply the Protocol by doing so or if it is sufficient that they have the capacity or ability to do so." *Id.*

120. Additional Protocol II, *supra* note 109, art. 1(1). *See* de Preux, *supra* note 113, at 479 (arguing that guerillas who do not respect the law of war may be disqualified from its protections). *See also* Lysaght, *supra* note 107, at 12. "The reality of life is that governments will agree to treat rebels as prisoners-of-war when and only when it is expedient in order to secure similar treatment for their own troops." *Id.* at 21.

121. *See* Lysaght, *supra* note 107, at 22-21 (citing A. Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 467, 496 (A. Cassese ed. 1979)). Although sympathizing with the disappointment of those who hoped for a more comprehensive protocol governing internal armed conflict, Mr. Lysaght concludes that Protocol II is a significant advance over Common Article 3 and the various nonderogable articles of human rights treaties. *Id.*

affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."[125]

Protocol II brings greater specificity to the law of internal armed conflict.[126] Signed and ratified by many states, it still has not achieved the sta-

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122. Protocol II prohibitions include:

> (a) violence to the life, health and physical or mental well being of person, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) collective punishments;
> (c) taking of hostages;
> (d) acts of terrorism;
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) slavery and the slave trade in all their forms;
> (g) pillage;
> (h) threats to commit any of the foregoing acts.

See Additional Protocol II, *supra* note 109, art. 4(2).

123. *Id.*

124. *Id.* Although, Common Article 3 remains broader in application because it arguably applies at all times, and not just during conflicts meeting the definition of Protocol II. *See* discussion *supra* note 94.

125. Additional Protocol II, *supra* note 109, art. 3(2). In effect, like Common Article 3, no legal status is created by this Protocol; thus, this provision is also relied upon as denying combatant immunity status to rebels. *See* discussion *supra* note 97.

126. *See* de Preux, *supra* note 113, at 481 ("it is a step forward"); Lysaght, *supra* note 107, at 22-21 ("[I]t must be concluded that Protocol II, in terms of rights stated, constitutes a significant advance over what is contained in Common Article 3 of the 1949 Geneva Conventions."). *But see* George H. Aldrich, *Comments on the Geneva Protocols*, 320 INT'L REV. RED CROSS 508, 510 (1997) ("As for Protocol II, I regret that the Diplomatic Conference largely failed."); A. Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 467, 496 (A. Cassese ed., 1979) (concluding that Protocol II is not as broad as Common Article 3); G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts*, *in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 18 (Brit. Inst. Int'l & Comp. L 1989) ("Protocol II cannot be considered a substantial advance of humanitarian principles in the law of internal armed conflict[,] an area in which it is particularly needed.").

tus attained by Common Article 3.[127] This notwithstanding, it serves as an important step to further define the law of internal armed conflict.

c. Other Treaties and Conventions

Various treaties and conventions regulating warfare apply to internal armed conflict, although this is not their primary purpose. These sources of conventional law are enforced both domestically and internationally.[128] Generally, they focus on outlawing methods and means of warfare in both international and internal conflicts, including the use of landmines and biological or chemical weapons.[129] As with Common Article 3 and Protocol II, these treaties and conventions provide evidence that states acknowledge domestic and international regimes regulating internal armed conflict.[130]

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127. Protocol II has been signed by 154 parties and ratified by 150 parties, while 189 parties have ratified Common Article 3. *See* International Committee of the Red Cross, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, *at* http://www.icrc.org/eng/ihl (last visited Mar. 16, 2002).

128. *See* Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, art. 22, 38 I.L.M. 769 (1999) (applies to armed conflicts not of an international character); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong. (1993), 32 I.L.M. 800 (1993) (concerns both control and use); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (applies in all circumstances); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997) (applies in all circumstances); Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *opened for signature* Apr. 10, 1981, 19 I.L.M. 1523 (1980) (applies in all circumstances); Protocol II on Mines, Booby-Traps and Other Devices, May 3, 1996, 35 I.L.M. 1206 (1996) (applies to all conflicts governed by Common Article 3).

129. *See* sources cited *supra* note 128. *See also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 119 (Oct. 2, 1995) (discussing the gradual extension to internal armed conflict of the rules embraced by the various treaties regulating methods and means of warfare), *reprinted in* 35 I.L.M. 32 (1996).

130. Meron, *supra* note 35, at 262 (discussing the application of treaties governing methods and means to internal armed conflicts).

d. Human Rights Obligations

Like other conventional sources, human rights law was not designed specifically to regulate internal armed conflict. It protects citizens, as individuals or groups, against state conduct.[131] Under most human rights treaties, however, these protections are not absolute.[132] The state can ignore certain rights and obligations during times of national crises, such as internal armed conflicts.[133]

Other rights remain non-derogable under human rights law, and states may not ignore them no matter the national situation.[134] Treaties with non-derogable rights continue to govern state conduct towards individuals during an internal armed conflict. Unlike law of war treaties, which govern all parties to the conflict, these limitations only apply to the state.[135] This anomaly arises from the expectation that the state will function as the guarantor of these rights.

The emerging law of internal armed conflict finds certain rights and obligations in human rights law.[136] Similar to the protections provided by

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131. *See* NEWMAN & WEISSBRODT, *supra* note 73, at 24 (discussing the scope of human rights law).

132. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter International Covenant on Civil and Political Rights] (parties may derogate in times of public emergency); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, OAS Treaty Series, No. 36 (1970), *reprinted in* 1969 Y.B. HUMAN RIGHTS 390; 65 AM. J. INT'L L. 679 (1971) [hereinafter American Convention on Human Rights] (parties may derogate in times of "war, public danger, or other emergency that threatens the independence or security of a State Party); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T. S. 221, *reprinted in*, 1950 Y.B. HUMAN RIGHTS 418 [hereinafter European Convention for the Protection of Human Rights] (Article 15 permits derogation during times of war or other public emergency which threatens life of the nation.).

133. This right of derogation arises when the existence of the state is threatened. *See* sources cited *supra* note 132. *See also* Hampson, *supra* note 88, at 61-65 (discussing generally derogable human rights).

134. *See* sources cited *supra* note 132. For example, the 1966 International Covenant on Civil and Political Rights permits no derogation in respect of the right to life, the right not to be tortured, ill-treated, or enslaved and the right not to be punished by *ex post facto* laws. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 4(2). The European Convention on Human Rights contains similar non-derogable protections. *See* European Convention for the Protection of Human Rights, *supra* note 132, arts. 2, 3, 4(1), 7. The American Convention on Human Rights' non-derogable protections include right to life, freedom from torture, and freedom from *ex post facto* laws. *See* American Convention on Human Rights, *supra* note 132, art. 27(2).

Common Article 3 and Protocol II,[137] these rights further define the minimum conventional standards applicable to internal armed conflicts.[138]

A broad conventional basis governs internal armed conflict. Common Article 3 serves as the primary convention for the law of internal armed conflict, and Additional Protocol II applies specifically to internal armed conflict. Other treaties and conventions, designed to regulate the methods and means of war, regulate state conduct during all armed conflicts, whether international or internal. Finally, human rights treaties with non-derogable provisions protect a state's citizens during internal armed conflict. Not without limitations, these conventions and treaties serve as the conventional sources for the law of internal armed conflict.

2. Customary Law of Internal Armed Conflict

The law of internal armed conflict has also experienced significant growth under customary international law.[139] Unlike conventional law, however, this growth occurred slowly and unevenly, rather than rapidly and systematically. Many customary law requirements are reflected in the

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135. *See* Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant Commission on Human Rights Resolution 1997/21, para. 9, UN Doc. E/CN.4/1998/87 (1998) ("[T]he rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situation of internal violence, it is also important to address the behavior of non-State armed groups."). *See also* AMNESTY INTERNATIONAL, MUDDYING THE WATERS, THE DRAFT "UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES": NO COMPLEMENT TO HUMAN RIGHTS (1998) [hereinafter DRAFT UNIVERSAL DECLARATION] (AI Index No. IOR 40/02/98) (stating position against applying Human Rights obligations to non-state actors), *available at* http://www.amnesty.org/ailib/ index.html.

136. *See* discussion *infra* Section III (discussing human rights law impact).

137. They include at least: (1) the right to life; (2) the prohibition on torture; (3) the prohibition on cruel, inhuman or degrading treatment; (3) the prohibition on slavery; and (4) the prohibition on retroactive criminal legislation or punishment. RESTATEMENT (THIRD), *supra* note 21, § 702. *Compare* Human Rights Treaties *supra* note 132, *with* discussion of Common Article 3, *supra* note 89, *and* Additional Protocol II, *supra* note 109 (demonstrating the similarity of many of the protections provided by these various sources).

138. *See* MERON, *supra* note 74, at ch. II (discussing the human rights instruments as becoming reflective of customary international law); Meron, *supra* note 35, at 274 (discussing fundamental standards of humanity that cannot be derogated from and would apply during internal armed conflicts).

139. Customary law and conventional law have equal authority as international law. RESTATEMENT (THIRD), *supra* note 21, § 102 cmt. j. The primary difference is that customary law generally applies to all states, whereas conventional law only applies to the parties to the convention. *See id.*

conventional law.[140] Yet even after codification, customary international law maintains its authority, particularly as regards states that do not adhere to or sign the codifying treaty.[141] In fact, some customs rise to the level of peremptory norms or *jus cogen*, which obligate all states and parties.[142]

State practice and *opinio juris* provide evidence of customary law.[143] Explicit evidence that a state considers a practice obligatory is not necessary; it can be inferred from the state's actions or omissions.[144] If a state follows a practice, but considers it non-binding, however, there is no *opinio juris*, and that practice may not become customary law for that state.[145]

Other diverse sources provide additional evidence of customary laws, including state acts, claims, diplomatic acts and instructions, declarations, official statements of policy, national law, court judgments, other govern-

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140. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14, 114, paras. 218-220 (Judgment of 27 June) (affirming that Common Article 3 is declaratory of customary international law). *See also* MERON, *supra* note 74, at 1 (Chapter 1 discusses humanitarian instruments as customary law.). *See generally* I. SINCLAIR, THE INTERNATIONAL LAW COMMISSION 138-45 (1987) (discussing the relationship between codification and customary international law).

141. *See* RESTATEMENT (THIRD), *supra* note 21, § 102 cmt. k (discussing persistent objectors).

142. "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 864 (7th ed. 1999). "There is general agreement that the principles of the United Nations Charter prohibiting the use of force are *jus cogens*." RESTATEMENT (THIRD), *supra* note 21, § 102, at 34 (reporter's note 6). *Jus cogen* norms include prohibitions on genocide, slave trade, and gross violations of human rights. *Compare id.* (discussing *jus cogen* norms generally) *and* text accompanying *infra* note 157 (discussing fundamental human rights), *with* Common Article 3, *supra* note 89, art. 3 (discussing Common Article 3 protections) *and* Additional Protocol II, *supra* note 109, art. 4(2) (discussing Protocol II protections).

143. RESTATEMENT (THIRD), *supra* note 21, § 102 (discussing sources of international law). *Opinio juris*: "The principle that for a country's conduct to rise to the level of international customary law, it must be shown that the conduct stems from the country's belief that international law (rather than moral obligation) mandates the conduct. BLACK'S LAW DICTIONARY 1119 (7th ed. 1999).

144. RESTATEMENT (THIRD), *supra* note 21, § 102 cmts. b, c (discussing state practice and *opinio juris*).

145. *Id.* § 102, at 32 (reporter's note 2) (discussing Norway's successful maintenance of a different system of delimiting its territorial zone) (citing Fisheries Case (United Kingdom v. Norway), I.C.J. Rep. 116 (1951)). Another example is the U.S. position on the application of the entire body of the law of war to internal armed conflicts. Although, in practice, the U.S. armed forces apply the law of war in all operations, this application is done as a matter of policy and not obligation. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998) [hereinafter DODD 5100.77].

mental acts or omissions, and even acquiescence to acts of other states.[146] Historical use establishes customary law,[147] as can military regulations and manuals that reflect state expectations for their armed forces.[148] Finally, reports by international organizations offer guidance on whether a law has achieved customary status.[149]

With its broad range of sources, the customary law of internal armed conflict may be as broad as the conventional law. Courts,[150] agencies,[151] and commentators[152] recognize that Common Article 3 has entered customary international law. Similarly, the protections of Additional Protocol II have become customary international law, even if its prohibitions have

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146. RESTATEMENT (THIRD), *supra* note 21, § 103. The Restatement provides a useful list:

> substantial weight is accorded to
> (a) judgments and opinions of international judicial and arbitral tribunals;
> (b) judgments and opinions of national judicial tribunals;
> (c) the writing of scholars;
> (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

Id. Importantly, the Restatement also notes that this list is not in order of precedence or inclusive. *Id. See also* International Court of Justice Statute Article 38, which provides the following sources of evidence of international law:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

147. *See, e.g.*, W. Hays Park, *Joint Service Combat Shotgun Program*, ARMY LAW. Oct. 1997, at 16 (exploring legality of combat shotgun by relying on its historical use).

148. *See, e.g.*, Prosecutor v. Tadic, No. IT-94-1-AR72, para. 106 (Oct. 2, 1995) (examining Nigerian Armed Forces' code of conduct in determining customary character of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

149. *See* RESTATEMENT (THIRD), *supra* note 21, § 103 cmt. c (discussing in comment c that although international organizations do not have authority to make law, their pronouncements provide evidence of custom). For an example of an international organization providing guidance on the customary law, see COMMENTARY ON I GENEVA CONVENTION, *supra* note 88, at 49-50.

not.[153] Protocol II's broad acceptance, however, adds to the evidence of state practice and *opinio juris* supporting the law of internal armed conflict.[154] A recent international criminal tribunal at The Hague concluded that customary rules for internal armed conflict now require

> protection of civilians from hostilities, . . . protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibitions of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[155]

Certain non-derogable human rights have also become customary international law,[156] including prohibitions against:

(a) genocide,

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150. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (discussing customary character of Common Article 3); *Tadic*, No. IT-94-1-AR72, para. 128 (discussing law of war and specifically Common Article 3 as becoming increasingly reflected in custom), *reprinted in* 35 I.L.M. 32 (1996).

151. *See, e.g.*, U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, paras. 11, 499 (1956) [hereinafter FM 27-10]; DEFENCE MINISTRY, NEW ZEALAND DEFENCE FORCE DIRECTORATE OF LEGAL SERVICES, at 112 (1992) (Interim Law of Armed Conflict Manual para. 1807, 8); Humanitares Volkerrecht in Bewaffneten Conflikten—Handbuch [The Handbook of Humanitarian Law in Armed Conflicts], DSK AV2073200065, para. 1209 (Aug. 1992) (unofficial translation) (all manuals discussing breaches of Common Article 3 as criminally punishable).

152. *See, e.g.*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244 (1996) (discussing the development of Common Article 3 into customary international law). *See generally* MERON, *supra* note 74, at 1 (discussing in Chapter 1 humanitarian instruments, specifically Common Article 3 and Protocol II as becoming customary law).

153. Message from the President of the United States, Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims on Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, Letter of Transmittal, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III-IV (1987) (discussing the obligations contained in Protocol II).

154. *See supra* note 127.

155. *Tadic*, No. IT-94-1-AR72, para. 127, *reprinted in* 35 I.L.M. 32 (1996). *But see* Meron, *supra* note 152, at 241-42 (Although, agreeing with the court's legal conclusions, Professor Meron concludes that the court's list of rules applicable to internal armed conflicts may be over-inclusive.).

156. *See* RESTATEMENT (THIRD), *supra* note 21, § 702 (discussing customary international law of human rights).

> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (e) a consistent pattern of gross violations of internationally recognized human rights. [157]

Like most customary international law, this list is neither complete nor closed.[158] Because these rights are non-derogable, they have the force of law regardless of the type of conflict.[159] So althought these rights originate from human rights law, they apply to internal armed conflict and form part of the law of internal armed conflict.

The customary law of internal armed conflict combines the customary protections found in Common Article 3, Protocol II, various other treaties affecting armed conflicts, and certain human rights treaties. Unlike conventional law, though, customary international law typically binds all parties to a conflict, whether state or non-state actors. This does not lend legitimacy or legality to the conduct of non-state actors; rather, the reach of the law is indiscriminate.

C. Conclusion

The law of internal armed conflict developed from the law of war. Although increasingly human-centric, the law of war is still limited to international armed conflicts. Specifically, it requires state conduct and armed conflict. A need was seen to extend protections beyond these limits, while still respecting state sovereignty. Prohibitions that previously applied only to international wars are being gradually extended to internal armed conflicts.[160]

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157. *Id.*

158. *See id.* cmt. a.

159. *See id.* cmt. n (discussing the *jus cogen* nature of these rights). *See* United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. REP. 3, 41 (discussing the imperative character of these legal obligations notwithstanding the circumstances).

160. Meron, *supra* note 27, at 574 (discussing war crimes and internal conflicts).

Historically, Common Article 3 was intended as a limited intrusion into state sovereignty. It establishes minimum standards of conduct during all conflicts, including internal armed conflicts.[161] In addition, other regimes, such as Protocol II, various arms control treaties and human rights treaties, apply to internal armed conflict. Debate over the application of these rules arises concerning internal armed conflict:

> (1) where the threshold of applicability of international humanitarian law is not reached.
>
> (2) where the state in question is not a party to the relevant treaty or instrument;
>
> (3) where the derogation from the specified standards is invoked; and
>
> (4) where the actor is not a government, but some other group.[162]

The law of internal armed conflict emerged in response to this debate.

Reflected in conventional and customary law, the law of internal armed conflict continues to grow. Currently, human rights law drives the law of internal armed conflict's development, and it exerts substantial influence on the emergence of this new body of law, despite its limited application to internal armed conflict. The next section explores this migration from the human rights regime to the law of internal armed conflict regime.

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161. *See* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing the historical role of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996). *See* also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (discussing role Common Article 3 to internal armed conflicts).

162. Theodor Meron, *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards,* 89 AM. J. INT'L L. 215, 217 (1995).

III. Confluence or Confusion: A River from Two Streams

Dovery no provery.[163]

Since the 1950's, the law of war has found a potent partner in the growing regime of human rights law.[164] They both serve to protect individuals, but the exact juxtaposition of these two bodies of law is unclear, even though their mutual support is apparent.[165] The relationship between the two regimes is so close that the U.N. General Assembly issued a resolution on the development of the law of war entitled "Respect for Human Rights in Armed Conflicts."[166]

It would be wrong to assume that this close relationship existed from the outset. Owing to their separate legal categories, only recently have commentators explored the similarities between the law of war and human rights law.[167] These similarities have been the basis for the confluence of many enforcement proposals.[168] To appreciate any proposed solution to the enforcement of the law of internal armed conflict, however, one must understand the migration that has occurred between these two distinctive areas of law.[169]

This section explores the traditions and subsequent confluence of the law of war and human rights regimes. It then investigates the two regimes'

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163. Ronald Reagan quoting the Russian maxim, "trust, but verify" on the signing of the INF treaty at The White House, December 8, 1987, *quoted in* THE QUOTABLE RONALD REAGAN 311 (Peter Hannaford ed., 1998).

164. Draper, *supra* note 126, at 4-5 (discussing the historical and theoretical connections between the law of war and human rights law).

165. *See* Kolb, *supra* note 24, at 412-13 ("international humanitarian law and international human rights law are near relations"). *See also* John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L REV. RED CROSS 445 (1998) ("the two subjects are now considered different branches of the same discipline); CHADWICK, *supra* note 69, at 5 (International humanitarian law is "understood to be divided into two main branches: the law of war and limited aspects of human rights law.").

166. G.A. Res. 2444, U.N. GAOR, 23rd Sess., 1748th plen. mtg., U.N. Doc.A/RES/2444 (1968).

167. Kolb, *supra* note 24, at 409 (discussing history and differences between law of war and human rights regimes).

168. *See* Walter Kälin, *The Struggle Against Torture*, 324 INT'L REV. RED CROSS 433, 444 (1998) ("weakness in one area can most often be compensated by invoking instruments [that] belong to the other").

169. Meron, *supra* note 35, at 239 (exploring the migration of principles from human rights to the law of war).

practical differences, which produce dissimilar enforcement strategies. Finally, this examination of historical, practical, and enforcement differences lays the groundwork to discuss the future of the law of internal armed conflict.

A. Historical Differences

The primary distinction between the law of war and human rights regimes relates to their historical development.[170] As discussed previously, the law of war has deep historical roots.[171] Evolving primarily in Europe, it is one of the oldest areas of public international law.[172] Human rights regimes later developed out of the theories of the Age of Enlightenment, which found "their natural expression in domestic constitutional law."[173] After the Second World War, the mutual relationship between the law of war and human rights law began. [174]

Two seminal conventions embodied the two legal regimes. For human rights law, the 1948 Universal Declaration of Human Rights[175] aspired to foster a convention on human rights that would bind its signatories.[176] This convention—drafted under the auspices of the United Nations, but never completed[177]—intended to regulate conduct during

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170. Kolb, *supra* note 24, at 410.

171. *See* sources cited *supra* note 31 (describing law of war in antiquity).

172. *See* Draper, *supra* note 126, at 5 (discussing the historical perspective of the law of war).

173. Kolb, *supra* note 24, at 410. Some examples include: from the United Kingdom, the 1628 Petition of Rights, the 1679 Habeas Corpus Act, and the 1689 Bill of Rights; from the United States of America, the 1776 Declaration of Independence and the 1776 Virginia Bill of Rights; from France, the 1789 Declaration of the Rights of Man and of the Citizen. *Id.*

174. *Id.* ("[T]he end of the 1940s was when human rights law was first placed beside" the law of war.) ; Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, *in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 31, 35 (Frits Kalshoven & Yves Sandoz eds. Martinus Nijhoff Publishers 1989) (discussing the relationship between human rights regimes and the law of war).

175. *See* G.A. Res. 217A(111), U.N. Doc. A/810 (1948).

176. The Declaration as a U.N. General Resolution has no force of law and is not a treaty. *See* RESTATEMENT (THIRD), *supra* note 21, § 102 (sources of international law). Since its passage, however, it has attained a normative character. *See id.* §701 (Reporters' note six discusses the debate regarding the binding nature of the Declaration, and concludes that the "Declaration has become the accepted general articulation of recognized rights.").

177. *See* Kolb, *supra* note 24, at 413.

times of peace.[178] Later human rights treaties also specifically limited their application to times of internal armed conflict.[179] Defining the relationship of states and their nationals, the convention would have implemented human rights law domestically with remedies for violations available at the municipal level.[180] The focus was more on state conduct, rather than individual responsibilities.[181]

At the same time, the Geneva Conventions were codifying much of the modern law of war. The drafters mentioned human rights in passing, but mostly in vague terms.[182] The conventions focused on protected persons (sick, wounded, prisoners of war, civilians), and defined rights in relation to that status. This in contrast to human rights law, which derives rights "solely from the quality of being human."[183] The Fourth Convention, dealing with civilians, explicitly stated that the law of war did not apply to the relations between a state and its nationals.[184]

The 1968 Tehran International Conference on Human Rights marked a historical confluence of the law of war and human rights law,[185] and treated the two regimes as branches of the same discipline.[186] "A number of factors have contributed to this merger, including the growing signifi-

178. *See* Dugard, *supra* note 165, at 446 (these treaties were "primarily concerned with the relationship between States and their nationals in time of peace."). *See also* Kolb, *supra* note 24, at 412-13.

179. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 4; American Convention on Human Rights, *supra* note 132, art. 27; European Convention for the Protection of Human Rights, *supra* note 132, art. 15 (each article discussing the right of derogation). *See also* Djamchid Momtaz, *The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife*, 324 INT'L REV. RED CROSS 455, 457 (1998) (discussing human rights instruments authorizing participating states to restrict their obligations in periods of crisis).

180. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 2(3) (creating the obligation of state parties to provide an effective remedy for violations); American Convention on Human Rights, *supra* note 132, art. 25 (requiring states to provide remedies under national laws); European Convention for the Protection of Human Rights, *supra* note 132, art. 13 (requiring remedies under national law for violations). *See also* MERON, *supra* note 74, at 139 ("The duty of a state to provide remedies under its national law for violations of human rights is perhaps implicit in human rights treaties which require national implementation and whose effectiveness depends on the availability of municipal remedies.").

181. *See* Kälin, *supra* note 168, at 442 (discussing the prevention, enforcement and reparation strategies of human rights regimes). *See also* DRAFT UNIVERSAL DECLARATION, *supra* note 135.

182. FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, vol. II, sec. A, at 165, 323, 692, 780 (1950).

183. Kolb, *supra* note 24, at 416.

cance of international criminal law and the criminalization of serious violations of human rights."[187] The law of war and human rights law, however, remain separate historical and theoretical legal regimes.

B. Practical Differences

Practical differences underlie the continued distinction between the law of war and human rights law. Each was the focus of a different institution, illustrating a dichotomy between the International Committee of the Red Cross and the United Nations.[188] The United Nations International Law Commission, for example, did not include the law of war among the international law subjects considered for codification.[189] This attitude can be understood only in a post-war context. "The United Nations, the guarantor of international human rights, wanted nothing to do with the Law of

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184. "A person is only a legal subject within a State and the provisions concerning the protection of civilians in time of war take no account of disputes which may exist between the State and its own citizens." COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 372-73. Although, perhaps perceptively the commentator "concludes that a doctrine which 'is today only beginning to take shape'—human rights—could one day broaden the scope" of the law of war. Kolb, *supra* note 24, at 418 (quoting COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 373).

185. Twenty years after the adoption of the Universal Declaration of Human Rights, the United Nations convened its first in a series of "mega-conferences." *See* Cerna, *supra* note 174, at 39. Held in Tehran, this conference was dedicated to human rights. The conference met from 22 April to 13 May 1968 to set out the United Nations human rights agenda for the future. *Id. See also* Meron, *supra* note 35, at 267 ("Soon after the [Tehran Conference], the U.N. General Assembly adopted Resolution 2444, (XXIII), entitled 'Respect for Human Rights in Armed Conflicts.'"); Dugard, *supra* note 165, at 445 ("[T]he 1968 Tehran International Conference on Human Rights" changed the situation dramatically.).

186. *See* Cerna, *supra* note 174, at 39 ("Resolution No. XXIII [Respect for Human Rights in Armed Conflicts] brought [the law of war], for the first time, squarely within the framework of the international human rights legal regime."). *See also* Kolb, *supra* note 24, at 412-13 ("From a historical standpoint, it must be emphasized that this common front hardly existed before the adoption of Resolution XXIII.").

187. Dugard, *supra* note 165, at 445.

188. Kolb, *supra* note 24, at 416 (discussing the different UN and International Committee of the Red Cross institutional roles in the development of the law of war and human rights).

189. Y.B. OF THE INT'L L. COMMISSION, 1949, at 281, para. 18 (1950). It was considered "that if the Commission, at the very beginning of its work, were to undertake this study (on the law of war), public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace." *Id.*

War."[190] Instead, the United Nations' focus remained on human rights law, while the International Committee of the Red Cross focused on the law of war.[191] In addition, the International Committee of the Red Cross did not want to move any closer to the essentially political United Nations or its focal point, human rights law.[192] So these two bodies of law are practically represented by two different institutions.

Additionally, human rights regimes apply primarily in peacetime.[193] In contrast, the law of war, with its minimal relevance in peacetime, applies during times of international armed conflict and limited times of internal armed conflict.[194] Times of international armed conflict pose the greatest threat to a state's sovereignty because of the "imposition by force" of one nation's will upon another.[195] Even in these circumstances, when the legitimacy of the state's concern for its sovereignty is paramount, the law of war prohibitions continue to apply. In contrast, human rights law allows states to derogate from most of their obligations during war and internal armed conflict, except for certain fundamental rights.[196]

Each regime also regulates distinct conduct. Under human rights law, "no one may be deprived of life except in pursuance of a judgment by a competent court."[197] Applying to relationships between unequal parties,

190. Kolb, *supra* note 24, at 411.

191. *See id.*

192. *See id.* (citing SEVENTEENTH INTERNATIONAL RED CROSS CONFERENCE REPORT, STOCKHOLM 48 (1948) (describing an adopted amendment that urged the International Committee of the Red Cross that "in view of the non-political character of the constituent bodies of the International Red Cross, to exercise the greatest care in [its] relationship with intergovernmental, governmental or non-governmental organizations")).

193. *See* Dugard, *supra* note 165, at 446 (these treaties were "primarily concerned with the relationship between States and their nationals in time of peace."). *See also* Kolb, *supra* note 24, at 412-13.

194. *See* discussion *supra* Section II.A.2 (triggering the law of war).

195. VON CLAUSEWITZ, *supra* note 34, at 118-19 (discussing war as a continuation of state policy).

196. This right of derogation is when the existence of the state is threatened. *See* International Covenant on Civil and Political Rights, *supra* note 132 (parties may derogate in times of public emergency); American Convention on Human Rights, *supra* note 132 (parties may derogate in times of "war, public danger, or other emergency that threatens the independence or security of a State Party); European Convention for the Protection of Human Rights, *supra* note 132 (permitting derogation during times of war or other public emergency, which threatens life of the nation). *See also* CHADWICK, *supra* note 69, at 76 (discussing derogation during times of internal armed conflicts); Hampson, *supra* note 88, at 61-65 (discussing generally derogable human rights).

197. Meron, *supra* note 35, at 240.

human rights law emphasizes the rights of individuals, aiming to protect the physical integrity and human dignity of the governed from their government.[198] In contrast, the law of war allows, or at least tolerates, "the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage."[199] The law of war permits limits on personal freedoms, access to courts, and avenues of appeal, whereas human rights law proscribes such limits.[200] The law of war also permits significant restrictions on freedom of expression, assembly, and movement,[201] whereas human rights obligations guarantee these rights.[202] Finally, the law of war has expanded to regulate the conduct of all parties in their individual and state capacity,[203] whereas human rights law continues to regulate primarily state actors.[204]

In sum, both historical and practical differences separate the law of war and human rights law. "The two systems, Human Rights Law and the Law of War, are thus distinct, and in many respects different."[205] Their respective enforcement regimes reflect these differences.

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198. *See* MERON, *supra* note 74, at 101 (discussing the differences between human rights law and other traditional field of international law).

199. Meron, *supra* note 35, at 240.

200. *Id.*

201. *Id.*

202. *See* International Covenant on Civil and Political Rights, *supra* note 132, arts. 19, 21 (guaranteeing freedom of expression, and assembly respectively); American Convention on Human Rights, *supra* note 132, arts. 13, 15, 22 (guaranteeing freedom of expression, assembly and movement respectively); European Convention for the Protection of Human Rights, *supra* note 132, arts.10, 11 (guaranteeing freedom of expression and assembly respectively).

203. XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 533-35 (1948) (establishing the legitimacy of individual responsibility of law of war violations). *See also* Meron, *supra* note 27, at 555 (discussing the future of prosecutions of serious violations of the law of war).

204. *See* RESTATEMENT (THIRD), *supra* note 21, § 701 (discussing the obligations to respect human rights as inuring to the state). *See also* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L REV. RED CROSS 481, 487 (1998) ("[H]uman right standards cannot be applied to acts committed by private individuals or group."); DRAFT UNIVERSAL DECLARATION, *supra* note 135.

205. Meron, *supra* note 35, at 240.

C. Enforcement Differences

The law of war and human rights regimes rely on a number of coercive and non-coercive enforcement measures.[206] Traditionally, each has developed its own enforcement scheme. Like most international law regimes, these two regimes recognize the importance of domestic enforcement schemes and institutions to ensure compliance.[207]

To secure compliance with its rules, the law of war contemplates domestic criminal prosecution and punishment of those individuals who violate its prohibitions.[208] These criminal sanctions apply primarily to international armed conflict.[209] For example, "grave breaches" under the Geneva Conventions can occur only in international armed conflict, and most of the remaining prohibitions are largely inapplicable to internal armed conflicts.[210] The Nuremberg and Tokyo War Crimes Tribunals saw a comprehensive application of the law of war's criminal enforcement

206. *See* DIETER FLECK ET AL., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 525 (1995) (outlining thirteen different measures to ensure compliance).

207. *See* R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints*, *in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 443 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing the principle that most international agreements on human rights leave the task of implementation to state parties); Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 35 (1999) (asserting that the clearest current deterrent to widespread violation of the law of war is found in state domestic law and the disciplinary codes and judicial systems of the various armed forces).

208. *See* Geneva Convention I, *supra* note 43, arts. 49-50; Geneva Convention II, *supra* note 43, arts. 50-51; Geneva Convention III, *supra* note 43, arts. 129-30; Geneva Convention IV, *supra* note 43, arts 146-147 (discussing penal sanctions and grave breaches in each of the articles). *See also* Dugard, *supra* note 165, at 445 ("in the final resort [the law of war] contemplate[s] prosecution and punishment of those individuals who violate their norms."); Lohr & Lietzau, *supra* note 207, at 35 n.6 (discussing the United States consistent willingness to discipline its own and citing recent prosecutions of law of war violations).

209. Prosecutor v. Tadic, No. IT-94-1-AR72, para. 79 (Oct. 2, 1995) ("[G]rave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the [Geneva] Conventions committed in international armed conflicts."), *reprinted in* 35 I.L.M. 32 (1996).

210. *See id*.; *see also* Mary Griffin, *Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century*, 838 INT'L REV. RED CROSS 369, 371 (2000) ("customary international law has not yet developed to the point of extending its coverage of grave breaches to internal armed conflicts").

mechanism to international armed conflict.[211] More recently, the International Criminal Tribunal for the Former Yugoslavia built upon this legacy of international criminal prosecution of law of war violations.[212]

Historically, neither Common Article 3 nor Protocol II contemplated the prosecution of violations of their standards.[213] This view is rapidly changing as international criminal tribunals exercise their jurisdiction to try crimes encompassed by norms in the law of internal armed conflict.[214] Many commentators increasingly view the international criminal enforcement mechanism or its threatened use as the best method of ensuring compliance.[215]

Human rights regimes also begin with domestic enforcement.[216] In 1978, the United Nations recommended a set of guidelines for the func-

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211. XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 533-35 (1948); *see generally* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 10-19 (1973) (discussing the Tokyo trials).

212. *Tadic*, No. IT-94-1-AR72, para. 79 (conviction for a law of war violation), *reprinted in* 35 I.L.M. 32 (1996).

213. Meron, *supra* note 27, at 559. "Until very recently, the accepted wisdom was that neither common Article 3. . . nor Protocol II . . . provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility." *Id.* (citing Dennis Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990) ("IHL applicable to non-international conflict does not provide for international penal responsibility of persons guilty of violations.")).

214. *Tadic*, No. IT-94-1-AR72, para. 134 ("customary international law imposes criminal liability for serious violations of Common Article 3"), *reprinted in* 35 I.L.M. 32 (1996). *See also* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 8(2) c & e, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] (governing the elements of crimes for conduct in internal armed conflicts), *reprinted in* 37 I.L.M. 999 (1998).

215. *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213 (2000) (arguing in support of implementation of the International Criminal Court); Jonathan I. Charney, *Progress in International Law?*, 93 AM. J. INT'L L. 452 (1999) ("Many believe that this progress heralds a breakthrough in the achievement of rights protected by international criminal law.").

216. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 2(2) (discussing use of domestic measures); American Convention on Human Rights, *supra* note 132, art. 2 (discussing implementation through domestic measures); European Convention for the Protection of Human Rights, *supra* note 132, art. 35 (discussing need to exhaust domestic remedies). *See also* Wieruszewski, *supra* note 207, at 443 ("states should adopt appropriate legislation in order to give effect to the rights recognized in those [human rights] treaties").

tioning of domestic institutions[217] that would authorize these institutions to receive complaints, possess independent fact-finding facilities, and provide redress through conciliation or other appropriate remedies such as compensation.[218] These domestic institutions now play an important role because several international human rights instruments require exhaustion of local remedies before a complaint can be taken to an international institution.[219]

Although the Charter of the United Nations and the Universal Declaration of Human Rights expound fundamental standards, they do not establish formal enforcement mechanisms.[220] Rather, later treaties elaborated on these standards and created mechanisms for their enforcement.[221] At the international level, human rights bodies monitor treaty compliance by three methods: periodic national reports, individual and non-governmental organization petitions, and inter-state complaints.[222]

Human rights bodies have varying powers of enforcement over the state parties that have agreed to their jurisdiction, ranging from the "legally binding orders of the European Court of Human Rights, to the 'views' of the U.N. Human Rights Committee."[223] Neither the periodic national reports, which are supposed to "indicate the factors and difficulties, if any, affecting the implementation of the present Covenant,"[224] nor the inter-state complaints system provide individuals with remedies for violations

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217. UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, SEMINAR ON NATIONAL AND LOCAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, GENEVA 18-29 SEPT. 1978, U.N. Doc. ST/HR/SER.A/2 (1978).

218. *See id.*

219. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 28; American Convention on Human Rights, *supra* note 132, art. 46; European Convention for the Protection of Human Rights, *supra* note 132, art. 35 (each article requiring the exhaustion of domestic remedies). *See also* MERON, *supra* note 74, at 171-82 (discussing exhaustion of local remedies rule).

220. *See* U.N. CHARTER; Universal Declaration of Human Rights, G.A. Res. 217A(111), U.N. Doc. A/810 (1948).

221. *See* International Covenant on Civil and Political Rights, *supra* note 132; American Convention on Human Rights, *supra* note 132; European Convention for the Protection of Human Rights, *supra* note 132.

222. *See* Wieruszewski, *supra* note 207, at 443-44 (discussing methods of implementation of human rights law); Dugard, *supra* note 165, at 446 (discussing human rights implementation).

223. *See id. See also* Kälin, *supra* note 168, at 441 (discussing the mandatory mechanisms and decisions of the European Court of Human Rights).

224. International Covenant on Civil and Political Rights, *supra* note 132, art. 40(2).

of their human rights.[225] Rather, under these mechanisms, publicity and persuasion ensure state compliance with human rights.[226] The individual or non-governmental petition does not provide direct standing for the individual whose rights have been violated.[227] Instead, it serves "as a source of information about these violations."[228] With few exceptions,[229] international human rights procedures are used to investigate widespread violations, but domestic enforcement is the rule.[230]

D. Conclusion

The law of war and human rights law are related, but distinct disciplines.[231] Human rights law, the law of war, and their respective bodies and institutions are now central to the protection of minimum humanitarian standards.[232] "Through a process of osmosis or application by analogy, the recognition as customary of norms rooted in international human rights instruments has affected the interpretation and, eventually, the status of the parallel norms in instruments of international humanitarian law."[233] Historical, practical, and enforcement differences, however, continue to keep

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225. Wieruszewski, *supra* note 207, at 444-45 (discussing methods of implementation of human rights law).

226. *See* Dugard, *supra* note 165, at 446 (discussing implementation strategies of human rights treaties).

227. Wieruszewski, *supra* note 207, at 445 (discussing the individual and non-governmental petition method).

228. *Id.* at 446.

229. Under the U.N. Convention Against Torture, Article 4 requires states to prosecute offenders under national law. *See* International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, art. 4 U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1987) (entered into force on June 26, 1987, and for the United States on Nov. 20, 1994).

230. *Id. See also* Dugard, *supra* note 165, at 446 (discussing implementation strategies of human rights treaties); Wieruszewski, *supra* note 207, at 445.

231. Kolb, *supra* note 24, at 416 ("A technical and cultural gap separated these branches of the law which the vicissitudes of two very different path has happened to bring relatively close to each other within the body of international law.").

232. *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L REV. RED CROSS 505 (1998) (exploring a human rights body applying the law of war); Meron, *supra* note 35, at 253 (discussing a law of war body applying human rights).

233. Meron, *supra* note 35, at 239 (discussing the direction of the law of war as "driven to a large extent by human rights."). Both the Yugoslavia Tribunal and the Rwanda Tribunals provide a wealth of material showing criminal tribunals applying humanitarian law based on human rights law. *See id.*

the two regimes distinct. The differences have resulted in gaps of coverage, specifically, application during internal armed conflicts.[234]

Developments in recent years have changed this situation. Because of the duplication between the areas of the law, a blurring of the lines between human rights and the law of war has occurred as each is applied in an attempt to cover these gaps.[235] This overlapping application is creating an emerging body of law for internal armed conflict.

This law of internal armed conflict is comprised of parts of the law of war, specifically Common Article 3 and Protocol II; sections of human rights law that survive even in time of a public emergency that threatens the life of a nation; and portions of other treaties governing warfare during all armed conflicts. In humanizing and tempering the harshness of battle normally governed by the law of war, notions from human rights law have found resonance.[236] But rather than a confusing blend of various bodies of law, this confluence is creating a coherent law of internal armed conflict.

Developments in the law of war and human rights law will continue to influence the law of internal armed conflict. This influence will likely benefit and serve to protect all actors in all conflicts. Separately, these legal regimes deal ineffectively with the particular characteristics of internal armed conflicts. Yet despite their historical, practical and enforcement

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234. *See* Momtaz, *supra* note 179, at 457 (discussing the shortcomings for protection of human rights in cases of internal violence); Burgos, *supra* note 84, at 3 ("Neither of the legal regimes, each designed with one of the two conditions in mind (peace and war), deals effectively with the particular characteristics of internal conflicts.").

235. *See* CHADWICK, *supra* note 69, at 5 (defining international humanitarian law as a combination of the law of war and certain human rights law); Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 468 (1998). Professor Meron noted that the "probable inclusion in the International Criminal Court Statute of Common Article 3 and crimes against humanity, the latter divorced from a war nexus connotes a certain blurring of international humanitarian law with human rights law and thus an incremental criminalization of serious violations of human rights." *Id*. (note this inclusion has since occurred). *See also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing the criminal nature of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

236. Meron, *supra* note 152, at 262 (discussing how the applications of human rights by human rights bodies have influenced law of war tribunals). *See also Tadic*, No. IT-94-1-AR72, paras. 110-11 (discussing historic human rights instruments as providing protections in internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

differences, many of their respective rules are creating a third legal regime that can regulate internal armed conflict, the law of internal armed conflict.

IV. The Future of the Law of Internal Armed Conflict

> *The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which working like gravity, without intermission, will press us at last into one consolidated mass.*[237]

International law has been traditionally concerned with relations between sovereign states. Equally important is its concern for promoting minimum standards in the conduct of hostilities and in the treatment of persons involved in them.[238] Some of these rules devised internationally now apply to internal armed conflicts.[239] The law of internal armed conflict, however, remains relatively undeveloped.

Having explored the past and present of the law of internal armed conflict, this article next examines the future of this body of law. Specifically, where can development be anticipated, and who might guide or enforce that development? The first question explores the growing criminalization of the law of internal armed conflict in custom and conventions. The second question explores enforcement mechanisms for the law of internal armed conflict, and demonstrates the willingness of diverse bodies to participate in its enforcement. With this information, it is possible to analyze more completely the role of domestic tribunals in the criminalization and enforcement of the law of internal armed conflict.

A. Criminalization of the Law of Internal Armed Conflict

1. Criminalization in Customary International Law

The criminalization of the law of internal armed conflict through customary international law norms will substantially impact its enforcement.

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237. Thomas Jefferson, *quoted in* CITIZEN JEFFERSON 62 (John P. Kaminski ed., 1994).

238. Meron, *supra* note 35, at 239 (discussing the humanization of the law of war).

239. *See* discussion *supra* Section II.B (Finding the Law of Internal Armed Conflict).

For example, any state may intercede on behalf of an individual against another state that violates a legal principle grounded in customary international law by bringing a claim *ergo omnes* (in relation to all states).[240] Some of the law of internal armed conflict may have already achieved this customary international law status.[241]

To date, the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia performed one of the most conspicuous customary law analyses of the criminalization of Common Article 3, a part of the law of internal armed conflict. In *Prosecutor v. Tadic*, [242] the court looked to historic and current internal armed conflicts in Spain, Congo, Biafra, Nicaragua, El Salvador, Liberia, Georgia, and Chechnya.[243] The court explored the two parts of customary law, state practice and *opinio juris*.[244] A fair reading of the decision discerns a heavier emphasis on *opinio juris*,[245] which the court relied upon to compensate for the scarcity of supporting state practice.[246]

For *opinio juris* supporting the customary character of the norms applicable to internal armed conflict, the court invoked statements by governments and parliaments, resolutions of the League of Nations and the United Nations General Assembly, instructions by Mao Tse-tung, and the International Court of Justice decision in the *Nicaragua* case.[247] The court further identified the Nigerian army's operational code of conduct; statements by a warring party (the Farabundo Marti National Liberation in El

240. *See* RESTATEMENT (THIRD), *supra* note 21, § 703 (discussing remedies for violations of human rights obligations).

241. *See* discussion *supra* Section II.B.2 (Customary Law of Internal Armed Conflict).

242. No. IT-94-1-AR72 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). The appellate chambers did not use the term law of internal armed conflict, but relied heavily on Common Article 3, Protocol II, and non-derogable human rights as reflected in customary law. *Id.* As discussed *supra* Section II, these sources form a substantial part of the law of internal armed conflict.

243. *Id.* paras. 97, 100, 105, 106, 113-115 (discussing application of the law of war in various civil wars).

244. *Id.* para. 99 (discussing the use of customary law for the purpose of regulating civil strife).

245. *See* Meron, *supra* note 152, at 239-40 (1996) (discussing the methodology of the *Tadic* appellate chamber's opinion).

246. *Tadic*, No. IT-94-1-AR72, para. 99, *reprinted in* 35 I.L.M. 32 (1996). *See also* RESTATEMENT (THIRD), *supra* note 21, § 102 (regarding sources of customary law).

247. *Tadic*, No. IT-94-1-AR72, paras. 100-02, 108 (citations omitted), *reprinted in* 35 I.L.M. 32 (1996).

Salvador); statements of the European Community, the European Union, and the U.N. Security Council; military manuals; the Declaration of Minimum Humanitarian Standards; and a national judgment (of the Supreme Court of Nigeria).[248] The court concluded that these examples of *opinio juris* supported the customary criminalization of Common Article 3.[249]

As for state practice, the *Tadic* court noted that, in examining evidence "with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behavior of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behavior."[250] The court explained that this difficulty resulted from independent observers' limited access to the conflict in the Former Yugoslavia, including the International Committee of the Red Cross. Moreover, the court commented, parties to a conflict may withhold information or release misinformation to effect the enemy, public opinion, and foreign governments.[251]

In examining the current customary status of the law of war applicable to internal armed conflicts, the *Tadic* court effectively outlined the emerging law of internal armed conflict. In addition to concluding that "customary international law imposes criminal liability for serious violations of Common Article 3,"[252] the court concluded that certain "prohibitions of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities" also applied to internal armed conflicts.[253] The court limited its conclusions to "serious" viola-

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248. *Id*. paras. 108-22 (citations omitted).

249. *Id*. para. 134 (concluding that "customary international law imposes criminal liability for serious violations of Common Article 3").

250. *Id*. para. 99. *But see* Meron, *supra* note 152, at 240 ("One may ask whether the Tribunal could not have made a greater effort to identify actual state practice."). Professor Meron posits that in choosing its sources, the

> [t]ribunal appears to have followed Richard Baxter's insightful conclusion that "[t]he firm statement of the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the action of that country at different times and in a variety of contexts."

Id. at 241 (quoting Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 42 BRIT. Y.B. INT'L L. 275, 300 (1965-66)). Professor Meron concludes that "such [state] statements are not to be equated to custom *jure gentium* but are an important element in the formation of custom." *Id.*

251. *Tadic*, No. IT-94-1-AR72, para. 99, *reprinted in* 35 I.L.M. 32 (1996).

252. *Id*. para. 134.

tions of Common Article 3 and these other prohibitions,[254] but the case demonstrates how the criminalization of the law of internal armed conflict through customary international law norms is already taking place.[255]

Not to dispute the *Tadic* court's conclusion that the actual conduct of belligerents in the field may be the most reliable evidence of state practice, arguably the training, education, and disciplining of a state's soldiers should be considered also as reliable evidence of state practice. Some of the evidence identified by the court as *opinio juris* may also show state practice as it evidences conduct. For example, the application of the Nigerian army's operational code of conduct implementing Common Article 3 to the court-martial, sentence, and execution of Nigerian service members for conduct during an internal armed conflict is evidence of state practice.[256] Other domestic prosecutions of service members for conduct occurring in internal armed conflicts similarly indicate state practice.[257] Additionally, military training manuals demonstrate how troops are trained and educated, which is further evidence of state practice.[258]

The *Tadic* criminalization of the rules forming the law of internal armed conflict is not necessarily revolutionary.[259] The International Committee of the Red Cross, in its study of the current state of the law of war

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253. *Id*. para. 127. *But see* Meron, *supra* note 152, at 241-42 (Although, agreeing with the court's legal conclusions, Professor Meron concludes that courts's list of rules applicable to internal armed conflicts may be over-inclusive.).

254. *Id.* para. 134. The court also limited its holding by stating that "only a number of rules and principles governing international armed conflicts have gradually been extended to internal armed conflicts," and that the extension does not consist of a full and mechanical transplant, but of just "the general essence of those rules." *Id.* para. 126. *But see* Meron, *supra* note 152, at 240-41. Professor Meron notes that these caveats are important but do not make it much easier to identify those rules and principles which have already crystallized as customary law. *Id.*

255. "To determine *opinio juris* or acceptance as law in this field, it is necessary to look at both physical behavior and statements." Meron, *supra* note 152, at 243 (discussing what law of war aspects may be applicable to internal armed conflict).

256. *Id*. para. 106 (discussing two cases of Nigerian soldiers being executed).

257. *See* United States v. McMonagle, 34 M.J. 825 (A.C.M.R. 1992); United States v. Finsel, 33 M.J. 739 (A.C.M.R. 1991) (prosecutions for firing weapons in the air above Panama City during Operation Just Cause); United States v. Mowris, No. 68 (Fort Carson & 4th Inf. Div (Mech) 1 July 1993), *discussed in* Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 17-18 (1994) (conviction of U.S. Army specialist for killing a Somali national).

258. *See* Baxter, *supra* note 250, at 282 (stating that military manuals may provide evidence of the practice of states). *See also* DODD 5100.77, *supra* note 145 (detailing implementation of law of war training throughout the department of defense).

applicable to international and internal armed conflict, also relied on custom as evidence of the criminalization of the norms underlying the law of internal armed conflict. Specifically, the study looked at "the conduct of belligerents, [and] also the instructions they issue, their legislation; . . . military manuals, [and] general declarations on law."[260] Similarly, customary evidence of the criminalization of parts of the law of internal armed conflict can be found in various national military manuals and domestic laws that treat violations of Common Article 3 as a basis for individual criminal responsibility.[261]

Other evidence clearly supports criminalization of the law of internal armed conflict through customary international law norms. For example, U.S. Ambassador Albright explained the U.S. understanding that the "laws or customs of war" that could be prosecuted encompassed "Common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions."[262] Further evidence includes the U.S. statement "that serious violations of the elementary customary norms reflected in Common Article 3 should be the centerpiece of the International Criminal Court's subject matter jurisdiction with regard to non-international armed conflicts."[263] Additional evidence of custom includes the act of states' rat-

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259. *Report of an Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia by Professor Tom Farer*, U.N. Security Council at 1, U.N.Doc.S/26351/Annex (1993) (discussing how the law of war has developed into customary international law and is therefore applicable to internal armed conflict).

260. REPORT ON THE FOLLOW-UP TO THE INTERNATIONAL CONFERENCE FOR THE PROTECTION OF WAR VICTIMS 6 (1995) (26th International Conference of the Red Cross and Red Crescent) (Commission I, Item 2, Doc. 95/C.I/2/2). *See also* Meron, *supra* note 152, at 244-48 (discussing the role of the International Committee of the Red Cross in development of this area of law).

261. FED. REP. GERMANY, HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL, para. 1209 (1992); CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL 18-5, 18-6 (undated) (Second Draft); UK WAR OFFICE, LAW OF WAR ON LAND, AND BEING PART III OF THE MANUAL OF MILITARY LAW para. 626 (1958). *See also* DODD 5100.77, *supra* note 145 (detailing implementation of law of war training throughout the department of defense). In addition, the U.S. government has stated that "[t]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency." Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (copy on file with author).

262. *See* Meron, *supra* note 27, at 560 (quoting statement by U.S. Ambassador Albright Concerning, U.S. Position on Article 3 of Statute Creating International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/PV.3217 at 15 (May 25, 1993)).

263. Meron, *supra* note 235, at 466-67 (quoting the U.S. Statement Submitted to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998)).

ification of the proposed elements of the International Criminal Court statute, which criminalizes conduct during an internal armed conflict.[264]

This evidence of state practice and *opinio juris* supports the criminalization of the rules of the law of internal armed conflict.[265] This transformation is taking place in both the essence and details of these rules.[266] As greater international criminalization of the law of internal armed conflict through custom occurs, a greater push for the enforcement of these norms under the principle of *ergo omnes* should be expected.

Generally, the evolution of customary international law is slow. Treaty making may be faster, although not necessarily expeditious. Still customary international law remains a legitimate method for criminalization of the law.[267] It remains to be seen whether criminalization through the formation of custom will be faster, although less precise in content, than criminalization through treaty making.[268]

2. Criminalization in Conventional Law

Conventional law provides another avenue for criminalizing the law of internal armed conflict. There is movement in this area, notwithstanding the difficulties in criminalizing conduct through treaty making.[269] Additional Protocol II, while not a criminal statute, did expand and make

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264. *See* Rome Statute, *supra* note 214, art. 8(2) c & e (criminalizing conduct in non-international armed conflicts). *See also* Meron, *supra* note 235, at 466 (discussing the emerging understanding of the need to criminalize internal atrocities).

265. *See* Meron, *supra* note 235, at 463 (discussing how the Hague tribunal has given judicial imprimatur to serious violations of the law of war in internal armed conflicts).

266. Prosecutor v. Tadic, No. IT-94-1-AR72, para. 126 (Oct. 2, 1995) (discussing the emergence of rules on internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

267. Meron, *supra* note 152, at 247 (developing the law of war through custom is "enhanced by the meager prospects for the satisfactory development of the law of war through orderly treaty making."). *But see* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916, 951-52 (1994) (discussing how customary international law is an unlikely vehicle for applying the law of war to internal armed conflicts).

268. Theodor Meron, *supra* note 27, at 555 (discussing the dampened prospects of extending protective rules to internal armed conflicts through treaty making).

269. "The significance of developing humanitarian law through customary law is enhanced by the meager prospects for the satisfactory development of the law of war through orderly treaty making." Meron, *supra* note 152, at 247.

more specific the basic guarantees of Common Article 3.[270] Moreover, it later served as a basis for the *Tadic* court to criminalize conduct in internal armed conflicts.[271]

To expedite matters, one solution may be to recognize that the law of internal armed conflict is still lacking, and simply draft another round of additional protocols. New instruments, such as a multi-state declaration of those principles that are the minimum standards applicable to internal armed conflict, could be the first step toward a future Protocol III or some other binding instrument.[272]

Historically though, international lawmaking and various diplomatic conferences have chosen not to comprehensively criminalize the protective rules applicable to civil wars.[273] States consistently refused to incorporate provisions that would apply the full Geneva Conventions to internal armed conflicts.[274] Concerns regarding state sovereignty, legal recognition of insurgents, and combatant immunity will need to be addressed before any wholesale revisions to the Geneva Conventions are possible.[275] In addition, treaties or declarations are often made by consensus. There-

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270. *See* Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (copy on file with author). *See also* discussion *supra* Section II.B.1.b (Additional Protocol II of the Geneva Convention).

271. Prosecutor v. Tadic, No. IT-94-1-AR72, para. 117 (Oct. 2, 1995) (discussing Protocol II as having crystallized into emerging customary law), *reprinted in* 35 I.L.M. 32 (1996).

272. Lopez, *supra* note 267, at 951-52 (discussing the need for the U.N. General Assembly to pass a declaration calling on states to incorporate the Geneva Convention into their internal laws); Burgos, *supra* note 84, at 25 (suggesting the remedy lies in more effective enforcement and also through new instruments). *See, e.g.*, Declaration of Minimum Humanitarian Standards, *adopted at* Abo Akademi University Institute for Human Rights in Turku/Abo, Finland (Dec. 2, 1990) (non-binding declaration made at international conference as a model that states could adopt), *reprinted in* 89 AM. J. INT'L L. 218-223 (1995).

273. *See* Meron, *supra* note 27, at 555 (discussing the dim prospects of extending protective rules to internal armed conflicts through treaties).

274. *See* René Kosirnik, *The 1977 Protocols: a Landmark in the Development of International Humanitarian Law*, 320 INT'L REV. RED CROSS 483, 485 (1997) (discussing the state parties reluctance to "extend to rebel forces the same rights and obligations of those accorded to the regular forces of enemy states"); de Preux, *supra* note 113, at 481 (discussing state concerns of sovereignty affecting the scope of obligations in internal armed conflicts).

275. Meron, *supra* note 27, at 555 (discussing how state insistence on maximum discretion has limited the application of the law of war to internal armed conflicts).

fore, in fashioning "generally acceptable texts, even a few recalcitrant governments may prevent the adoption of more enlightened provisions."[276]

The Rome Statute of the International Criminal Court may also serve to criminalize the law of internal armed conflict,[277] assuming the statute is ratified.[278] It would represent the most complete conventional criminalization of the law of internal armed conflict to date,[279] including twenty-five specific crimes.[280] Additionally, a court created under this statute could further develop the law of internal armed conflict through its inherent judicial powers.[281] The International Criminal Court may yet represent a successful example of criminalization of the law of internal armed conflict along conventional lines.

3. Conclusion

Until recently, the law of war applicable to internal armed conflict did not have a basis for international criminalization.[282] Rather, it was "asserted that the normative customary law rules applicable in non-international armed conflicts do not encompass the criminal elements of war crimes."[283] Just eight years ago, the International Committee of the Red Cross in its comments on the proposed draft statute for the Yugoslavia tri-

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276. *Id.* at 555.

277. *See* Rome Statute, *supra* note 214, art. 8(2)c & e (criminalizing conduct in non-international armed conflicts).

278. The Rome Statute of the International Criminal Court will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession. To date 139 countries have signed and fifty-six have ratified the treaty. *See* International Criminal Court, *Ratification Status*, *at* http://www.un.org/law/icc/index.html (last visited Mar. 27, 2002).

279. *See* Noone & Moore, *supra* note 47, at 112 (discussing the creation and general nature of the court); Michael N. Schmitt & Peter J. Richards, *Into Uncharted Waters, The International Criminal Court*, 369 NAVAL WAR C. REV. 93 (2000) (offering a primer on the International Criminal Court, including its development and structure).

280. *See* Rome Statute, *supra* note 214, art. 8(2) c & e (including crimes such as murder, mutilation, cruel treatment, torture, taking hostages, attacking civilians, rape, pillage, sexual slavery, enlisting children and denying quarter).

281. *See* Meron, *supra* note 152, at 247 (discussing international criminal tribunals, Professor Meron notes the court's role "in the interpretation and application of jurisdictional provisions of their statutes").

282. *See* Meron, *supra* note 27, at 559 (citing Plattner, *supra* note 213, at 414 ("IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty for violations.")). *See also* discussion *supra* Section IV.A (Criminalization of the Law of Internal Armed Conflict).

bunal concluded that "according to [the law of war] as it stands today, the notion of war crimes is limited to situation of international armed conflict."[284] Similarly, the United Nations War Crimes Commission took this position as late as 1994.[285] The landscape has changed significantly since then with judgments from the tribunals in Yugoslavia[286] and Rwanda,[287] as well as the passage of the International Criminal Court statute with proposed elements of crimes for internal armed conflicts.[288]

Evidence continues to mount in favor of applying fundamental norms of behavior, such as the law of internal armed conflict, to all conflicts. The unwillingness to apply any kind of international jurisdiction over internal armed conflicts is gradually giving way to the establishment of universal criminal jurisdiction over any actor in any kind of conflict.[289] "International law [is] increasingly render[ing] individuals accountable for violations of the most basic humanitarian rules."[290] This international criminalization of the law of internal armed conflict continues.[291]

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283. Meron, *supra* note 27, at 559 (discussing the growing criminality of humanitarian law).

284. *Id.* (citing unpublished comments of the International Committee of the Red Cross, dated March 25, 1993).

285. *Report of United Nations High Commissioner for Refugees*, UN Doc. S/1994/674, annex, para. 42 (1994) ("the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification"), *cited by* Meron, *supra* note 27, at 559 (discussing the criminalization of humanitarian law).

286. Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing individual criminal responsibility in an internal armed conflict), *reprinted in* 35 I.L.M. 32 (1996).

287. Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998) (conviction for crimes against humanity and genocide, but no conviction for violating Common Article 3), *summarized in* 37 I.L.M. 1401 (1998).

288. *See* Rome Statute, *supra* note 214, art. 8(2) c & e (elements for crimes in non-international armed conflict).

289. Meron, *supra* note 235, at 462 (asserting that international investigations and prosecutions of law of war violations are possible and credible).

290. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 316 (1999). *See also Tadic*, No. IT-94-1-AR72 (finding individual criminal responsibility in an internal armed conflict), *reprinted in* 35 I.L.M. 32 (1996); *Akayesu*, Judgment, No. CTR-96-4-T (prosecution for crimes against humanity in an internal armed conflict), *summarized in* 37 I.L.M. 1401 (1998).

291. *See* Meron, *supra* note 235, at 463 (The law of war has "developed faster since the beginning of the atrocities in the former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions."). *See also* discussion *supra* Section IV.A (Criminalization of the Law of Internal Armed Conflict).

B. Enforcement of the Law of Internal Armed Conflict

Despite the trend to criminalize violations of the law of internal armed conflict, enforcement issues remain. Like any other international law regime, a wide variety of non-coercive and coercive measures exist to deal with violations of the law of internal armed conflict.[292] A partial list of these enforcement measures includes:

-consideration of public opinion;
-reciprocal interest of parties to the conflict;
-maintenance of discipline;
-fear of reprisals;
-penal and disciplinary measures;
-fear of payment of compensation;
-activities of protecting powers;
-international fact finding;
-activities of International Committee of the Red Cross;
-diplomatic activities;
-domestic implementing measures;
-dissemination of the law;
-personal conviction and responsibility of the individual.[293]

Neither exclusive nor complete, this list illustrates the broad spectrum of enforcement measures available.[294] Commentators, however, view the current enforcement regimes as less than adequate.[295] The most often-raised complaint is the lack of enforcement, or more precisely, the lack of effective enforcement.[296] This article next examines possible enforcement by human rights bodies, international criminal tribunals, and Security Council actions under Chapter VII. It also briefly considers the work of

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292. *See* Roberts, *supra* note 24, at 14 (discussing a variety of possible methods to enforce the law of war).

293. FLECK ET AL., *supra* note 206, at 525.

294. *See* Roberts, *supra* note 24, at 14 (discussing additional methods to implement the law of war).

295. *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (2000) (discussing the impotence of the current ad-hoc tribunals and suggesting that the International Criminal Court be provided even broader powers); CHADWICK, *supra* note 69, at 202-03 ("The Yugoslav War Crimes Tribunal remains controversial and there are many doubts regarding its ultimate success.").

296. *See* Hampson, *supra* note 88, at 69 ("The great weakness of both Protocol II and [Common] Article 3 is the enforcement system."). *See also* Roberts, *supra* note 24, at 14 (excellent discussion of a variety of enforcement regimes).

non-governmental organizations, before concluding that an international solution to enforcement is not the universal remedy.

1. Enforcement Through Human Rights Bodies

Human rights bodies include the European Court of Human Rights, European Commission of Human Rights, the Inter-American Court of Human Rights, Inter-American Commission of Human Rights, and the U.N. Human Rights Committee, among other Human Rights bodies. While these judicial, quasi-judicial, or supervisory bodies primarily interpret the treaties that established the bodies, "the decisions of such organs are frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law."[297] Moreover, "[i]nterpretations of human rights conventions by quasi-judicial or supervisory bodies affect the internal and external behaviors of states."[298] These human rights bodies assist in enforcing human rights treaties between states by investigating, monitoring and reporting violations to member states.[299]

Increasingly these human rights bodies turn to law of war regimes in trying to accomplish their goals.[300] The anomaly of human rights bodies relying on the law of war can be explained by the emergence of the law of internal armed conflict, which includes human rights legal regimes. Of course, each case will depend on its unique facts and circumstances, as well as the human rights body involved. But the possibility that human

297. *See* Meron, *supra* note 74, at 100.

298. *Id.* ("They shape the practice of states and may establish and reflect the agreement of the parties regarding the interpretation of a treaty.").

299. *See* International Covenant on Civil and Political Rights, *supra* note 132, arts. 40-42 (discussing the role and responsibilities of the UN Human Rights Committee); American Convention on Human Rights, *supra* note 132, § 2 art. 41 (establishing the functions of the Inter-American Commission on Human Rights); European Convention for the Protection of Human Rights, *supra* note 132, art. 19 (establishing European Court of Human Rights to ensure observance of convention). *See also* NEWMAN & WEISSBRODT, *supra* note 73, at 174 ("[T]he most prevelant technique for implementing human rights treaties [are] periodic reporting and review by treaty bodies.").

300. *See, e.g.*, IACHR, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, Oct. 30, 1997 (Inter-American Commission on Human Rights) (for additional discussion see text *infra* note 302); 1990 REPORT ON COLOMBIA BY SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY AND ARBITRARY EXECUTION para. 50 (1990) (C/CN.4/1990/22/Add.1) (finding that the Colombian military failed to comply with the law of war by engaging in violence against civilian population). *See also* O'Donnell, *supra* note 204, at 502 (discussing the increasing application of the law of war by UN human rights mechanisms).

rights bodies will reach beyond their human rights treaties and draw on the principles of the law of war merits examination.

The decision by the Inter-American Commission on Human Rights[301] in *Tablada*[302] illustrates this possibility. Arising from insurgents' attack on an Argentinian military barracks, this human rights body decision also demonstrates the emergence of the law of internal armed conflict as an avenue of enforcement.[303] In concluding that it had jurisdiction to hear claimed violations of the law of war by Argentina, the *Tablada* Commission typified the struggle to superimpose international standards on a purely domestic situation.[304] Most remarkable, this regional, inter-governmental body, established by human rights treaty, concluded it was competent to consider law of war violations.[305]

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301. The Inter-American Commission of Human Rights is established under Article 33 of the American Convention on Human Rights. *See* American Convention on Human Rights, *supra* note 132, art. 33 (establishing the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights).

302. IACHR, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, *available at* http://www.cidh.oas.org/annualrep/97eng/97encontan.htm [hereinafter *Tablada* Commission]. The case arose from a 23 January 1989 attack by forty-two armed persons on an Argentinean infantry barracks in La Tablada, Argentina. The subsequent battle lasted approximately thirty hours and resulted in the deaths of twenty-nine of the attackers and several soldiers. After the attack, state agents participated in the execution of four attackers, the disappearance of six attackers, and the torture of a number of others. The surviving attackers filed a complaint with the Commission alleging violations by state agents of the American Convention on Human Rights and the Law of War. The Commission found Argentina responsible for violating the right to life, the right to humane treatment, the right to appeal a conviction to a higher court, and the right to a simple and effective remedy. The Commission recommended that Argentina conduct a full investigation into the events and identify and punish those responsible. It further recommended that Argentina take the necessary steps to make effective the judicial guarantee of the right to appeal and repair the harm suffered. *Id. See also* Richard J. Wilson, *The Index of Individual Case Reports of the Inter-American Commission on Human Rights: 1994-1999*, 16 AM. U. INT'L L. REV. 353, 533 (2001); Zegveld, *supra* note 232, at 505.

303. The Commission characterized the claim as based on the law of war. However, given the mixed nature of the claim (aspects of the law of war and of human rights law); that the claim did not involve international armed conflict, so as to trigger the law of war; and that the nature of the claim was violation of due process under Common Article 3, it might be just as accurate to term the claim as based on the law of internal armed conflict.

304. *See* Zegveld, *supra* note 232, at 505.

305. *See Tablada* Commission, *supra* note 302, para. 157. The American Convention on Human Rights, which establishes the commission, describes its main function as promoting "respect for and defense of human rights." American Convention on Human Rights, *supra* note 132, art. 41. In the treaty establishing the commission no mention is made of the law of war or the commission having any power to apply the law of war. *Id.*

Ultimately, the *Tablada* Commission held that Argentina did not violate the law of war.[306] Still, the Commission relied on the law of war because it enhanced its ability to respond to a situation of internal armed conflict.[307] The *Tablada* Commission based its reach into the law of war on five justifications.[308] First, it reasoned that the overlap of protections between the Geneva Conventions (specifically Common Article 3) and the American Convention on Human Rights provided the Commission competence to apply the law of war.[309] Second, the *Tablada* Commission determined that the American Convention on Human Rights required the parties to provide an effective domestic remedy to violations of the law of war, and that lacking such a remedy, it had competence to provide one.[310] Third, it noted that Article 29b of the American Convention on Human Rights required the Commission to give legal effect to treaties that imposed higher standards, such as law of war treaties.[311] Fourth, the Commission determined that under Article 27 of the American Convention on Human Rights, state derogation measures, even during state emergencies, must be consistent with a state's other international obligations, such as its

306. *See Tablada* Commission, *supra* note 302, paras. 327-28 (concluding that Argentina was responsible for other human rights violations, but dismissing the law of war claim).

307. *See id.* para. 161. The commission concluded that the American Convention, although formally applicable in times of armed conflict, was not designed to regulate armed conflicts, so it needed to search for another basis, the law of war. *Id.* para. 158.

308. *See id.* para 157. *See also* Zegveld, *supra* note 232, at 505.

309. The *Tablada* Commission stated:

> [I]ndeed, the provisions of Common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of Common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens . . . or disadvantages [to] its armed forces vis-à-vis dissident groups. This is because [Common] Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention.

Tablada Commission, *supra* note 302, para. 158, n.19. This reasoning is similar to that used in the Commentaries to the Geneva Convention. COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 50, at 36. *See also* Zegveld, *supra* note 232, at 508 (discussing how the similarity of substantive norms between human rights and the law of war regimes does not mean that supervisory bodies set up under one regime are competent to apply the rules of the other regime).

310. *Tablada* Commission, *supra* note 302, para. 163.

311. *Id.* para. 164.

law of war obligations.[312] Finally, the *Tablada* Commission relied on an advisory opinion by the Inter-American Court of Human Rights that declared the Commission had properly invoked other laws and treaties on previous occasions.[313]

Notwithstanding the legal merits of these arguments,[314] the willingness of the Inter-American Commission on Human Rights to exercise this authority suggests a possible enforcement mechanism for the emerging law of internal armed conflict.[315] This development could lead to future examinations of law of war violations by this human rights body.[316] Given that this Commission has jurisdiction over the Americas, it will likely uphold its *Tablada* decision in the future. Petitions arising from other regional internal armed conflicts, as in Colombia or Peru, could easily find their way to this body.

The *Tablada* decision may also encourage other human rights bodies to extend their enforcement functions to violations that are part of the law of internal armed conflict.[317] It is foreseeable that other courts, commissions, and international bodies examining alleged violations in an internal

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312. *Id*. paras. 168, 170. S*ee also* Zegveld, *supra* note 232, at 510 (discussing and agreeing with the strengths of this justification). If the law of internal armed conflict is grounded in customary international law, as discussed Section II.B., this would suggest that in fact a human rights body might be competent under its organic legislation to apply the law of internal armed conflict.

313. *Tablada* Commission, *supra* note 302, para. 171. In its advisory opinion the Inter-American Court of Human Rights noted that on occasion the Commission had properly relied on other treaties and conventions relating to the protection of human rights. Advisory Opinion, Subject: "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), OC-1/82 of 24 Sept. 1982, Inter-Am.Ct. H.R. (Ser. A) No. 1, para. 42. This reasoning suggests that because the Commission had correctly gone outside its cognizance before, that justified its current foray.

314. *See* Zegveld, *supra* note 232, at 508-10 (discussing the strengths and weakness of each of the commission's arguments).

315. *See* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L REV. RED CROSS 513, 529 (1998) (suggesting that the European Court of Human Rights accepted the law of war into its jurisprudence).

316. *See* Zegveld, *supra* note 232, at 505 ("This decision may pave the way for future petitions."); MERON, *supra* note 74, at 100 ("Cumulatively, the practice of judicial, quasi-judicial and supervisory organs has a significant role in generating customary rules.").

317. *See* Zegveld, *supra* note 232, at 506 (discussing the possible impact of this case). *See, e.g.*, Hampson, *supra* note 88, at 72 (suggesting that one approach the problem from the standpoint of human rights law and so the International Covenant on Civil and Political Rights could make use of the existing enforcement machineries, which on the universal level would be the U.N. Human Rights Committee).

armed conflict might find the Commission's reasoning persuasive.[318] Although the law of war has appeared in the practice of other human rights bodies, no other human rights body has gone as far as the *Tablada* Commission, which decided it was competent to apply the law of war.[319] Perhaps it is only a matter of time.

Whether other human rights bodies are suited to apply the law of internal armed conflict raises some valid questions. First, the different supervisory powers that exist among the various human rights bodies may lead to inconsistent approaches and standards.[320] For example, the U.N. Commission on Human Rights with its worldwide jurisdiction, has little if any control over internal conflict management, as the great majority of states have not accepted the competence of the Commission.[321] It can consider only a state's application, except in the very few instances when states accept the right of individual application.[322] In comparison, the European Court on Human Rights has broad authority to hear applications from individuals, to award compensatory damages, and to make legally binding orders.[323] It is considered the most developed of the regional human rights bodies.[324] Similarly, the Inter-American Court on Human Rights has authority to hear applications from individuals and to grant

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318. *See* MERON, *supra* note 74, at 100 (discussing how the decision of these human rights bodies might affect state behavior, other bodies and eventually have a role in generating customary rules).

319. Before the European Commission on Human Rights, Cyprus invoked the law of war. *See* On an Inter-State Complaint Against Turkey, (Cyprus v. Turkey), 4 Eur. H.R. Rep. 482, 552-53 (1976). The European Commission, however, did not analyze this law of war claim. *See* Cerna, *supra* note 174, at 31-67.

320. *See* NEWMAN & WEISSBRODT, *supra* note 73, at 19 ("[E]ach of the structures has developed unique approaches to seeking assurance that the rights are put into practice.").

321. *See* O'Donnell, *supra* note 204, at 499 (to date only fifty-three UN member states have accepted the U.N. Commission on Human Rights' jurisdiction).

322. *See* Wieruszewski, *supra* note 207, at 446 (discussing the general lack of individual standing in the U.N. human rights system).

323. *See* European Convention for the Protection of Human Rights, *supra* note 132, arts. 33, 41, 46 (creating right to individual application, compensatory damages and legally binding orders, respectively). *See also* Reidy, *supra* note 315, at 529 (suggesting that the European Court of Human Rights also accept the law of war into its jurisprudence).

324. *See* NEWMAN & WEISSBRODT, *supra* note 73, at 468 (comparing the various human rights regional bodies).

compensatory damage awards, but its ability to make legally binding orders is limited.[325]

Most human rights regimes are designed to examine human rights violations by states against individuals.[326] In contrast, violations by dissident groups against individuals would have to be enforced by the very state opposing the dissident group. This inherent unfairness might suggest a lack of legitimacy in the decisions of these human rights bodies.[327] Ultimately, these human rights bodies are left with the capacity to govern only one side of an armed conflict.[328]

Support still exists for these human rights bodies to take an active part in governing internal armed conflicts.[329] The effect of their active participation may be to "shape the practice of states and . . . establish and reflect the agreement of the parties regarding the interpretation of a treaty."[330] By drawing from the law of war and moving beyond their human rights treaty basis, these human rights bodies offer an enforcement mechanism that might develop the law of internal armed conflict, albeit with some significant challenges. Notwithstanding the challenges of differing standards of application, diverse jurisdictions, and the inability to reach non-state actors, these bodies are increasingly willing to serve as forums for violations of the law of internal armed conflict.

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325. *See* American Convention on Human Rights, *supra* note 132, arts. 44, 62, 63(1) (discussing that any person may lodge a complaint with the court, limited jurisdiction and compensatory damages, respectively).

326. *See* RESTATEMENT (THIRD), *supra* note 21, § 701 (discussing the obligations to respect human rights as inuring to the state).

327. *See* O'Donnell, *supra* note 204, at 501 (applying the law of war by human rights bodies to reach non-state actors would reinforce the objectivity and impartiality of the system).

328. *Id.* at 487 ("[H]human right standards cannot be applied to acts committed by private individuals or group."). *But see* NEWMAN & WEISSBRODT, *supra* note 73, at 24 (discussing human rights as reaching all actors by using Common Article 3, the Convention on Torture and various "terrorist" oriented regimes).

329. *See* Hampson, *supra* note 88, at 72 (agreeing with the need for these bodies to take an active role); Reidy, *supra* note 315, at 529 (suggesting that the European Court of Human Rights accept the law of war into its jurisprudence).

330. MERON, *supra* note 74, at 100.

2. Enforcement Through International Criminal Tribunals

International criminal tribunals offer another possible enforcement measure for the law of internal armed conflict. [331] There is an emerging desire to establish international criminal tribunals to examine misconduct committed during internal armed conflicts.[332] The Security Council has established ad-hoc international criminal tribunals to enforce the law of internal armed conflict.[333] The International Criminal Court, if activated, will enforce provisions of the Rome Statute that specifically criminalize conduct during internal armed conflict. [334]

The ability of future international criminal tribunals to enforce the law of internal armed conflict will depend upon their implementing statutes. If the Yugoslavia and Rwanda criminal tribunals suggest a trend, future tribunals may encompass all parts of the law of internal armed conflict. For example, the Yugoslavia statute criminalized crimes against humanity when committed in either internal or international armed conflict. [335] Some of the *Tadic* judges argued that customary international law went even farther than the statute. "Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all."[336] Judge Abi-Saab, in his *Tadic* dissent, asserted that the Yugoslavia Tribunal should go farther yet in

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331. Meron, *supra* note 235, at 462 (discussing the development of the law of war in the wake of the current ad-hoc tribunals in Yugoslavia and Rwanda).

332. *See supra* note 18; *Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999) (using various legal theories such as positivist, policy-oriented, international legal process to justify greater use of international criminal tribunals).

333. For the Statute of the Yugoslavia Tribunal, see S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827, *reprinted in* 32 I.L.M. 1202 (1993). For the Statute of the Rwanda Tribunal, see S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955, *reprinted in* 33 I.L.M. 1602 (1994).

334. *See* Rome Statue, *supra* note 214, art. 8(2) c & e (elements of crimes occurring in internal armed conflicts). *See also* Meron, *supra* note 235, at 462 (relying on U.S. Statement Submitted to Preparatory Committee of the Establishment of an International Criminal Court (Mar. 23, 1998) (on file with Professor Meron) (discussing inclusion of war crimes to crimes occurring in internal armed conflicts). *See generally supra* note 278 (regarding status of ratification process of the Rome Statute).

335. Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 140-41 (Oct. 2, 1995) ("crimes against humanity do not require a connection to international armed conflict"), *reprinted in* 35 I.L.M. 32 (1996).

336. *See id.* para. 141. *See also* Meron, *supra* note 235, at 465 (arguing that the Yugoslavia Tribunal may not have gone far enough in criminalizing crimes against humanity); Meron, *supra* note 152, at 242 (using the *Tadic* decision as proof that the distinction between international and internal armed conflict is decreasing).

extending the crimes applicable to internal armed conflict as a matter of customary international law.[337] This illustrates the willingness of international criminal tribunals to move towards greater enforcement of the law of internal armed conflict.

The Rwanda Tribunal statute completely removed the link between crimes against humanity and armed conflict, effectively criminalizing crimes against humanity in any domestic situation.[338] Protecting individuals from state conduct, without the corresponding requirement for armed conflict, is analogous to situations where only human rights protections previously governed. Arguably, this is an example of a law of war tribunal criminally enforcing a human rights protection.

In the future, the Security Council could establish additional international criminal tribunals over internal armed conflicts, as done for Rwanda and Yugoslavia. These ad hoc tribunals, however, could produce disparate results when trying similar offenses. This owing to the differences in the tribunals' founding statutes, arising from the varying political will of the Security Council when it drafts the respective statutes.[339] Notwithstanding these statutory limitations, the activism of the tribunals suggests that future tribunals will continue to find a basis to enforce the law of internal armed conflict.[340] Finally, the International Criminal Court with its more expansive jurisdiction may also contribute to the enforcement of the law of internal armed conflict.

3. Enforcement Through Security Council Activity

The U.N. Security Council offers another mechanism for enforcing the law of internal armed conflict due to its increasing focus on humanitar-

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337. *Tadic*, No. IT-94-1-AR72, para. 128 (Judge Abi-Saab dissenting because court did not go far enough), *reprinted in* 35 I.L.M. 32 (1996).

338. Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998) (conviction for crimes against humanity in a domestic situation), *summarized in* 37 I.L.M. 1401 (1998).

339. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal* Court, 10 HARV. HUM. RTS. J. 11, 60 (1997) (Professor Bassiouni discussing that "ad hoc tribunals generally do not provide equal treatment to individuals in similar circumstances who commit similar violations. Thus, such tribunals create the appearance of uneven or unfair justice, even when the accused are properly deserving of protection."); Meron, *supra* note 27, at 555 (expressing concern for a system for selecting tribunals based on consensus of Security Council being obtained).

340. *See* discussion *supra* note 242 and accompanying text.

ian concerns.[341] Much has been written regarding the scope of the Security Council's powers, but an internal armed conflict of sufficient scope would clearly constitute a threat to international peace and security.[342] In such a case, the Security Council could take measures to restore international peace and security under Chapter VII of the United Nations Charter.[343]

Because the law of internal armed conflict is international law, its violation alone could justify Security Council intervention. Acting under Chapter VII, the Security Council could effectively legislate that the law of internal armed conflict applies to all conflicts because all conflicts threaten international peace and security.[344] This legislation would open the door for future Security Council intervention.[345] The international community would likely perceive such wide-reaching action by the Security Council as an illegitimate exercise of power.[346] Similar apprehension would be expressed if the Security Council limited itself to applying the law of internal armed conflict as a minimum level of protections for all participants. Opponents would argue that such action allows a small group of states to unilaterally impose their will on the community of nations.[347]

Nevertheless, the Security Council has acted in internal armed conflicts to enforce minimum humanitarian standards. For example, sending

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341. *See* Lopez, *supra* note 267, at 951 (arguing that this approach might "spur the international community into building consensus for the enhance protections of person" during an internal armed conflict through the passage of a Convention or another Protocol II similar device establishing an automatic enforcement mechanism).

342. *See* Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 574 (1997) ("Internal acts can also be threats to international peace and security, as we have seen in a number of the cases with which the Security Council has been dealing."). *See also* Lopez, *supra* note 267, at 952-53 (discussing how Security Council actions could further humanitarian interests).

343. U.N. CHARTER art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.").

344. In effect, issuing general legislation rather than a mere injunction. The legality of this action is debatable. *See* Henkin, *supra* note 342, at 574 ("I must also conclude, limits on the Security Council's discretion are not juridical, and they cannot be adjudicated in court. The limits on the Security Council's discretion are political.").

345. *See* Michael E. Smith, *NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination*, ARMY LAW., Feb. 2001, at 1 (reasoning that Security Council resolutions regarding Kosovo provided the legal justification for NATO intervention).

346. *See* Lopez, *supra* note 267, at 955 (concluding that it is unlikely that the Security Council members would want to apply this standard to themselves).

troops to East Timor,[348] enforcing the Northern Iraq no-fly zone,[349] and using force in Kosovo[350] arguably represent reactions to serious violations of the law of internal armed conflict. By its activism, the Security Council effectively enforces the norms embodied by the law of internal armed conflict. This suggests that the Security Council with its broad range of sanctions can serve as a possible enforcement mechanism for the law of internal armed conflict.

In sum, greater enforcement of the law of internal armed conflict may come from human rights bodies, international criminal tribunals, or the Security Council acting under Chapter VII authority. The legitimacy of the law of internal armed conflict will be reflected by the legitimacy of these enforcement actions. The activity of these bodies demonstrates not only the emergence of the law of internal armed conflict, but also the growing willingness to enforce the rules of this new area of the law.

4. The Role of Non-Governmental Organizations

International organizations play a vital role in the development of the law of internal armed conflict. Their role has been historic and increasingly frequent.[351] Typically, the making of international law is reserved to

347. "Is the U.N. aspiring to establish itself as the central authority of a new international order of global laws and global governance? This is an international order the American people will not countenance." Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov/~foreign/2000/ pr012000.html. Although Senator Helms agreed with the U.N. Secretary General's statement that the people of the world have "rights beyond borders," he reminded the Security Council that the sovereignty of nations must be respected. *Id*.

348. *See* S.C. Res. 1264, U.N. SCOR, 4045th mtg. U.N. Doc. S/RES/1264 (2000) (Security Council resolution for East Timor), *reprinted in* 38 I.L.M. 232, 233.

349. *See* S.C. Res. 688, U.N. SCOR, 2982nd mtg. (1991) (northern Iraq), *reprinted in* 30 I.L.M. 858; 140 CONG. REC. H1005 (1994) (report of President on use of force against Iraq discussing sanctions in response to human rights violations in northern Iraq against Iraqi citizens, and that these actions have reduced level of aggression against civilian populations).

350. *See* S. C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998); S. C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203, (1998) (Security Council resolutions for Kosovo), *reprinted in* 38 I.L.M. 249, 250 (1999).

351. I THE LAW OF WAR, *supra* note 30, at 1 (for a detailed historical discussion of the role of the International Committee of the Red Cross); Schmitt & Richards, *supra* note 279, at 125 n.1 (discussing the thirty-three intergovernmental organizations and 236 non-governmental organizations that participated in the Rome Conference).

states and some intergovernmental organizations.[352] Non-governmental organizations, however, have influenced the process since the beginning of the modern law of war.

The International Committee of the Red Cross (ICRC) substantially influences the growth and development of the law of war.[353] This is in addition to its status and function under the Geneva Conventions and Additional Protocols.[354] Historically, the ICRC "right of initiative" has been the most extensive and historic method for ensuring the application of the law of war.[355] This right allows the ICRC to visit and inspect to ensure that parties to a conflict comply with their responsibilities under the Geneva Conventions.[356] Afterwards, the ICRC prepares a report and delivers it to the inspected party. Unlike other non-governmental organization reports, these reports remain private between the ICRC and the party. [357] While the ICRC has traditionally focused its efforts on the state parties to an internal armed conflict, it is increasingly visiting and inspect-

352. *See* RESTATEMENT (THIRD), *supra* note 21, § 103 cmt. c (stating that international organizations generally have no authority to make law); George H. Aldrich & Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, 94 AM. J. INT'L L. 90, 98 (2000) ("The relationship between NGOs and intergovernmental institutions remains contested and has been highlighted by the Secretary-General as one of the priorities for the United Nations as it moves into the new millennium.").

353. *See* Meron, *supra* note 152, at 245 (discussing role of the ICRC in developing customary international law).

354. *See* Geneva Conventions I-IV, *supra* note 43, art. 3 (stating that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the Conflict"); Additional Protocol II, *supra* note 109, art. 18 (discussing role of the Red Cross).

355. Burgos, *supra* note 84, at 15 (discussing the juridical basis of the ICRC action known as the "right of initiative").

356. *See id.*

357. *See* O'Donnell, *supra* note 204, at 502 (discussing relationship between ICRC and United Nations bodies in applying the law of war in internal armed conflicts).

ing rebel or insurgent groups.[358] At this time, however, no law requires a state to agree to automatic ICRC visits during internal armed conflicts.[359]

The ICRC exerts significant influence because of its great prestige and continuing involvement in internal armed conflicts. Consequently, its recommendations carry great weight regarding application of legal regimes in those conflicts. Its recent report on customary rules of the law of war applicable to international and internal armed conflicts will also affect the development of the law.[360] This report may become a restatement of the customary law of war, similar in importance to the ICRC's Commentary on the Geneva Conventions and the Additional Protocols.[361]

In both criminalization and enforcement aspects, the ICRC has used quiet diplomacy to develop a reputation as a non-political body driven by humanitarian considerations. Less subdued are the public condemnation, political pressure, and public scrutiny by groups such as Amnesty International,[362] Human Rights Watch,[363] other non-governmental organizations, and a multitude of media organizations.[364] Their reports, however, serve as a catalyst for examining conduct in all armed conflicts. By investigating and publicizing parties' conduct in internal armed conflicts, these groups spur the development of the law of internal armed conflict by mobilizing public interest, which leads to state action. Their efforts have also caused

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358. Press Release 00/37, International Committee of the Red Cross (Oct. 3, 2000) (condemning grave breaches of the law of war by the FARC insurgency group and the paramilitary groups in Colombia for executing wounded combatants during evacuations of wounded combatants.), *available at* http://www. icrc.org/icrceng.nsf/Index.

359. *See supra* note 354. Common Article 3 only states that the ICRC "may offer its services," not that states must accept this offer. *Id. See also* Burgos, *supra* note 84, at 15 (discussing the potential political embarrassment of declining an ICRC visit).

360. REPORT OF THE PRESIDENT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS FOR THE PROTECTION OF WAR VICTIMS, 26TH INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT 2 (1995) (Conf. Doc. 95/C.I/2/I).

361. Through its commentaries on the Geneva Conventions and Protocols, the ICRC influences state practice and thus, indirectly, the development of customary law. *See* Meron, *supra* note 152, at 245.

362. For examples of Amnesty International condemnations, see Amnesty International Web site at http://www.amnesty.org (listed countries include Turkey, Jamaica, Burundi, and Russia).

363. For examples of Human Rights Watch condemnations, see Human Rights Watch Web site at http://www.humanrightswatch.org (listed countries include Congo, China, Israel, and the United States).

364. For an example of media scrutiny, see Cable News Network, *In-Depth Special Reports-Colombia*, *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes (last visited Mar. 16, 2002) (reporting on internal armed conflict in Colombia).

some parties to comply with the law of internal armed conflict to avoid this "public shaming."[365]

From private diplomacy to public reports, nongovernmental organizations attempt to show parties to a conflict that, even in cases of civil wars, combatants are not free to wage war with total disregard for the sufferings of the affected population.[366] Although lacking the traditional institutional role of human rights bodies, the international criminal tribunals or the Security Council, nongovernmental organizations contribute to the development of the law of internal armed conflict through their active participation in the political process.[367]

C. Conclusion

The future of the law of internal armed conflict is uncertain, though two general observations can be made. First, the trend is to criminalize the law of internal armed conflict. The law of internal armed conflict binds states through conventional and customary law, which are increasingly criminal in nature. The recent passage of the Rome Statue may yet embody a complete conventional criminalization of this law, resulting in the law of internal armed conflict binding the statute's signatories.[368] The role of custom in the criminalization of the law is evident in the decisions of both the Yugoslavia and Rwanda Tribunals.[369] While not yet binding on all states as *jus cogens*, the norms of the law of internal armed conflict continue to gain universal acceptance.

Second, international bodies are increasingly willing to attempt to govern the conduct of internal armed conflicts. If a state fails to prosecute the law of internal armed conflict, international bodies can enforce that law: human rights bodies by relying on the law of war, and international

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365. *See, e.g.*, Maria Cristina Caballero, *A Journalist's Mission in Colombia: Reporting Atrocities Is Not Enough*, Special Report, CNN.com (n.d.) (interviewing a paramilitary group leader attempting to justify his human rights violations), *at* http://www.cnn.com/ SPECIALS/2000/colombia.noframes/story/essays /caballero/.

366. Hampson, *supra* note 88, at 72.

367. *See* Aldrich & Chinkin, *supra* note 352, at 98 (discussing nongovernmental organizations' role as a U.N. identified priority).

368. *See* Rome Statute, *supra* note 214, art. 8(2) c & e (elements of crimes occurring in internal armed conflicts). *See also* Noone & Moore, *supra* note 47, at 112 (discussing the history and creation of the International Criminal Court).

369. Meron, *supra* note 152, at 239.

criminal tribunals by criminalizing Common Article 3, Additional Protocol II, and certain methods and means of warfare.[370] The Security Council's activism in response to violations of human rights and humanitarian norms also serves as a possible enforcement mechanism. Finally, non-governmental organizations demonstrate increased international involvement in domestic matters by investigating law of war and human rights violations during internal armed conflict.

The growing number of international bodies seeking to enforce parts of the law of internal armed conflict substantiates its emergence. In the future, the law of internal armed conflict will be increasingly criminalized, and because of its international nature, the call for expanding the international enforcement of its penal aspects will grow louder.[371]

V. Domestic Enforcement of the Law of Internal Armed Conflict

> *Law will never be strong or respected unless it has the sentiment of the people behind it.*[372]

The law of internal armed conflict prohibits many atrocities. While the sociological, political or cultural reasons for such conduct may lie beyond the reach of the law of internal armed conflict, its effective enforcement reinforces more humanitarian conduct.[373] Despite the trend toward international enforcement, humanitarian interests would be better served by a renewed emphasis on domestic enforcement of the law of internal armed conflict.[374]

Common Article 3, Protocol II to a limited extent, treaties regulating the methods and means of warfare, and certain non-derogable human rights form the core of the law of internal armed conflict.[375] Growth continues in both the scope and breadth of this law.[376] Its biggest challenge,

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370. Meron, *supra* note 27, at 561.

371. *See supra* note 18.

372. THE LAWYER'S QUOTATION BOOK 32 (1992) (quoting James Bryce).

373. *See* Hampson, *supra* note 88, at 72 (concluding that the weakness of the law lies in ineffective enforcement systems).

374. *See* Meron, *supra* note 27, at 555 (arguing that enforcement of the law of war cannot depend solely on international tribunals).

375. *See* discussion *supra* Section II (The Law of Internal Armed Conflict).

376. *See* discussion *supra* Section III (Confluence or Confusion: A River from Two Streams).

however, may be its enforcement system.[377] Specifically, the law of internal armed conflict lacks an independent enforcement mechanism, a body capable of making objective determinations of fact, or a mechanism by which a state or non-state party can be compelled to account for their conduct.[378] Human rights bodies, international criminal tribunals, and Security Council activism offer possible solutions.[379] Often dismissed, however, is the enforcement mechanism inherent in domestic tribunals.[380]

Much work remains in allocating enforcement responsibility between national and international tribunals. This section explores some of the necessary steps. First, drawing from Sections II and III, this section discusses the need for a distinct legal regime, the law of internal armed conflict. Next, building on the analysis from Section IV, it explores the weaknesses of international tribunals. It then examines the value of domestic tribunals in enforcing the law of internal armed conflict. Finally, it concludes that this new legal regime embodies universal standards, the enforcement of which is best accomplished domestically.[381]

A. The Need for a Distinct International Legal Regime

The need for an encompassing legal regime to govern internal armed conflict is apparent. As shown, law of war and human rights regimes are limited in their application, scope, and enforceability. While each regime has desirable aspects, such as the establishment of minimum standards and the possibility of international enforcement, neither regime provides adequate protections in the context of internal armed conflict.[382] As one commentator adeptly stated, "What is needed is a uniform and definite corpus

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377. *See* Mark W. Janis, *International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts*, 12 CONN. J. INT'L L. 161, 1704 (1997) (concluding that in dispensing justice the international criminal tribunals have been largely ineffective); Hampson, *supra* note 88, at 55, 72 (concluding that much work remains to secure enforcement of the human rights and law of war in internal armed conflicts).

378. *See* Hampson, *supra* note 88, at 71; Burgos, *supra* note 84, at 23 (both authors concluding that an international surveillance system with broader authority is necessary).

379. *See* discussion *supra* Section IV (The Future of the Law of Internal Armed Conflict).

380. *See* Penrose, *supra* note 295, at 329 (dismissing domestic tribunals based on the failures of the Leipzig trials following World War I and concluding that despite the failures of the Yugoslavia and Rwanda Tribunals, the solution lies in even greater authority and power to international tribunals).

381. *See* Meron, *supra* note 27, at 555 ("[International Tribunals] will never be a substitute for national courts.").

of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law." [383]

The law of internal armed conflict is emerging as the answer. Its emergence is visible in the practice of various international bodies and states. For example, recognizing the limitations of human rights regimes, which do not criminalize violations and may not apply in times of national emergency, human rights bodies are looking to the law of war to provide fundamental standards that are criminalized and cannot be abrogated.[384] Human rights also remain tied to the relationship between individuals and their states, despite the need to reach non-state actors.[385] The law of war provides the mechanism to reach these actors.[386]

The law of war is limited, however, by its general application to only inter-state conflict.[387] It does not apply during peacetime, and it may be limited during times of internal armed conflict.[388] States also remain wary of the requirement of legal status upon which so much of the law of war depends.[389] In contrast, the human rights regime is not tied to legal status because it is based on a person's "humanness."[390] Thus, these relative

382. *See* Burgos, *supra* note 84, at 25 (discussing the inherent weaknesses of each legal regime to reach conduct in internal armed conflicts necessitates a new integrated legal regime).

383. Meron, *supra* note 27, at 555.

384. *See* discussion *supra* Section IV.B.1 (Enforcement Through Human Rights Bodies). *See also* Reidy, *supra* note 315, at 529 (suggesting that the European Court of Human Rights take this approach and accept the law of war into its jurisprudence).

385. *See* discussion *supra* Section III.B (Practical Differences). *See also* Current Developments, *The Fifty-Fifth Session of the UN Commission on Human Rights*, 94 AM. J. INT'L L. 192 (2000) (deciding again to postpone a draft resolution on the application of human rights obligations to non-state actors); DRAFT UNIVERSAL DECLARATION, *supra* note 135. *See generally* RESTATEMENT (THIRD), *supra* note 21, § 701 (discussing the obligations to respect human rights as inuring to the state); O'Donnell, *supra* note 204, at 487 ("[H]uman right standards cannot be applied to acts committed by private individuals or group.").

386. *See* discussion *supra* Section III.B (Practical Differences). *See also* Dugard, *supra* note 165, at 445 ("in the final resort [the law of war] contemplate[s] prosecution and punishment of those individuals who violate their norms.").

387. *See* discussion *supra* Section II.A.2 (Triggering the Law of War).

388. *See id.*

389. *See supra* text accompanying note 95 (discussing the concern for state sovereignty resulting in limitations found in Common Article 3).

390. *See* discussion *supra* Section III.B (Practical Differences). *See also* MERON, *supra* note 74, at 101 (discussing the differences between human rights law and other traditional field of international law).

strengths and weaknesses illustrate the shortcomings of the law of war and human rights regimes.

The recent passage of the Rome Statute with its detailed crimes reflects states' drive to reach the conduct regulated by the law of internal armed conflict.[391] In addition, whether through Security Council action, regional bodies or individually, states' activism in responding to behavior during internal armed conflicts demonstrates the emergence of this new international legal regime.[392]

With the emergence of this new regime comes the task of selecting the most effective enforcement mechanism. While many commentators call for international tribunals,[393] reliance on domestic tribunals remains the most effective means of enforcement. To understand why, this article next explores the weaknesses of international tribunals.

B. Weaknesses of International Tribunals

The work of the two international criminal tribunals and the adoption of the Rome Statute of the International Criminal Court suggest a turning point in international law.[394] Conduct that is prohibited by the law of internal armed conflict "can now be prosecuted directly before international criminal tribunals without the interposition of national law."[395] It remains to be seen if the International Criminal Court may eliminate the need for establishing additional ad hoc international criminal tribunals.

Still, international criminal tribunal supporters argue that states should continue sacrificing more of their sovereignty for the noble cause of international justice.[396] While the need for international justice is not

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391. *See* Rome Statute, *supra* note 214, art. 8(2) c & e (criminalizing twenty-five specific crimes in internal armed conflicts).

392. *See* discussion *supra* Section IV (The Future of the Law of Internal Armed Conflict).

393. *See* Penrose, *supra* note 295, at 321 (concluding that future international criminal tribunals will need greater powers to be successful); Janis, *supra* note 377, at 161 (concluding that future international criminal tribunals are needed).

394. Meron, *supra* note 235, at 463 (discussing the cumulative impact the two ad-hoc international criminal tribunals have had on the development of the law of war).

395. Meron, *supra* note 35, at 253.

396. "Outmoded traditions of state sovereignty must not derail the forward movement." Benjamin Ferencz, Address Before Rome Conference on International Criminal Court (June 16, 1998), *available at* http://www.un.org/icc/speeches/616ppc.htm.

challenged, one must remember what stopped the Nazi march across Europe, the Communist march across the world, and the Serbian march across Kosovo—the world's democracies' principled projection of power.[397] Strong, stable and legitimate democracies, not international criminal tribunals, remain the surest way of ensuring the future peace and security of the world.[398]

Yet a proliferation of international criminal tribunals continues. Recent examples include the establishment of the International Tribunals for the Former Yugoslavia and Rwanda, the International Criminal Court, and the recent call for ad-hoc tribunals for Sierra Leone and Cambodia.[399] While this fervent drive to support the rule of law is admirable, the lack of uniform standards and differing procedures is a noted concern.[400] Of greater concern is the willingness of states to abrogate responsibilities to deal with their problems. In effect, the continued reliance on international criminal tribunals removes the responsibility of the state, as the unitary structure of social order, to ensure that violations do not occur.

This reliance on international criminal tribunals suffers from three weaknesses. First is the valid concern of the potential politicization of prosecutions. Second, these international criminal tribunals weaken and de-legitimize already chaotic states. Finally, the credibility of the enforcement is debatable given the disenfranchisement of the local community. Ultimately, the benefits of international criminal tribunals will not out-

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397. Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov/~foreign/2000/ pr012000.html.

398. *See* Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L L. 86, 87 (2001) (discussing the strong forces in support of the democratic model for postconflict societies such as prestige, familiarity, and economic prosperity).

399. *U.N. Report of the Group of Experts for Cambodia, Pursuant to GA Res. 52/155* (Feb. 18, 1999) (recommending an ad hoc international tribunal to try Khmer Rouge officials); *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, para. 73, U.N. Doc. S/2000/915 (Oct. 4, 2000) (discussing international criminal tribunal for Sierra Leone with annex containing proposed statute).

400. Report of Fifth Legal Advisers' Meeting at U.N. Headquarters in New York, 89 AM. J. INT'L L. 644, 647 (1995) (discussing the necessary problems that will need to be overcome to establish an international criminal tribunal).

weigh the benefits of developing effective domestic enforcement mechanisms.[401]

1. Selective Political Enforcement

Any prosecution, whether municipal, national or international, has the potential to become politicized. For this very reason, commentators often deplore the use of national courts for the enforcement of international standards.[402] Similarly though, international criminal prosecutions can also yield to political pressures.[403]

Such political pressure was evident in the Security Council's creation of the ad hoc international criminal tribunals for Rwanda and Yugoslavia.[404] These tribunals resulted from non-representative political processes. They were imposed on the parties to the conflict, notwithstanding their noble purpose.[405] As Rwanda learned, states with less political power may be more obliged to accept tribunal jurisdiction over a conflict than states with greater political power.[406]

The internal armed conflicts in Chechnya and Cambodia provide additional examples. Because of Russia and China's position as permanent members of the Security Council, it is unlikely that an international

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401. *See* José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 462 (1999) (noting that increasing funds for the international tribunals diminishes the funds available for domestic tribunals); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 25 (2001) (asserting that Rwanda courts had received substantial funds in excess of $30 million).

402. *See* Penrose, *supra* note 295, at 342 (arguing that based on the failure of the Leipzig trials over seventy years ago, the international community cannot trust domestic courts to render impartial justice); Burgos, *supra* note 84, at 3 ("large numbers of detain[ee]s whose rights to procedural due process have been denied indicates the fallacy in relying upon national law to protect political prisoners").

403. *See* Lohr & Lietzau, *supra* note 207, at 47 (discussing the recent Libyan use of prosecutions against members of the Reagan administration).

404. *See supra* note 333.

405. Rwanda, ultimately cast the only negative vote at the Security Council against Resolution 955, which established the Rwanda Tribunal. At the time of the Resolution's passage, Rwanda was an at-large member of the Security Council. *See* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminal: Two Case Studies–the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646 (1995) (former Rwanda Ambassador to the UN).

406. *See id.*

criminal tribunal will ever be created to prosecute alleged crimes in either Chechnya or Cambodia.[407] Similar conduct occurring in the former Yugoslavia or in Sierra Leone however, merits the creation of an international tribunal. Concern is justifiable when "the selectivity involved in a system where the establishment of a tribunal for a given conflict depends on whether consensus to apply Chapter VII of the U.N. Charter can be obtained."[408]

Supporters of international criminal tribunals nonchalantly offer guarantees that these tribunals will operate with restraint and unbiased interests.[409] Any prosecutorial decision, international or domestic, however, is subject to political pressure.[410] While any prosecution is subject to politicization, removing the discretion from the state involved out of a false assumption that mankind's interests are served merely ensures that the state's interests are no longer served.[411] Enforcement at a domestic level, though, ensures that lawmakers are subject to the laws they enforce, rather than recipients of benevolent coercion from afar.[412] Greater emphasis on domestic enforcement of the law of internal armed conflict remains the more valid objective.[413]

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407. *See* Kay Johnson, *Will Justice Ever Be Served?*, TIMEasia.com, Apr. 10, 2000 (discussing that any Security Council attempt to force an international criminal tribunal on Cambodia would likely result in a Chinese veto), *at* http://www.time.com/time/asia/magazine/2000/0410/cambodia.html. Any Security Council attempt to impose an international criminal tribunal on Chechnya, a province of Russia, would also likely result in Russia exercising its veto.

408. Meron, *supra* note 27, at 555.

409. *See* The International Criminal Court, *Setting the Record Straight*, *at* http://www.un.org/News/facts/ iccfact.htm (last modified June 1, 1999) (explaining that because of internal checks and balances, the International Criminal Court will be unbiased and that parties may object after an investigation has started).

410. "The essence of government is power, and power lodged as it must be in human hands, will ever be liable for abuse." James Madison, Speech Before the Virginia State Constitutional Convention (Dec. 1, 1829). *See also* Lohr & Lietzau, *supra* note 207, at 47 (discussing concerns with "trusting" that powerful institutions will operate with apolitical self-restraint).

411. *See* Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 342 (1997) (discussing the need for the Rwanda Tribunal to more aggressively market itself to the people of Rwanda to increase its legitimacy).

412. *See* Penrose, *supra* note 295, at 339-40 (recognizing the obstacle of "importing justice" and its effect on the legitimacy of the tribunal).

2. Adding Chaos to the Atrocities

To be sure, those seeking international peace may advocate for the destabilization of repressive regimes. At this time, however, the international system recognizes the right of all states to be free from outside interference and intervention.[414] A state emerging from or engaged in an internal armed conflict is a chaotic situation at best,[415] and this loss of self-control often results in atrocities.[416] Reducing the state further weakens its government, leaving it with less and less ability to discharge or comply with its remaining duties. [417]

The state exists as the central organization of social life, but to retain that role it must be supreme in organizational power and legal authority.[418] The state is weakened when its capacity for legislative promulgation, judicial interpretation, and executive enforcement of criminal statutes is removed to an international organization.[419] Removing this power from the state destroys what the declared enemies of the state cannot, the government and the governmental capacity of the people, upon whom the capacity to govern absolutely depends.[420] In other words, either the state

413. *See, e.g.*, *Colombia's Pastrana Says U.S. Aid Will Not Fan War*, REUTERS, Aug. 29, 2000 (Shortly after the announcement of aid, President Pastrana submitted legislation to the Colombian Parliament for domestic trials for allegations of abuses of human rights.); *Milosevic Arrested*, CNN.com, Apr. 1, 2001 (reporting arrest of former Yugoslavian President on domestic charges so Yugoslavia could obtain international aid needed to stave off popular unrest), *at* http://www.cnn.com/WORLD.

414. *See* U.N. CHARTER art. 2(7). "Member states agree to not become involved in other member states domestic affairs." *Id.*

415. *See* AMNESTY INTERNATIONAL REPORT 2000, CAMBODIA (2000) (covering period from Jan. to Dec. 1999) (discussing on-going unrest in Cambodia and Cambodia's efforts to set up domestic tribunals for suspects of gross human rights violations), *available at* http://www.amnesty.org.

416. *See* AMNESTY INTERNATIONAL REPORT 2000, SIERRA LEONE (2000) (covering period from Jan. to Dec. 1999) (discussing the mutilations occurring as rebel factions were forced out of the capital of Freetown), *available at* http://www. amnesty.org.

417. *See* Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940) [hereinafter Sumners Address] (discussing the effect upon democracy of loss of state sovereignty), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941).

418. *See* NIEMEYER, *supra* note 3, at 313 (discussing the notion of sovereignty in international law).

419. All these activities, which seem to embody the very functioning of a state, are necessary for the effective functioning of an international criminal tribunal. *See* Penrose, *supra* note 295, at 342 (discussing need for tribunal with broad powers).

420. *See* Sumners Address, *supra* note 417, at 752 (discussing the effect upon democracy of loss of state sovereignty).

or the international criminal tribunal must possess central authority.[421] When both bodies compete to exercise this authority, chaos is added to the atrocities of internal armed conflict. Although internal armed conflicts occur in many settings, including repressive and democratic regimes, state self-sufficiency must be nurtured for long-term international stability.

3. Decreased Credibility of Judgment

An effective enforcement mechanism is a reasonable goal. But for an international tribunal to be effective, its judgments should reflect the community it represents.[422] An intimate relationship between the lawmaking system and its subjects minimizes the likelihood that those subject will violate the law.[423] "Their participation in the lawmaking process makes it likely that the law will reflect their collective interests, giving the law legitimacy and a strong pull toward compliance."[424]

When an international criminal tribunal is empowered, the primary subjects of the law are no longer the lawmakers themselves. In effect, the victims and community are disenfranchised from the process, even though they have the greatest interest in its enforcement.[425] As a result, the tribunal no longer represents their interests. The importance of community involvement in resolving the internal armed conflict cannot be overemphasized.[426] For it is the challenge of rebuilding the society cooperatively, which serves to heal the rifts of internal armed conflict.[427] An international tribunal may represent the general interests of the international commu-

421. *See* Penrose, *supra* note 295, at 321 (resolving this dilemma in favor of the international criminal tribunal). This neo-colonial judicial approach, however, seems at odds with the idea of self-government embodied by the UN Charter. *See* U.N. CHARTER art. 2(7).

422. The idea of a tribunal representing the community is not unusual. *See* U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

423. *See* Charney, *supra* note 8, at 533 (discussing the evolution of international law and its current trend towards creating fundamental norms).

424. *Id.*

425. For example, the Rwanda Tribunal Statute only covers crimes committed during a one-year period, despite Rwanda's objections that this placed an artificial limitation on the court. *See* Statute for International Criminal Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1602 (1994). While, Rwanda will likely prosecute those responsible for the atrocities outside the jurisdiction of the Tribunal, the legitimacy of the Tribunal as representing the victims of the genocide is questionable. *See* Bakuramutsa, *supra* note 405, at 646 (former Rwanda Ambassador to the UN).

nity, but it risks disenfranchising the very victims and communities it is judging.[428]

For example, in establishing the Rwanda tribunal, no death penalty was authorized as a sanction.[429] In Rwanda, however, the death penalty is an acceptable sanction, and the paternalistic removal of that sanction, dictated by outside interests, served only to reduce the credibility of the tribunal.[430] The community does not get justice in such cases, but instead gets an international criminal tribunal that applies someone else's standards.[431] It appears that the international criminal tribunal for Sierra Leone will repeat this mistake.[432]

Domestic tribunals remain tied to the community over whose subjects they exercise power.[433] International criminal tribunals, in contrast, may be incapable of responding to the communities over which they exercise

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426. *See* Miguel Caballos, *It is Ultimately up to Ordinary Colombians to Bring Change to Colombia* , Special Report, CNN.com (n.d.) (discussing need for continued citizen involvement in resolving internal armed conflict), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/story/essays/ceballos/.

427. *See* Caballero, *supra* note 365, (discussing need of all parties to the conflict to work together, and similar need for citizens and international observers to do so), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/ story/essays/caballero/.

428. *But see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, para. 7, U.N. Doc. S/2000/915 (Oct. 4, 2000) (discussing overcoming this illegitimacy through an extensive information campaign to convince local citizens of the value of the tribunal).

429. *See* Statute for International Criminal Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1602 (1994). Interestingly, a majority of countries retain the death penalty for the most serious offenses. *See Question of the Death Penalty: Report of the Secretary-General submitted pursuant to the Commission Resolution 1999/8, reprinted in* UN Doc. E/CN.4/1999/52.

430. *See* William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 553 (1996) (discussing the effect of exclusion of the death penalty on Rwanda's support for the Tribunal).

431. *See* Bakuramutsa, *supra* note 405, at 646 (stating the difference in treatment between Rwanda courts and the International Tribunal was "not conducive to national reconciliation in Rwanda").

432. *See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, annex, U.N. Doc. S/2000/915 (Oct. 4, 2000) (asserting that extensive persuasion will be needed to convince local citizens that despite the lack of capital punishment the international criminal tribunal is not acquitting the accused but imposing a more humane punishment).

433. While some may see this as a weakness, even the independent judiciary of the United States is balanced by the separate legislative and executive powers. *See* U.S. CONST. arts. I, II, III.

authority.[434] This unique form of judicial tyranny in the pursuit of justice seems at odds with the ideals of human rights. While the law of internal armed conflict must recognize certain fundamental standards that exist across borders, it must also recognize that each community applies these standards in accordance with their community norms.[435]

4. Value of International Tribunals as Secondary Mechanisms

International tribunals should be supported to the extent that they are effective.[436] Their continued existence or threat of existence may help ensure the application of fundamental standards.[437] In effect, they serve as a continuing reminder that accountability will be had, if not domestically, then internationally.[438] States, however, must be primarily responsible for

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434. *See* Lohr & Lietzau, *supra* note 207, at 48. "Despite the ICC treaty's incorporation of several internal checks and balances, [it] does not answer to any executive authority [nor] is it subject to balances provided by a separate legislature." *Id.*

435. *See Aide-Memoire on the Report of the United Nations Group of Experts for Cambodia of 18 February 1999*, issued by the Government of Cambodia, U.N. Doc. A/53/875, S/1999/324 (Mar. 12, 1999).

> The national judiciary system will undertake the investigation, prosecution and trial of Ta Mok, the culprit, under the Cambodian law in force. . . . [T]he culprit is a Cambodian national, the victims are Cambodians, the place of the commission of the crimes is also in Cambodia; therefore the trial by a Cambodian court is fully in conformity with this legal process.

Id.

436. *See* Penrose, *supra* note 295, at 321 (concluding that the Yugoslavia and Rwanda Tribunals failed because they do not have enough power); Janis, *supra* note 377, at 161 (concluding that to date international criminal tribunals have been largely ineffective).

437. *See* RESTATEMENT (THIRD), *supra* note 21, § 701 (discussing state obligation to respect human rights embodied by custom, treaty and general principles of law). *See also* MERON, *supra* note 74, at 171-82 (discussing the continued existence of the exhaustion of local remedies as a requirement in human rights and humanitarian law). No matter how few cases these international tribunals try, their existence does send a powerful message that the international community will get involved if the law of internal armed conflict is ignored. *See* Meron, *supra* note 27, at 555 (discussing state fear of the activities of these tribunals as spurring domestic prosecutions). More importantly, a state can be liable for failure to take steps to punish a violation of fundamental rights. *See* RESTATEMENT (THIRD), *supra* note 21, § 703 (remedies for violations).

438. *See* Akhavan, *supra* note 402, at 27 (discussing the possibility of international criminal tribunals as making it increasingly difficult for states to avoid their own obligations to impose accountability).

violations of their obligations under international law.[439] For the international community, this means ensuring state authority and capacity for domestic enforcement. Domestic enforcement of the law of internal armed conflict enhances humanitarian interests by maximizing compliance.

Perhaps the role of international tribunals is best exemplified in the principle of complementarity contained in the Rome Statute.[440] When no state is willing or able to prosecute, an international tribunal could fill this role. If a state prosecution is a mere sham used to shield violations, an international tribunal may serve as an alternative forum.[441] The difficulty lies in maintaining the presumptive reliance on domestic forums over international forums. In the face of the increasing willingness of international bodies to govern domestic matters, this reliance may be easily dismissed.[442]

C. Importance of Domestic Enforcement

Domestic enforcement of the law of internal armed conflict reiterates that government or insurgency power ultimately relies on the people. International criminal tribunals reflect an international determination that the state has lost the power to govern, whether through atrocities or other actions, and that an international judicial order must be imposed.[443] This new international judicial order, however, suffers from three fundamental defects. First, it can be politicized.[444] Second it may add to the chaos of

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439. *See* RESTATEMENT (THIRD), *supra* note 21, § 206 (discussing capacity, rights and duties of states as including pursuing and being subject to legal remedies). *See also* Meron, *supra* note 27, at 563 (stating that the development of international norms should not obviate the responsibility of the states to prosecute those norms).

440. *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 25 (2001) ("The [International Criminal Court] can fulfill an important function in buttressing domestic justice by serving as an additional forum for dispensing justice when domestic forums are inadequate."). The focus on the domestic judiciary and the responsibility of the state should remain paramount.

441. *See* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 424 (1998) (discussing the idea of primacy of national courts over the international criminal court).

442. *See infra* note 370 and accompanying text regarding the increasing willingness of international bodies to examine domestic conduct.

443. *See The International Criminal Court, Setting the Record Straight*, *at* http://www.un.org/News/facts/ iccfact.htm (last modified June 1, 1999) (discussing why an international criminal tribunal is needed).

the internal armed conflict.[445] Finally, it fails to represent the people upon which it is imposing order.[446] Whether domestic or international, the farther removed the judiciary is from its source of power, the community's people, the less effective it will be in accomplishing its judicial functions.[447] To that end, a renewed emphasis on domestic enforcement of the law of internal armed conflict is needed to reverse this neo-colonialist judicial trend.

1. Effect of Reinvigorating the Sovereignty of the State

This section argues in favor of reinvigorating the principle of sovereignty. It then examines domestic judicial enforcement of the law of internal armed conflict as a means of establishing or reestablishing a credible rule of law in these chaotic situations. Finally, this section briefly discusses the collateral effect on state and non-state actors.

The doctrine of sovereign equality is the modern cornerstone of the international legal order.[448] Sovereignty is a state's ability to manage its

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444. *Compare id.* (asserting that the International Criminal Court will avoid politicization because it needs permission from itself to start an investigation), *with* Lohr & Lietzau, *supra* note 207, at 48 ("Despite the ICC treaty's incorporation of several internal checks and balances, [it] does not answer to any executive authority [nor] is it subject to balances provided by a separate legislature."), *and* Meron, *supra* note 27, at 555 (expressing concern about "the selectivity involved in a system where the establishment of a tribunal for a given conflict depends on whether consensus to apply Chapter VII of the U.N. Charter can be obtained").

445. *See* Penrose, *supra* note 295, at 321 (although concluding that international criminal tribunals are necessary, the commentator recognizes that the first priority should be bringing an end to the war, and then begin imposing justice). It appears that the on-going tribunals have done little to stop Balkan or central African violence. *See Macedonia Seizes All 'Key Points,'* CNN.com, Mar. 25, 2001 (discussing violence spreading out of Kosovo), *at* http://www.cnn.com/2001/WORLD/europe/03/25/macedonia.04/ index.html; *Mass Graves Found in Burundi*, CNN.com, Mar. 25, 2001 (discussing continuing violence between Hutu and Tutsis tribes), *at http://www.cnn.com/2001/ WORLD/africa/03/25/ burundi.Bodies /index.html*.

446. *See* Bakuramutsa, *supra* note 405, at 646 (stating the difference in treatment between Rwanda courts and the International Tribunal was "not conducive to national reconciliation in Rwanda").

447. *But see* Penrose, *supra* note 295, at 321 (concluding that these difficulties can be overcome by giving international criminal tribunals more power such as police forces and prison systems). Not discussed by commentators, is the impact of this imperialistic imposition of a complete social order on a society.

448. *See* U.N. CHARTER art. 2(7). Member states agree to not become involved in other member states' domestic affairs. *Id.*

own affairs independent of external interference or intervention.[449] This territorial inviolability is reflected in the right of the state to conduct its domestic affairs as it sees fit. Any new international legal regime must recognize the right of each community to govern itself.

> In order for the people to govern and to continue to develop their capacity to govern they must have the power to govern and the necessity to govern as close to them as it is practical to place it, and there must be provided for their use governmental machinery adapted to the exercise of these functions by the people.[450]

Even supporters of international criminal tribunals agree that sovereignty not only protects a state's independence, but also contributes to the state's ability to provide security and protection for its own citizens.[451] In the wake of internal atrocities, however, it is easier to emphasize the international responsibility for prosecution of fundamental norms.[452] It is harder, yet more important, to affix this responsibility to the state.[453]

East Timor provides one successful example where the international response restored state responsibility. Despite an almost complete evisceration of the local judiciary, the international community assisted in rebuilding a domestic judiciary with local judges, prosecutors, and tribunals.[454] Similarly, in Kosovo the international community overcame Herculean challenges and assisted in restoring a local judiciary.[455] Even though individual states or parties may find short-term advantages in violating the law in particular situations, their long-term accountability is bet-

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449. *See* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 417-18 (1991).

450. Sumners Address, *supra* note 417, at 751 (discussing governmental progress in a democracy).

451. *See* Bickley, *supra* note 215, at 259 (arguing that the U.S. opposition to the ICC is based on disingenuous notions of sovereignty, but recognizing the values that sovereignty provides).

452. *See* Penrose, *supra* note 295, at 324-28 (discussing the failure of the international community to respond to various atrocities throughout the world).

453. *See* Meron, *supra* note 27, at 555 (reminding that "national courts cannot be ignored."). *See also* Sumners Address, *supra* note 417, at 751 (noting that the freedom enjoyed by the state is not so that it may merely enjoy the blessings of this freedom, but rather that the state may discharge the duties incident to freedom and gain strength by its discharge).

454. Strohmeyer, *supra* note 64, at 51-53.

455. *Id.*

ter ensured through domestic enforcement of the law of internal armed conflict.[456]

The state is a centrally structured social organization meant to bring about the comprehensive coordination of individual energies.[457] As the central organization, it carries the ultimate authority and responsibility for that social structure. The state gains strength by fulfilling its responsibilities, but is rendered incapable when relieved of its governmental capacity to fulfill those responsibilities.[458] If the goal of a stable international system is states that apply and live by a rule of law, then states must have the power, strength and capacity to fulfill that responsibility. To bring order out of the chaos of internal armed conflict, the international community must focus its efforts on ensuring that states retain the capacity to exercise their inherent responsibilities.

Reducing state sovereignty, however, decreases the legitimacy of the state. As states recognize this loss of sovereignty and legitimacy that occur with the imposition of international judicial institutions, the states are less likely to support these institutions.[459] Under the law of war, the interna-

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456. Charney, *supra* note 8, at 532-33; MANNING, *supra* note 7, at 106-07. In response to advocates for swift justice, the author draws attention to the paucity of completed cases for the current international criminal tribunals despite over twelve years of combined operations. As of the date of writing, all the concluded trials, except for the case of Mr. Erdemovic, are still on appeal. For an updated list of persons indicted by the Yugoslavia Tribunal, see http://www.un.org/icty/BLS/ind.htm (last visited Mar. 16, 2002). For an updated list of persons indicted by the Rwanda Tribunal, see http://www.ictr.org (last visited Mar. 16, 2002). In addition, attention is also drawn to the situations in Argentina, Chile and Croatia where the perpetrators of atrocities of those regimes are now being called to justice, domestically. *See* Faiola, *supra* note 17, at A19 (ruling by Argentine court allowing prosecutions for activities during "Dirty War"); Pascale Bonnefoy, *Pinochet Charges Are Reduced; Appeals Court Orders Trial as Accessory, Not Mastermind*, WASH. POST, Mar. 9, 2001, at A20 (ruling by court upholding the indictment of General Augusto Pinochet for human rights abuses committed shortly after his 1973 coup, but reducing the charges from masterminding the murder and kidnapping of dissidents to acting as an accessory in covering up the crimes); *War Crimes Suspect Detained*, CNN.com, Feb. 21, 2001 (discussing arrest of Croatian General Mirko Norac for role in 1991 killing of Serb civilians), *available at* http://www.cnn.com/2001/WORLD/europe/02/21/croatia.general/index.html.

457. *See* NIEMEYER, *supra* note 3, at 313.

458. Sumners Address, *supra* note 417, at 751.

459. *See* Penrose, *supra* note 295, at 363-64 (concluding that the failure of the current international criminal tribunals is because of the dependence on the "vacillating interests of nation-states" and "the acquiescence of powerful nations."). To not rely on the acquiescence of the nation-state as the representative of its citizens may be trading justice for tyranny. *See also supra* note 347 (discussing whether the role of the U.N. includes becoming a supra-government).

tional community originally envisioned a scheme that relied first on the conflict's parties to enforce the law.[460] Similarly, human rights regimes and other "[i]nternational conventions that proscribe certain activities of international concern without creating international tribunals to try the violators characteristically obligate the states to prohibit those activities and to punish the natural and legal persons under their jurisdiction for violations according to national law."[461] Even the current structure of the International Criminal Court recognizes this concern through its principle of complementarity.[462] It follows that the law of internal armed conflict should recognize this concern by reinvigorating state sovereignty.

Although the law of internal armed conflict is not based on reciprocity, experience in both inter-state and internal conflicts suggests that enforcement of the law of internal armed conflict may depend on reciprocity and fear of reprisals.[463] A party to the conflict may apply the law out

460. *See* Geneva Convention I, *supra* note 43, art. 49; Geneva Convention II, *supra* note 43, art. 50; Geneva Convention III, *supra* note 43, art. 129; Geneva Convention IV, *supra* note 43 art. 146 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts."). For an example of this scheme in practice, see GEORGE S. PRUGH, LAW AT WAR: VIETNAM, 1964-1973, at 154 (1975) (discussing U.S. war crimes prosecutions during the Vietnam conflict). For the United States policy, see FM 27-10, *supra* note 151, para 506c ("Grave Breaches . . . are tried and punished by United States tribunals as violations of international law."), para 506d ("[G]rave breaches are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction."). State sovereignty should not be reduced, but rather encouraged with domestic tribunals having primacy in prosecuting violators of the law of internal armed conflict. *See* Meron, *supra* note 35, at 253 (discussing historical implementation of the law of war by relying on domestic tribunals).

461. Meron, *supra* note 27, at 562-63 (citing as an example the Convention on the Prohibition of the Development of Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, Art. VII, *reprinted in* 32 I.L.M. 800, 810 (1993)). "When treaties fail to clearly define the criminality of prohibited act, the underlying assumption has been that customary law and internal penal law would supply the missing links" *Id.*. *See* International Covenant on Civil and Political Rights, *supra* note 132, art. 2(3) (creating the obligation of domestic implementation); American Convention on Human Rights, *supra* note 132, art. 2 (requiring states to provide implementation under national laws); European Convention for the Protection of Human Rights, *supra* note 132, art. 13 (requiring remedies before national authority).

462. *See Rome Statute*, *supra* note 214, pmbl., para. 10 ("the [ICC] established under this Statute shall be complementary to national criminal jurisdictions."). *See also* Newton, *supra* note 440, at 25; Noone & Moore, *supra* note 47, at 140-42 (both discussing principle of complementarity and its implementation).

463. *See* Meron, *supra* note 35, at 247-51 (discussing the origin of the principles of reciprocity and reprisal).

of simple fear that its forces will suffer the consequences if it does not. A party may feel less inclined to comply, however, when there is no reasonable prospect that an opposing party will apply the law, whether because of unwillingness, plain ignorance, lack of resources, or the fact that responsibility has been removed to the international level. Therefore, working with state and non-state parties to the conflict to educate their fighters on fundamental standards, rather than relying on international criminal tribunals after the fact, better serves humanitarian interests. This approach will increase pressure on the parties to respect their obligations and enhance the likelihood of some form of reciprocity, however limited.[464]

In the wake of internal atrocities, it is easy to demand justice and look to international institutions for prosecution of fundamental norms.[465] It is more important to demand this responsibility of the state.[466] Reinvigorating state sovereignty will serve humanitarian interests by demanding this state accountability.[467]

2. Empowering National Tribunals

The rule of law may be in greatest jeopardy during or after an internal armed conflict.[468] Empowering national tribunals to enforce the law of internal armed conflict can introduce, reinforce or reinvigorate the rule of law at the local level.[469] The domestic application of fundamental standards results in the greater effectiveness of local courts, and consequently,

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464. Hampson, *supra* note 88, at 69-71 (discussing role of International Committee of the Red Cross in this process).

465. *See* Penrose, *supra* note 295, at 324-28 (discussing the need to respond to atrocities throughout the world by creating stronger and more powerful international tribunals); Bickley, *supra* note 215, at 213 (arguing in support of establishing international criminal court to deal with atrocities).

466. *See* Meron, *supra* noted 238, at 468 (discussing the continuing universal criminalization of the law of war and serious violations of human rights as serving to stimulate national prosecutions).

467. "Moreover, the evolution of individual criminal responsibility must not erode the vital concepts of state responsibility for the violation of international norms." Meron, *supra* note 27, at 555.

468. *See Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, para. 34, U.N. Doc.S/2000/1055 (Oct. 31, 2000) (discussing steps needed to develop respect for the rule of law).

469. *See* Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001) (discussing the important role of local forums in postconflict transitions).

greater credibility for any judgment. The challenge lies in ensuring the correct application of these standards.

International criminal tribunals resolve this dilemma by removing domestic interests from the process.[470] International observers, however, could resolve the dilemma and reinforce the rule of law during this critical time by reintroducing domestic tribunals to the process.[471] This idea of shared responsibility between domestic tribunals and international observers is not revolutionary.[472] Most law of internal armed conflict violations already lie within the jurisdiction of domestic civilian criminal courts and military courts-martial.[473] United Nations human rights rapporteurs have recommended incorporating the fundamental standards embodied by the law of internal armed conflict into domestic legislation.[474] Holding trials at the national instead of international level may raise procedural concerns, but it in no way compromises the fundamental principles of justice.[475] As

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470. *See* Charney, *supra* note 215, at 456 (suggesting that these tribunals may actually provide political cover for states to avoid prosecuting war criminals by passing the responsibility to the tribunal).

471. The Cambodian government has proposed this method. *See Letter from the Prime Minister of Cambodia to the Secretary-General*, UN Doc A/53/866, S/1999/295 (Mar. 24 1999) ("To ensure that the [Khmer Rouge] trial by the existing national tribunal of Cambodia meets international standards, the Royal Government of Cambodia welcomes assistance in terms of legal experts from foreign countries.").

472. O'Donnell, *supra* note 204, at 502. The United Nations bodies and the International Committee of the Red Cross do "not have sole responsibility for monitoring compliance with humanitarian law during armed conflicts. That responsibility is shared with national tribunals, and with international tribunals, when such tribunals have been established." *Id.*

473. *See* Meron, *supra* note 27, at 564-65 (discussing the various national military manuals or laws dealing with law of war violations, specifically Common Article 3). *See, e.g.*, FED. REP. GERMANY, HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL, para. 1209 (1992); CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL (Second Draft) at 18-5, 18-6 (undated); UK WAR OFFICE, LAW OF WAR ON LAND, AND BEING PART III OF THE MANUAL OF MILITARY LAW para. 626 (1958); FM 27-10, *supra* note 151, para. 505d (each discussing jurisdiction over law of war violations).

474. In 1997, the U.N. Special Rapporteur on Torture concluded "that both the Geneva Conventions and the Convention Against Torture obliged state parties to extradite or prosecute torturers found within their jurisdiction. . . . He urged all States to review their legislation to ensure that their courts had jurisdiction over war crimes and crimes against humanity." O'Donnell, *supra* note 204, at 496 (citing U.N. Doc. E/CN.4/1998/38, paras. 230-32).

475. Meron, *supra* note 27, at 566 (arguing that applying international fundamental standards whether at the international or domestic level does not result in *ex post facto* problems).

either tribunal can serve justice, it is better to select a system that can directly embody the community it is judging.

Some might suggest that international criminal tribunals offer swift and sure justice at the modest price of state sovereignty.[476] Regretfully, this is not the case. For example, the Rwanda Tribunal established in 1995 has handed down only seven judgments in its six years, all of which are on appeal.[477] In contrast, domestic tribunals in Rwanda have completed thousands of trials for conduct arising out of its internal armed conflict.[478]

Similarly, the President of the Yugoslavia Tribunal recently reported that at a cost of $100 million annually, the temporary tribunal's mission might be accomplished by 2016, more than twenty years after its establishment.[479] It is fair to ask what the effect of putting $100 million a year into a domestic judiciary for the next fifteen years may have on the long-term effectiveness of that domestic judiciary. Although serving as examples of independent judiciaries, when international criminal tribunals eventually complete their tasks, the affected states lose all benefit from those tribunals. Perhaps a better long-term commitment to justice and humanitarian ideals resides in developing permanent domestic tribunals.

The enforcement of the law of internal armed conflict cannot depend solely on international tribunals. "They will never be a substitute for national courts. National systems of justice have a vital, indeed, the principal, role to play here."[480] This assumption of primacy of domestic tribunals over domestic affairs is embodied throughout international law.[481]

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476. Bickley, *supra* note 215, at 213 (arguing that the International Criminal Court offers the hope of justice and an end to impunity).

477. *See supra* note 456.

478. *See Death Penalty for Trio Found Guilty of Rwanda Killings*, CNN.com, Feb. 4, 1999, *at* http://www.cnn.com/world/africa/9902/04/rwanda.01/index.html.

479. "Almost a thousand people are now employed at the [Yugoslavia] Tribunal and its annual budget has risen to over 100 million dollars." Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, Address Before the U.N. General Assembly (Nov. 20, 2000), *available at* http://www.un.org/icty/pressreal/p450-e.htm.

480. Meron, *supra* note 27, at 555 (concluding that the function of the national courts cannot be ignored because of the uncertainties surrounding the International Criminal Court, doubts about additional ad hoc international criminal tribunals being established, and the recognition that any international criminal tribunal will be complementary to national justice systems). *See also* Charney, *supra* note 215, at 453 (recognizing that aggressive international criminal prosecutions of these international crimes are easy to support, but also present difficult conflicts between legal, political and national reconciliation efforts).

Similarly, law of war and human rights regimes have always operated on the assumption that their rules would be domestically enforced.[482] "The fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes."[483]

A clear need exists for a renewed emphasis on domestic solutions to these problems. If the international community allocates the same time, money and effort to establishing strong and coherent domestic tribunals, it would demonstrate a long-term commitment to humanitarian ideals and the rule of law, which would be enforced by the people of the state that suffered the internal armed conflict. Relying on international criminal tribunals to do the work forsakes this long-term commitment to the course of humanitarian progress.

3. Collateral Benefits of Domestic Enforcement

Empowering domestic tribunals with the primary responsibility of enforcing the law of internal armed conflict may have collateral benefits beyond maximizing humanitarian interests and reinforcing the rule of the law. Governments or insurgents that violate the law of internal armed conflict lose legitimacy and international credibility.[484] This possibility may cause the parties to attempt greater compliance with the law[485] because compliance strengthens a party's international and domestic legitimacy.[486] Continued violation may result in the insurgency or the government losing

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481. *See* RESTATEMENT (THIRD), *supra* note 21, §§ 401, 403 (discussing limitations on jurisdiction over other states); MERON, *supra* note 74, at 171-82 (discussing exhaustion of domestic remedies).

482. *See* Meron, *supra* note 35, at 253 (discussing the traditionally domestic implementation of the law of war).

483. Meron, *supra* note 27, at 563 (reminding that the development of international norms must not erode the concept of state responsibility).

484. *See* Karen DeYoung, *Pastrana Urges U.S. to Meet with Guerillas*, WASH. POST, Feb. 27, 2001, at A20 (United States had begun dialogue with Colombian rebels, but ended it in March 1999 after rebels killed three American humanitarian workers.).

485. *See id.* ("Although the FARC acknowledged responsibility for what it called a 'mistake of war,' and announced that it would punish several low-level guerillas, the United States said there would be no more talks until those responsible for ordering and committing the killings are turned in."). *See also* Wilson, *supra* note 17, at A19 (reporting the convictions of a Colombian general officer and a colonel for allowing illegal paramilitary groups to massacre civilians following the receipt of funds under the Colombian government's foreign policy initiative, Plan Colombia).

the credibility needed to further its political agenda.[487] In effect, to eventually govern, opposing parties must compete to gain consensus from the people, and this end is attained by compliance with the law of internal armed conflict.[488]

"Nations derive their legitimacy from the consent of those they govern, and lose that legitimacy when they oppress their people." [489] This legitimacy can come from properly exercising state functions through domestic enforcement of fundamental norms. Similarly, parties opposed to the state can find legitimacy through compliance.[490] A military or insurgency force that self-regulates or is sanctioned by its judiciary may seek reform to gain this legitimacy. State legislators or insurgent politicians can also gain political power by embracing humanitarian norms.[491] State investigative organs can engender respect and responsibility by investigating violations by all parties. In addition, media and citizen groups are more

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486. *See, e.g.*, Caballero, *supra* note 365 (interview with head of Colombian paramilitaries, Carlos Castano who denied "being a monster and rejected allegations he had committed massacres").

487. *See* Laura Garces, *The Dynamics of Violence*, Special Report, CNN.com (n.d.) (Colombian President "Pastrana has been successful in restoring Colombia's credibility abroad and in garnering financial assistance, both from the United States and from Europe."), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/story/essays/garces/ia.noframes/story/essays/garces/; Sibylla Brodzinsky *Viciousness of Extortion Shocks, Colombians Slaying Leads to Suspension of Peace Talks*, USA TODAY, May 18, 2000, at A1 (reporting that outrage over the gruesome murder of a local farmer sparked an unprecedented outcry against leftist rebels and their widespread extortion practices and prompted the suspension of peace talks with guerillas).

488. *See* Wilson, *supra* note 17, at A1 (discussing the growing paramilitary ranks "not only from beleaguered peasants seeking protection [from the insurgents], but also from an exhausted middle class that has watched a once-powerful economy savaged by guerillas."); Caballero, *supra* note 365 (interview with head of Colombian paramilitary group, Carlos Castano who is trying to recast his image as "only protecting Colombians from guerillas").

489. Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov /~foreign/2000/ pr012000.html.

490. The law of internal armed conflict does not provide combatant immunity or legal status to any parties of the conflict; rather it established basic standards of conduct. *See supra* note 95 and accompanying text (discussing combatant immunity and the effect on legal status). Adherence to these standards, however, can provide legitimacy.

491. *See Milosevic Remanded in Custody*, CNN.com, April 2, 2001, *at* http://www.cnn.com/2001/ WORLD/europe/04/01/milosevic.evidence/index.html. Serbian President Kostunica was reported as stating: "No one can remain untouchable. Every individual must bear responsibility according to the law. Whoever shoots at the police must be apprehended. Whoever has been subpoenaed by a judge must answer those summons. The law applies to every citizen." *Id.*

likely to stay involved and participate in the development of standards.[492] Domestic enforcement of the law of internal armed conflict can rebuild and reunite the torn society.

In sum, domestic enforcement of the law of internal armed conflict has effects that cannot be achieved through international mechanisms. It will reinvigorate the sovereignty of the state and reduce the chaos of internal armed conflict. It will also begin the process of establishing the rule of law through domestic tribunals. Finally, with effective domestic tribunals in place, compliance with the law of internal armed conflict serves the interests of all parties to the conflict.

D. Conclusion

Critics of domestic enforcement of the law of internal armed conflict often cite the paucity of domestic prosecution of violations.[493] To be sure, the record of domestic prosecutions of government and dissident violators of such international norms as embodied by the law of internal armed conflict is disappointing.[494] But the growing criminalization of these norms should not lead to relieving states of their responsibilities.

The desire for justice through international criminal tribunals overlooks their inherent weaknesses. International criminal tribunals are subject to political machinations. In addition, international criminal tribunals add greater uncertainty to a chaotic situation as sovereignty is split between the international criminal tribunal and the state. The credibility of international criminal tribunals' judgments are also questionable because they do not represent the community they are serving, and they occur at a rate of once every twelve years.

Although it may be difficult to accept a regime's prosecutorial decisions, continued emphasis and pressure on national prosecutors to rely on fundamental standards embodied by the law of internal armed conflict can be successful.[495] State sovereignty must be reinforced so that "the evolution of individual criminal responsibility [does] not erode the vital con-

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492. *See* Caballos, *supra* note 426 (discussing the active role Colombians need to take in resolving the internal armed conflict).

493. Penrose, *supra* note 295, at 342 ("[I]t is the very failure observed at Leipzig that precludes domestic enforcement for violations that have been increasingly characterized as international crimes.").

494. Meron, *supra* note 27, at 556.

cepts of state responsibility for the violation of international norms."[496] Diminishing the independent governmental responsibility of a state destroys the possibility of the creation, preservation, or institution of democracy.[497] In addition, the enforcement of the law of internal armed conflict by domestic tribunals will go farther in creating an independent judiciary and respect for the rule of law. By comparison, an international criminal tribunal is created out of the political consensus of allegedly disinterested states, and it eventually will leave a judicial vacuum when its mission is complete.[498] Finally, emphasis on domestic enforcement of these norms forces responsibility on the parties seeking international and domestic legitimacy. Therefore, an international commitment to the domestic enforcement of this new legal regime will capitalize on humanitarian interests by maximizing compliance with the law during an internal armed conflict.

VI. Closing Thoughts

Experience suggests that some of the most flagrant violations of the law of war and of human rights occur during internal armed conflicts. This does not arise from a legal vacuum. Customarily and conventionally, the law of war, human rights obligations, and various treaties governing methods and means of war continue to apply. The confluence between these legal rules in an internal armed conflict has given rise to a new international legal regime, the law of internal armed conflict. The law of internal

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495. *See* Wilson, *supra* note 17, at A19 (reporting the convictions of a Colombian general officer and a colonel for allowing illegal paramilitary groups to massacre civilians following the receipt of funds under the Colombian government's foreign policy initiative, Plan Colombia.); *Pinochet Murder Hearing Starts*, USA TODAY, Dec. 7, 2000, (reporting on domestic court hearings against former Chilean President).

496. Meron, *supra* note 27, at 563. State-sponsored violations as well as non-state-sponsored violations should be the responsibility of the state as the sovereignty.

497. Sumners Address, *supra* note 417, at 751. *But see* Burgos, *supra* note 84, at 3 ("The very existence of a large number of political detainees whose rights to procedural due process have been denied indicates the fallacy in relying upon national law to protect political prisoners.").

498. *See supra* notes 429, 470 and accompanying text (respectively discussing the problems suffered by the Rwanda Tribunal and re-establishing the rule of law through domestic tribunals).

armed conflict does not provide combatant immunity or legal status to any party of the conflict; rather it establishes basic standards of conduct.[499]

The criminalization of the norms underlying this regime is increasing. An effective enforcement system remains key, however, to the success of the law of internal armed conflict. This enforcement system must be structured to balance many interests. It must balance the victim's interest in justice, the interest of the accused in an impartial hearing, the international interest in humanity, and the interest of states in representing their communities. The recent ad hoc international criminal tribunals in Yugoslavia and Rwanda, along with the possible implementation of the International Criminal Court, have encouraged greater reliance on international mechanisms to balance these interests. While laudatory, a more effective mechanism is available, domestic tribunals. Domestic tribunals using universal standards can best balance these various interests.

National court systems should be the primary enforcement mechanism of the law of internal armed conflict. "From the perspective of impact on the individual, the most important means of implementing international law is through the national legislation, courts, and administrative agencies."[500] The norms embodied by the law of internal armed conflict represent the international interest in ensuring justice. In addition, enforcement by domestic tribunals stabilizes the international system through respect for state sovereignty. By requiring the state to accept the responsibility of enforcement of the law of internal armed conflict, the law stabilizes the situation and allows the process of rebuilding the fractured state to occur.

Critics of domestic tribunals continue to overlook the importance of furthering democratic ideals by keeping the power of governing nearest the people. International mechanisms should be warily used because of the inherent colonialism of enforcement of these norms outside the domestic political process. Rather, international emphasis should be on supporting, educating and requiring domestic enforcement of the law of internal armed conflict.

> *It is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to pro-*

499. *See supra* note 95 and accompanying text (discussing combatant immunity and effect on legal status).

500. *See* NEWMAN & WEISSBRODT, *supra* note 73, at 21.

> *tect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*[501]

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501. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

PRIVATE CONSENSUAL SODOMY SHOULD BE CONSTITUTIONALLY PROTECTED IN THE MILITARY BY THE RIGHT TO PRIVACY

MAJOR EUGENE E. BAIME[1]

I. Introduction

United States service members cannot engage in any type of sodomy without breaking the law.[2] This broad restriction makes no distinction based on the service member's status. Article 125, Uniform Code of Military Justice (UCMJ), applies whether an individual is married or unmarried, heterosexual or homosexual.[3] The restriction also applies whether the sodomy is consensual or nonconsensual.[4] In fact, the only difference between consensual and forcible sodomy is the authorized punishment.[5] It is irrelevant whether the sodomy is committed in public or in the privacy of a service member's off-post bedroom.[6] Thus, under the UCMJ, married service members commit criminal offenses if they engage in consensual oral or anal sodomy in the privacy of their own bedroom with their own spouse.

The prohibition against private consensual sodomy still exists for two reasons. First, when Congress created the UCMJ fifty years ago, it intended to criminalize sodomy. Second, the courts are unwilling to hold conclusively that Article 125 unconstitutionally interferes with a married service member's right to privacy. For these two reasons, service members

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1. Judge Advocate, United States Army. Presently assigned as Chief, Administrative and Civil Law, Fort Bliss, Texas. LL.M., 2001, The Judge Advocate General's School, U.S. Army; J.D., 1991, The John Marshall Law School; B.A., 1988, University of Illinois, 1988. Prior assignments include: Chief of Litigation and Senior Environmental Attorney, Rock Island Arsenal, Rock Island, Illinois, 1998-2000; Commissioner, Panel 3, United States Army Court of Criminal Appeals, Falls Church, Virginia, 1996-1997; Appellate Attorney, Government Appellate Division, Office of The Judge Advocate General, United States Army, Falls Church, Virginia, 1994-1996; Trial Defense Counsel, Second Infantry Division, Camp Casey, Korea, 1993-1994; Legal Assistance Attorney, Fort Huachuca, Sierra Vista, Arizona, 1992-1993; 127th Officer Basic Course, The Judge Advocate General's School Army, 1992. The author wishes to thank Major Tim Grammel for his advice and guidance, Colonel Richard Cairns and Major Mike Lacey for their comments, and Lieutenant Colonel John Saunders for his advice concerning potential writing topics. This research paper was submitted in partial completion of the Master of Laws requirements of the 49th Judge Advocate Officer Graduate Course.

may be prosecuted under Article 125 for engaging in consensual sodomy. This remains the case despite a finding by the United States Navy-Marine Court of Criminal Appeals that "it seems clear to us that Congress and our superior courts never intended that we disregard the mantle of privacy and protection traditionally afforded to the marital relationship."[7]

The Court of Appeals for the Armed Forces[8] refuses, absent direction from the Supreme Court, to identify a constitutional right to privacy allowing service members to commit sodomy.[9] The court recognizes that con-

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2. Uniform Code of Military Justice (UCMJ) Article 125 states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

UCMJ art. 125 (2000). The elements of the offense of sodomy are:

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
>
> (Note: Add either or both of the following elements, if applicable)
>
> (2) That the act was done with a child under the age of 16.
>
> (3) That the act was done by force and without the consent of the other person.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 51b (2000) [hereinafter MCM].

3. *See* UCMJ art. 125; MCM, *supra* note 2, app. A23-14, ¶ 51 (Analysis of Punitive Articles).

4. *See* MCM, *supra* note 2, pt. IV, ¶¶ 51b(1), b(3).

5. *Id.* pt. IV, ¶ 51e. The President added the distinction between the punishments in order to enhance the punishment for committing the more severe offense of forcible sodomy. "The maximum punishment for forcible sodomy was raised in recognition of the severity of the offense which is similar to rape in its violation of personal privacy and dignity." *Id.* app. A23-14, ¶ 51e.

6. *See* UCMJ art. 125; United States v. Scoby, 5 M.J. 160, 163 (C.M.A. 1978).

7. United States v. Kulow, No. NMCM 96 01253, 1997 CCA LEXIS 484, at *10 (N-M. Ct. Crim. App. Aug. 29, 1997) (unpublished).

8. Formerly known as the United States Court of Military Appeals.

9. United States v. Fagg, 34 M.J. 179, 180 (C.M.A. 1992); United States v. Henderson, 34 M.J. 174, 178 (C.M.A. 1992). *See also* United States v. Jones, 14 M.J. 1008, 1011 (A.C.M.R. 1982).

victing a service member for committing consensual sodomy may not be the best decision as a matter of policy.[10] The court, however, can only determine whether a statute is constitutional, not whether the statute is erroneous as a matter of policy.[11] Recognizing this, the court has commented that Congress could alter Article 125 or convening authorities could decide not to prosecute consensual sodomy cases.[12]

Consensual sodomy, committed in private, should not be prohibited under the UCMJ. Service members have a constitutional right to privacy, and within that right is the ability to make decisions and engage in activities free from governmental intrusion. Numerous state courts have recognized that one of the most fundamental and important decisions an individual can make is whether to engage in private sexual intimacies. These courts have held unconstitutional state statutes prohibiting sodomy because they improperly intruded upon individuals' right to privacy.[13] That same logic should apply to the military where service courts fail to recognize a right of privacy pertaining to any act of sodomy committed under any circumstances.[14]

Military courts have erred by not holding that Article 125 is unconstitutional, insofar as it prohibits consensual oral and anal sodomy committed in private. This article asserts that Article 125's prohibition causes an unconstitutional infringement upon service members' right to privacy. First, it discusses the history behind criminal sodomy provisions. Second, it discusses the right to privacy in general terms. Third, it evaluates *Bowers v. Hardwick*,[15] a Supreme Court case that considered whether homosexual sodomy is constitutionally protected under the right to privacy.

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10. *See Fagg*, 34 M.J. at 180 ("[W]e may sympathize with the accused regarding this particular conviction for what was unquestionably consensual conduct."); *see also Kulow*, 1997 CCA LEXIS 484, at *36 (Clark, S.J., concurring) ("Had this offense been charged as consensual sodomy I would find it more troubling than I do in its present context—a lesser included offense of the charged forcible sodomy.").

11. *Henderson*, 34 M.J. at 178.

12. *Id.*; *see also Kulow*, 1997 CCA LEXIS 484, at *29-30 ("Of course, the Congress is free to modify the codal provision outlawing sodomy if it chooses.").

13. *See, e.g.*, State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (finding statute that prohibited private consensual oral sodomy between married persons to be unconstitutional, because it infringed upon the constitutional right of privacy). *See infra* note 174.

14. United States v. Davis, No. ACM 29681, 1993 CMR LEXIS 187, at *2 (A.F.C.M.R. Apr. 28, 1993) ("Military jurisprudence does not now recognize a right of privacy extending to sodomy under any circumstances.").

15. 478 U.S. 186 (1986).

Fourth, it explores the rationale used by courts that determined state sodomy statutes were unconstitutional. Fifth, it discusses Article 125 as it currently applies to married service members. Sixth, it proffers that all service members enjoy a constitutional right to privacy to engage in consensual oral or anal sodomy. Seventh, it demonstrates that government intrusion into this right to privacy serves no compelling governmental interest. Finally, the article proposes a change to Article 125 that would uphold service members' constitutional right to privacy.

II. History

The crime of sodomy has ancient historical roots.[16] Originally appearing in Hebraic law,[17] sodomy prohibitions historically pertained to male homosexual activity.[18] In addition, oral sex historically has been defined as "unnatural or deviant" conduct.[19] Sodomy is not a new offense in the military. The Court of Military Appeals wrote that military law has criminalized oral sodomy "since time immemorial."[20] Prior to 1920, sodomy was considered a criminal offense under Article of War 96, although this general article did not specifically list sodomy as an offense.[21] Under military jurisprudence, however, oral sex was considered a crime.[22] From 1920-1949, sodomy was prosecuted as a violation of Article of War 93, which specifically stated that sodomy was an offense, but did not define it.[23] The *1949 Manuals for Courts-Martial* for the Army and the Air Force later defined the crime of sodomy as "taking into . . . [the] mouth or anus .

16. *See id.* at 192.

17. Harris v. State of Alaska, 457 P.2d 638, 648 & n.37 (Alaska 1969) (citing *Genesis* 19:24; *Ezekiel* 16:49) ("Sodomy appears originally as part of the Hebraic law, taking its name from the practices reputedly indulged in by the inhabitants of Sodom and Gomorrah.").

18. *See id.* at 649; United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992).

19. United States v. Jones, 14 M.J. 1008, 1010 (A.C.M.R. 1982) (citing *Leviticus* 18:22-23; *Deuteronomy* 23:17).

20. *Henderson*, 34 M.J. at 176.

21. United States v. Harris, 8 M.J. 52, 53 (C.M.A. 1979) (detailing the legislative history as to whether cunnilingus was intended to be a crime).

22. *See* United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978); *Harris*, 8 M.J. at 53.

23. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ¶ 443 (1921) (Article of War 93).

. . the sexual organ of any other person or animal or placing his or her sexual organ in the mouth or anus of any other person or animal."[24]

Article 125 is a direct descendant of these "preexisting sexual proscriptions in the land and naval forces of the United States."[25] Congress did not intend Article 125 to change significantly the prohibitions against sodomy then in existence.[26] Article 125, however, provided a far more refined definition of sodomy.[27] Although the origin of the term sodomy suggests that it applies only to homosexual conduct, it is clear from the language of Article 125 that Congress intended the prohibition to apply to heterosexual sodomy as well.[28]

The United States Court of Appeals for the Armed Forces has often interpreted Congress's legislative intent in creating Article 125.[29] In reviewing the legislative history, the court found that Congress did not determine whether there are any harmful consequences to the military community resulting from sodomy committed in private.[30] The court found, however, that Congress intended the UCMJ to include oral sodomy as an offense under Article 125.[31] After evaluating prior court decisions and "other authorities," the court concluded that Congress clearly intended that Article 125 encompass "consensual, noncommercial, heterosexual fellatio . . . performed in private between two unmarried adults."[32] Mili-

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24. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ¶ 180*j* (1949); MANUAL FOR COURTS-MARTIAL, UNITED STATES AIR FORCE ¶ 180*j* (1949).

25. *Henderson*, 34 M.J. at 176.

26. *Id.* at 176. *See also* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1233 (1985) [hereinafter INDEX AND LEGISLATIVE HISTORY].

27. *See Harris*, 8 M.J. at 54.

28. *Id.* ("Thus, it would appear that the purpose of the change in language was to express a legislative intention to define sodomy as including acts other than those within the scope of its common-law definition."). *See also Henderson*, 34 M.J. at 175-76 ("The language of the Article makes it clear that, under the rubric 'sodomy,' Congress intended to proscribe a more general range of conduct than the origin of the term might suggest.") (citation omitted).

29. *See Harris*, 8 M.J. at 53-59; *Henderson*, 34 M.J. at 176; United States v. Scoby, 5 M.J. 160, 165-66 (C.M.A. 1978).

30. *Scoby*, 5 M.J. at 165 ("The background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community.").

31. *Id.* at 166 (finding that fellatio, or oral sodomy, is forbidden conduct under Article 125).

32. United States v. Gates, 40 M.J. 354, 355 (C.M.A. 1994).

tary courts have not found corresponding congressional intent to apply Article 125 to married couples' sexual conduct.[33]

Congress clearly intended to include in Article 125 the conduct that earlier military law prohibited.[34] Simply put, the offense of consensual sodomy exists in military law because Congress chose to incorporate the common law offense of sodomy into the UCMJ.[35] The military courts' interpretation of the legislative history[36] indicates no unique rationale for Congress to criminalize sodomy in the military other than this desire to legislate the common law offense of sodomy.[37] The courts provide no insight into possible compelling interests that Congress considered when creating the prohibition against sodomy.[38] The Court of Appeals for the Armed Forces even commented that Congress did not make any determination of possible harm that could arise if service members engaged in private consensual sodomy.[39] The only certainty is that Congress criminalized consensual oral sodomy out of deference for the common law's premise that sodomy was unnatural or deviant sexual behavior.[40]

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33. *See* United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *35 (N-M. Ct. Crim. App. Aug. 29, 1997) (Clark, S.J., concurring). Senior Judge Clark's concurring opinion discussed the implied elements of proving a sodomy case against a married service member. He wrote that there is an "apparent absence of a clear congressional intent that the military justice system intrude into the marital bedroom and regulate consensual sexual relations between husband and wife." *Id.*

34. *Henderson*, 34 M.J. at 176.

35. United States v. Morgan, 24 C.M.R. 151, 154 (C.M.A. 1957).

36. *See generally* INDEX AND LEGISLATIVE HISTORY, *supra* note 26, at 1233.

37. *See* United States v. Harris, 8 M.J. 52, 55-58 (C.M.A. 1979). Congress looked to Maryland and District of Columbia statutes for definitions when drafting the UCMJ. In 1920, however, when sodomy was first specifically mentioned as violation of the Articles of War, the military courts looked to common law to define the crime. *Id*. at 56. Article 125, UCMJ, was based on the District of Columbia's sodomy law, which was derived from Maryland's sodomy law. *Id*. at 57.

38. Since the right to privacy was not recognized as pertaining to sodomy at the time the statute was formed, no compelling government interest had to be shown. Thus, it is not surprising to see only the interest of formally criminalizing what was traditionally a crime at common law.

39. United States v. Scoby, 5 M.J. 160, 165 (C.M.A. 1978); *see supra* note 30.

40. *See* United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992).

III. Constitutional Analysis

A. Right to Privacy

"[T]he right to be let alone [by the Government is] the most comprehensive of rights and the right most valued by civilized men."[41] Although the Constitution does not expressly grant a right to privacy,[42] the Supreme Court first articulated this right in 1891.[43] Thus, the right has arisen from case law and the Court's interpretation of the Bill of Rights—specifically the First, Fourth, Fifth,[44] and Ninth Amendments—and both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[45] After reviewing prior case law involving the right to privacy, the Court determined that the "guarantee of personal privacy" only applies if the action in question is "fundamental" or "implicit in the concept of ordered liberty."[46] The Court explained, however, that the right to privacy has its true basis in the Fourteenth Amendment.[47] The right to privacy may even protect practices that were uncommon when the Fourteenth Amendment was adopted.[48] The Court is supposed to exercise reasoned judgment to define the appropriate "sphere of liberty" when adjudicating each substantive due process claim.[49]

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41. Olmstead v. United States, 277 US 438, 478 (1928) (Brandeis, J., dissenting).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id.

42. *See* U.S. CONST; Roe v. Wade, 410 U.S. 113, 152 (1973); *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). *See generally* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding a right to privacy in the penumbra of guarantees afforded by the Bill of Rights).

43. In *Union Pacific Railway v. Botsford*, 141 U.S. 250, 251 (1891), the Court wrote: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Interpreting the right to privacy is not an easy task. It does not guarantee citizens the right to do things in private, but rather guarantees them the right to engage in certain personal acts[50] or decisions.[51] It is important to understand this distinction. Otherwise, one could argue that the right to privacy protects someone who commits a murder in private. Limited in scope to certain fundamental rights, the right to privacy does not protect citizens' every act.

In *United States v. Griswold*,[52] the Supreme Court found unconstitutional a ban on the distribution of contraceptives to married people. The Court held that there is a constitutional right to privacy, which protects a married couple from state intrusion into their intimate affairs.[53] Justice Douglas, writing for the majority, wrote:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The

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44. In a case in which the Supreme Court ruled that evidence inadmissibly obtained could not be used against the defendant, the Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes (sic) of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,--it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Boyd v. United States, 116 U.S. 616, 630 (1886).

45. *Roe*, 410 U.S. at 152; *Griswold*, 381 U.S. at 484-85.

46. *Roe*, 410 U.S. at 152. However, the rights must be "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted).

47. *See Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . ."); Carey v. Population Srvs. Int'l, 431 U.S. 678, 684 (1977).

48. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 848 (1992) (reaffirming a woman's right to choose whether to have an abortion) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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49. *Id.* at 849-50.

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
>
> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Id. (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

50. Lovisi v. Slayton, 363 F.Supp 620, 625-26 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976).

> The phrase "right to privacy" may, unless carefully defined, be misconstrued. This is because privacy can refer either to seclusion or to that which is personal. To describe an act as private may mean that it is performed behind closed doors. It may also mean that the doing of that act is a decision personal to the one performing it and having no effect on others. In the constitutional context, the meaning of privacy is doubtless closer to the latter than the former definition. This does not mean, however, that the United States Constitution guarantees to an individual the right to perform any act which he may choose to do so long as the performance of that act has no meaningful effect on others. Rather, the right to privacy extends to the performance of personal acts or decisions only within certain contexts.

Id. This was a case dealing with "swingers" who engaged in consensual sodomy in public. Their children took pictures and brought them to school. The court found that, because the acts were done in public, there was no right to privacy. *Id.*

> We deal with a right of privacy older than the Bill of Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[54]

In *Eisenstadt v. Baird*,[55] the Court faced facts similar to *Griswold*, but the issue was whether contraceptives could be provided to unmarried individuals.[56] The Court determined that the Equal Protection Clause of the Fourteenth Amendment prohibited states from creating legislation treating certain groups of individuals differently based on criteria unrelated to the statute's purpose.[57] Because married people were entitled to contraceptives, the Court held that unmarried people must enjoy the same unfettered access.[58] In explaining why unmarried and married individuals share the same rights, the Court wrote:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamen-

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51. *Planned Parenthood*, 505 U.S. at 851.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

Id.

52. 381 U.S. 479 (1965).
53. *Id.* at 485-86.
54. *Id.*
55. 405 U.S. 438 (1973).
56. *Id.* at 454-55.
57. *Id.* at 447. *See also* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686-87 (1977).
58. *Eisenstadt*, 405 U.S. at 453.

> tally affecting a person as the decision whether to bear or beget a child.[59]

The Supreme Court has not expressly stated whether the right to privacy allows every adult to engage in private consensual sodomy.[60] To determine whether the right to privacy protects such conduct, a court must employ a three-part test. First, the court must recognize that the right to privacy protects individuals' ability to engage in private consensual sodomy.[61] Because the right to privacy is not an absolute right, however, it may be regulated by the states.[62] Second, assuming the right to privacy exists, the court must evaluate whether a compelling governmental interest justifies regulation of or intrusion into the right to privacy.[63] Third, if a compelling governmental interest exists, the court must evaluate whether a statute is drawn narrowly enough to protect that interest.[64]

B. Bowers v. Hardwick

Bowers v. Hardwick[65] is the seminal case that addresses whether the U.S. Constitution protects acts of sodomy. The 1986 case involves homosexual sodomy between two men.[66] The Court was sharply divided and

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59. *Id.* (citations omitted).

60. The Court has held that the right to privacy does not grant individuals the right to engage in homosexual sodomy. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

61. *See* Roe v. Wade, 410 U.S. 113,152 (1973); United States v. Allen, No. ACM 32727, 1999 CCA LEXIS 116, at *6 (A.F. Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

62. *Roe*, 410 U.S. at 154.

63. Washington v. Glucksberg, 521 U.S. 702,721 (1997); Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); *Roe*, 410 U.S. at 155; Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). The Court of Appeals for the Armed Forces, when asked to recognize a fundamental constitutional right that a superior court has yet to recognize, evaluates the governmental interests against allowing that right before deciding whether the right exists. *See also* United States v. Bygrave, 46 M.J. 491, 495 (1997).

64. *Carey*, 431 U.S. at 686; *Roe*, 410 U.S. at 155; *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *Bygrave*, 46 M.J. at 496.

65. 478 U.S. 186 (1986).

66. *Id. See also* Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (summary affirmance) (similar fact pattern).

voted 5-4 to hold that the respondent did not have a constitutional right to engage in homosexual sodomitical acts.[67]

Hardwick was charged with a violation of the Georgia statute prohibiting sodomy. The State of Georgia did not prosecute Hardwick because the district attorney decided against pursuing the case. Nevertheless, Hardwick sued in federal district court where he challenged the statute's constitutionality.[68]

1. Majority Opinion

The Supreme Court explored the constitutionality of Georgia's statute as it applied to both homosexuals and heterosexuals because the statute applied equally to both groups.[69] The Court could have easily formed a bright line rule determining whether all individuals have a constitutionally protected right to privacy to engage in acts of sodomy. The Court only opined, however, on the statute as it applied to consensual homosexual sodomy.[70] The majority opinion stated, "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have so for a very long time."[71] The very narrow holding was limited to the Court's interpretation of the Constitution. In upholding the Georgia sodomy law, the Court emphasized that its opinion did not affect state legislatures' power to decriminalize sodomy or state courts' ability to hold state statutes unconstitutional based on state constitutions.[72]

The majority opinion reviewed the Court's prior decisions concerning the right to privacy, finding that none of the rights previously recognized resembled the alleged constitutional right of homosexuals to participate in

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67. *Bowers*, 478 U.S. at 196. *Cf. Doe v. Commonwealth*, 403 F. Supp. at 1202 (2-1 vote to uphold Virginia sodomy provision). "In sum, we believe that the sodomy statute, so long in force in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court." *Id.*

68. *Bowers*, 478 U.S. at 188. ("He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violated the Federal Constitution.").

69. *Id.*

70. *Id.* ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").

71. *Id.* at 190.

sodomy.[73] The Court found specifically that homosexual sodomy had no connection with family, marriage, or procreation, and that the earlier line of privacy cases did not imply that all private consensual sexual conduct between adults is beyond state regulation.[74]

The Court explained that fundamental liberties unmentioned in the Constitution must be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[75] Alternatively, a fundamental liberty may be one that is "deeply rooted in this Nation's history and tradition."[76]

The Court discerned no fundamental right to engage in homosexual sodomy.[77] It explored the historical roots of sodomy, which was criminalized not only in ancient times, but also at both common law and by the original thirteen states that ratified the Bill of Rights.[78] The Court concluded that a right to engage in sodomy was neither "deeply rooted in this

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72. *Id.* The majority continued:

> This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no questions about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.

Id.

73. *Id.* at 190-91.

74. *Id.*

> Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Id.

75. *Id.* at 191-92.

76. *Id.* at 192 (citations omitted).

77. *Id.*

78. *Id.* at 192-93.

Nation's history and tradition," nor was it "implicit in the concept of ordered liberty."[79] Thus, the majority refused to recognize a constitutional right to engage in homosexual sodomy.[80]

The majority opinion also explained that crimes sometimes occur in the privacy of one's home, necessitating intrusion by the government.[81] The Court compared sodomy to other "victimless crimes" such as possession and use of drugs, possession of firearms, and possession of stolen goods.[82] The majority asserted that, if it allowed homosexual sodomy, it would be difficult to justify prosecuting individuals for "adultery, incest, and other sexual crimes even though they are committed in the home."[83]

2. Dissenting Opinions

a. Justice Blackmun

Justices Blackmun and Stevens wrote separate dissenting opinions in which they asserted that the Georgia statute infringed unconstitutionally on an individual's right to privacy. Justice Blackmun began his critique by writing, "The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make a persuasive one."[84] Justice Blackmun next surmised that the sex and status of the alleged perpetrator were irrelevant under the Georgia statute.[85] His dissenting opinion then examines the facts of the case using a privacy analysis that is applied uniformly to all individuals whether married or single, homosexual or heterosexual.[86]

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79. *Id.* at 193. After discussing the historical background, the Court wrote, "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.*

80. *Id.* at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

81. *Id.* at 195.

82. *Id.*

83. *Id.* at 195-96.

84. *Id.* at 203 (Blackmun, J., dissenting).

85. *See id.* at 200 ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." (citing GA. CODE ANN. § 16-6-2(a) (1984)).

86. *Id.* at 199-214.

Justice Blackmun determined that privacy is a two-pronged right, which encompasses the right to make decisions and the right to act in certain places.[87] He stated that Hardwick's case concerned both, adding that these rights to privacy form a central part of an individual's life.[88] Justice Blackmun found extremely important the ability to choose how to express one's self in an intimate sexual manner.[89] Regarding the right to act in certain places, he argued that Hardwick's sodomitical conduct should have been protected because it occurred in his home.[90] Justice Blackmun then concluded that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."[91]

To the majority's conclusion that there is no fundamental right to engage in sodomy, Justice Blackman responded that the Court's scrutiny should still apply to legislation regulating individuals' conduct, even though that conduct has been considered immoral or illegal for many years.[92] Justice Blackmun urged that the majority's rationale threatens the

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87. *Id.* at 204 ("First, [the Court] has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make . . . . Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged." (citations omitted)).

88. *Id.* ("We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.").

89. *Id.* at 205.

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Id. (citations omitted).

90. *Id.* at 207.

91. *Id.* at 208.

92. *Id.* at 210.

> Like Justice Holmes, I believe that "[it] is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Id. at 199 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

nation's deeply rooted values by taking away the individual's right to make personal decisions.[93]

b. Justice Stevens

Justice Stevens also determined that the Georgia statute applied equally to all people who engaged in sodomy.[94] His dissenting opinion first explores whether a state could prohibit all people from engaging in sodomy before turning to whether a state could enforce a sodomy law against only homosexuals.[95]

Examining the Court's prior decisions, Justice Stevens remarked that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[96] He further opined that unmarried individuals share the same liberty interest.[97] Justice Stevens next determined that married couples possess a right to engage in private consensual sexual relations even if others consider their conduct immoral.[98] Deciding whether to engage in the sexual conduct is a matter of individual choice, not one to be left to the government.[99] Thus, Justice Stevens concluded, the Court's prior decisions interpreting the right to privacy allow all adults, regardless of marital status or sexual orientation, to decide whether to engage in private consensual sodomy.[100]

After determining that a state could not prohibit sodomy through a statute that applied equally to all individuals, Justice Stevens next explored

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93. *Id.* at 214.

> I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

Id.

94. *Id.* at 216 (Stevens, J., dissenting).

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* ("Moreover, this protection extends to intimate choices by unmarried as well as married persons." (citations omitted)).

whether a state could enforce a law solely against one group of individuals, namely homosexuals.[101] He concluded that a state could not because homosexuals have the same individual interests as heterosexuals, and state intrusion into their right to choose how to live their personal lives would be legally improper.

> From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.[102]

3. Analysis

The Supreme Court limited the application of the *Bowers* opinion by narrowing the focus of its holding, and thus the case has limited precedential value. The majority opinion ignored the reasoning of the dissenting opinions, and it failed to consider the Georgia statute in its entirety. Because the Court did not offer any opinion on the statute as it applied to heterosexuals, it left open the question of whether consensual heterosexual

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98. *Id.* at 217-18.

> Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It may also prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide. The essential "liberty" that animated the development of the law in cases likes *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Id. (citation omitted).

99. *Id.* at 217.

100. *Id.* at 218.

101. *Id.*

102. *Id.* at 218-19.

sodomy is constitutional.[103] The majority opinion neither overruled nor rejected the premise that married couples enjoy a right to privacy in intimate affairs.[104] As a result, when exploring whether married couples have a constitutional right to engage in sodomy, *Bowers* offers little assistance.

Although the *Bowers* opinion holds no precedential value regarding heterosexuals, whether married or not, it clearly limits the right of homosexuals to engage in sodomy with each other. For several reasons, the Court should overturn the opinion.

The *Bowers* majority held that there was no right to privacy primarily because it discerned no fundamental liberty interest for individuals to engage in homosexual conduct.[105] The Court mistakenly made this assumption based on the lack of protection historically afforded to sodomy.[106] The same argument, however, could be extended to other personal decisions protected by the right to privacy, such as interracial marriage.[107] Moreover, had the Court always followed this analysis, such things as civil rights and women's right to vote would not exist. In its haste to rely on this

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103. *Id.* at 188. *See also* United States v. Henderson, 34 M.J. 174, 177 (C.M.A. 1992) ("Admittedly, the [*Bowers*] majority focused on the constitutionality of the Georgia statute as it pertained to consensual 'homosexual sodomy,' leaving open the question of the constitutionality of consensual heterosexual sodomy.").

104. *See, e.g.*, State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (finding statute that prohibited private consensual oral sodomy between married persons to be unconstitutional because it infringed upon the constitutional right of privacy).

105. *Bowers*, 478 U.S. at 192-93.

106. *Id.* at 193-94. *But cf.* John E. Theuman, Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R. 4th 1009 (2000) ("Litigation challenging the constitutionality validity of sodomy laws has increased sharply in recent years, apparently as a result of changing sexual mores which are typified by the claim that what consenting adults do in private should be their own business and nobody else's.").

Although the Court refused to consider whether heterosexuals have a fundamental right to commit sodomy, the historical discussion indicates that all sodomy was a criminal offense. *Bowers*, 478 U.S. at 193-94. Thus, according to the Court's logic, all sodomy should be prohibited. The author could find no cases supporting that analysis. Also, had the Court truly believed its logic, it could have expanded the scope of its opinion to prohibit all sodomy.

107. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992), the Court wrote, "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) [a case founded in equal protection principles]." *See generally* Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 N.D. J.L. ETHICS & PUB. POL'Y 753, 755-56, 762-63 (2000).

argument, the majority opinion failed to address the second part of the constitutionality test, which is unrelated to the historical background of the alleged liberty: Is the right to privacy as it pertains to sexual intimacy "implicit in the concept of ordered liberty?"[108]

The *Bowers* majority focused on the wrong right. The case was not about the right to engage in homosexual intimacies; rather, it was about the freedom to make an individual choice, free from governmental intrusion, about a personal, private, consensual sexual relationship that affects nobody but the participants. The Court failed to follow its past precedents expanding the zone of the right to privacy, and chose instead to outlaw an act that it presumably determined was personally immoral. Ironically, the Court refused to recognize an individual's ability to make a personal choice, arguably one of the most important fundamental liberties.

At the end of the opinion, the *Bowers* majority offers an unconvincing justification for its holding. Government intrusion into private sexual conduct is acceptable in the case of homosexual sodomy, argued the Court, because to hold otherwise would make it difficult to prosecute other sexual crimes occurring in the home.[109] The Court failed to articulate, however, the public harm caused by allowing two individuals, whether homosexual or heterosexual, to engage in private acts of consensual oral or anal sodomy. Additionally, the Court offered no basis for the assertion that the government would be precluded from prosecuting other sexual criminal acts, such as incest or rape, which may occur in the home.

The dissenting opinions of Justices Blackmun and Stevens offer logical and rational reasons why all individuals should enjoy the right to engage in sexual intimacy free from governmental intrusion. These opinions are also consistent with the Court's previous decisions defining and expanding the right to privacy.[110] The majority's conclusion—that the right to engage in intimate sexual affairs in the privacy of one's home is

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108. *Bowers*, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

109. *Id.* at 195-96.

110. *See, e.g.*, *id.* at 203-04 (Blackmun, J., dissenting) (citing Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); United States v. Karo, 468 U.S. 705 (1984); Payton v. New York, 445 U.S. 573 (1980); Roe v. Wade, 410 U.S. 113 (1973); Rio v. United States, 364 U.S. 253 (1960); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)), 216 (Stevens, J., dissenting) (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird; 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

not protected by the right to privacy—flies in the face of logic considering the trend of these prior decisions. Thus, the majority opinion clearly limited the expanding right to privacy.[111]

Decided by a 5-4 vote, *Bowers* was almost decided the other way. Justice Powell, who voted with the majority and wrote a concurring opinion,[112] initially was going to vote against the Georgia sodomy law.[113] Although Justice Powell personally disfavored laws prohibiting sodomy,[114] he voted with the majority because he did not recognize a fundamental right to commit private consensual sodomy.[115] Therefore, the decision is more tenuous than the majority opinion would lead readers to believe.

To compound matters, the Court of Appeals for the Armed Forces erroneously interpreted *Bowers* for the proposition that consenting adults do not have a general constitutional right to sexual intimacy.[116] Rather, as discussed previously, the *Bowers* opinion is limited in its application to consensual sexual relations between homosexuals.[117] Nothing in the case limits consenting heterosexuals from engaging in sexual relations.

C. Right to Privacy and Sodomy

The right to privacy should cover all service members' ability to engage in private consensual oral and anal sodomy. This right of privacy is subject to different interpretations by the states and the military because

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111. The Court realized, however, that its ruling did not prohibit states from finding sodomy statutes unconstitutional based on state constitutions. *Id.* at 190-91.

112. *Id.* at 197-98 (Powell, J., concurring) (speaking of how excessive prison terms may constitute a violation of the cruel and unusual punishment clause of the Constitution.).

113. *See* Al Kamen, *Powell Changed Vote in Sodomy Case; Different Outcome Seen Likely if Homosexual Had Been Prosecuted*, WASH. POST, July 13, 1986, at A1.

114. *Id.*

> Though Powell did not agree with the reasoning, he voiced sufficient distaste for the anti-sodomy law that he agrees to provide the crucial fifth vote for an overall decision striking the Georgia statute. . . . Powell, sources said, dislikes anti-sodomy laws, feeling that they are useless, never enforced and unenforceable.

Id.

115. *See Bowers*, 478 U.S. at 197 (Powell, J., concurring).

116. *See* United States v. Bygrave, 46 M.J. 491, 495 (1997).

117. *See supra* note 70 and accompanying text.

the Supreme Court has not fully defined an adult's right to privacy concerning intimate sexual relations.[118] Thus, the Court leaves to the different states and the military the task of defining the parameters of the right to privacy as it concerns the right to engage in sexual intimacy.[119] Currently, the military restricts service members' ability to engage in acts of sodomy.

1. Current Status in the Military

In *United States v. Scoby*,[120] the Court of Military Appeals discussed whether service members enjoy the right to privacy as it pertains to private oral sodomy. The court held there was no right to privacy in *Scoby* because the sodomy was committed in a public place.[121] The court went one step further, however, and wrote, "[T]o dispose properly of other cases in which we granted review to await decision in this case, we must decide whether Article 125 can constitutionally be applied to sexual acts performed in private quarters, with or without the presence of other persons."[122] The *Scoby* court then held that Article 125 does not violate a constitutional right to privacy.[123] This decision reflects the current state of military law, and military courts still refuse to recognize service members' right to privacy to engage in private consensual oral sodomy.

In *United States v. Allen*,[124] the United States Air Force Court of Criminal Appeals upheld an appellant's conviction for engaging in anal sodomy with his wife. Two of the three judges concurred with the lead opinion in all respects except for the determination that the right to privacy constitutionally protects consensual sodomy.[125] In this case, the appellant told his wife to prostitute herself both to make money to pay their bills and to "improve their sexual relationship."[126] Although the wife did not want

118. Carey v. Population Srvs. Int'l, 431 U.S. 678, 688 n.5 (1977). The Supreme "Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . ." *Id.*

119. *See Bowers*, 478 U.S. at 190 (placing limitation and allowing states to regulate based on state constitutions).

120. 5 M.J. 160 (C.M.A. 1978).

121. *Id.* at 164-65.

122. *Id.*

123. *Id.* at 166.

124. No. ACM 32727, 1999 CCA LEXIS 116, at *1 (A.F.Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

125. *See id.* at *30 (Young, S.J., dissenting), *40 (Schlegel, J., dissenting).

126. *See id.* at *45 (Schlegel, J., dissenting).

to be anally sodomized because she was forcibly sodomized as a teenager, she eventually succumbed to her husband's desires.[127]

The lead opinion in *Allen* expressly held that the right to privacy covers sexual conduct between a husband and a wife.[128] In his dissent, Senior Judge Young argued that the lead opinion completely ignored Congress's decision to criminalize all sodomy in Article 125.[129] While asserting that the right to privacy may be limited if there is a compelling governmental interest, Senior Judge Young never articulated what interest is served by regulating consensual sodomy.[130] Even if it was unconstitutional to prohibit married couples from engaging in consensual sodomy, Senior Judge Young stated that he would not grant the appellant any relief because his acts of sodomy were not in furtherance of and did not support the marital relationship.[131] Senior Judge Young premised his dissenting opinion, in part, on his finding that the appellant, convicted of consensual sodomy, had forcibly sodomized his wife.[132]

In the other *Allen* dissent, Judge Schlegel argued that anal sodomy did nothing to promote a marital relationship.[133] Based on his concluding remarks, however, it is reasonable to infer that the facts of the case prevented Judge Schlegel from acknowledging a constitutional right to privacy regarding consensual marital sexual relations. Specifically, he found the appellant's behavior to be violent, anything but consensual, and not in furtherance of the marital relationship.[134]

The Court of Appeals for the Armed Forces reviewed the *Allen* case, but declined to hold that anal sodomy between a husband and a wife is constitutionally protected.[135] The court found that, although the appellant was convicted of consensual sodomy, the facts "graphically depict[ed] a pattern of degradation and depersonalization."[136] According to the court, these specific acts did not promote a marital relationship and were thus undeserving of constitutional protection.[137] The court said it evaluated the

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127. *Id.* The appellant reneged on a promise to his wife that he would stop anally sodomizing her if she let him videotape the act. *Id.* at *46.

128. *Id.* at *9.

129. *Id.* at *35 (Young, S.J., dissenting).

130. *Id*.

131. *Id.* at *37 (Young, S.J., dissenting). "Under all the circumstances of this cases, I am unable to conclude that the acts of sodomy were truly consensual or that the accused's conduct was in furtherance of or support of the marital relationship." *Id.* at *39-40.

132. *Id*. at *39-40.

133. *Id*. at *45 (Schlegel, J., dissenting).

nature of the charged acts in determining whether Article 125 was constitutional as it pertained to married service members.[138] The Court of

134. *Id.* at *46-47 (Schelgel, J., dissenting). He wrote:

> The use of temporal police power to punish the appellant for sodomizing his wife does not strike me as anymore an unwarranted violation of the sanctity of this marriage, than the punishment he received for assaulting her or encouraging her to sell herself to help pay the bills. We know he harmed her physically while performing this sexual act because the pain caused her to cry and sometimes scream. I also infer he harmed her emotionally as she was forced to recall the trauma she suffered when she was violated as a teenager.
>
> In my humble opinion, the result here does not offend the Constitution or marriage as an institution. Instead, the appellant's conviction for violating Article 125 is permissible because he violated the marital union by using it to impose his desire on his wife, who but for that marital union would have never allowed her body to be subjected to that invasion.

Id.

135. United States v. Allen, 53 M.J. 402, 410 (2000).

136. *Id.*

137. *Id.* at 410. The issue remains whether the Court of Appeals for the Armed Forces would have found a marital exception if the facts indicated a purely consensual fact pattern.

138. *Id.*

> The facts of this case make it clear that appellant's acts were not in furtherance of the marriage. Regardless of whether the facts would have been sufficient to prove beyond a reasonable doubt that appellant engaged in forcible sodomy, they clearly demonstrate that the charged acts do not warrant constitutional protection because they were not "in furtherance of or supportive of the interests of the marital relationship. . . ." Instead, the facts graphically depict a pattern of degradation and depersonalization, of which the acts of sodomy were a part, that appellant visited upon his former wife. Such a pattern falls outside the ambit of conduct that could be considered in furtherance of the marriage for purposes of determining whether the statute should be invalidated on constitutional grounds. In that regard, we emphasize that we are not engaged in a subjective evaluation of the quality of marriage; rather, our consideration is focused on the reasonable inferences that may be drawn from the record concerning the nature of the charged acts in the context that immediately surrounded their commission.

Id. (citation omitted).

Appeals for the Armed Forces concluded that Allen's behavior did not fall within the ambit of constitutionally protected conduct.[139]

In *United States v. Kulow*,[140] the Navy-Marine Court of Criminal Appeals held constitutional a service member's conviction for engaging in consensual sodomy with his wife.[141] The court identified no marital privilege in the military that would preclude prosecution of a married person for engaging in sodomy with his or her spouse.[142] The court determined, however, that Congress and the Court of Appeals for the Armed Forces never intended that service courts ignore the right to privacy inherent in the marital relationship.[143]

The *Kulow* court went one step further toward recognizing the right to privacy when it wrote, "The law does not favor prosecuting consensual sexual activities of married couples that occur within the sanctity of their own bedrooms."[144] After undergoing a constitutional analysis suggesting that the court would recognize a right to privacy protecting married service members' acts of consensual sodomy with their spouse, the court held that no such right existed. [145] The court premised its holding, however, upon the facts of the case that involved Kulow's service-discrediting sexual and physical abuse of his spouse, not his mere consensual sodomy.[146] Thus, the holding of the case should be limited to cases of "forcible" sodomy.

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139. *Id.*

140. No. NMCM 96 02153, 1997 CCA LEXIS 484, (N-M. Ct. Crim. App. Aug. 29, 1997).

141. He was charged with forcible sodomy and found guilty of the lesser included offense of consensual sodomy. *Id.* at *5, *29-30.

142. *Id.* at *9-10, *29.

143. *Id.* at *10-11 (citing United States v. Foster, 40 M.J. 140, 146 (C.M.A. 1994)).

144. *Id.* at *22 (discussing the law in general, not military jurisprudence specifically).

145. *Id.* at *29.

146. *Id.* at *27. The court wrote:

> While the members did not find that the appellant had raped his wife or that the anal sodomy was forcible, there was no question but that his actions were part of an abusive marital relationship and that the incident in question constituted abuse. Such abuse undermines good order and discipline.

Id.

2. States Have Found the Right to Privacy Allows People to Engage in Sodomy

Although the military justice system criminalizes consensual sodomy, many states have decriminalized this conduct.[147] States accomplish this through one of three methods: an executive decision not to prosecute, a judicial opinion that the conduct is constitutionally protected, or a legislative decision to decriminalize sodomy. Generally, states only protect private consensual sodomy. Even in states that recognize a constitutional right to engage in sodomy, that right does not extend to sexual acts committed in public.[148]

This article next provides a summary of court cases determining that state statutes infringed upon the right to privacy protecting individuals' right to engage in private consensual oral or anal sodomy. Some of the cases interpret state constitutions, which often extend the right to privacy beyond the protection afforded by the U.S. Constitution.

a. Georgia

In the 1998 case, *Powell v. Georgia*, the Georgia Supreme Court ruled on the same Georgia statute that the U.S. Supreme Court upheld in *Bowers*.[149] Powell was charged with rape and forcible sodomy, but convicted for violating the Georgia sodomy statute by engaging in consensual oral sodomy with his wife's seventeen-year-old niece. [150]

Powell argued that the right to privacy granted to him by the state constitution protected the act.[151] The Georgia Supreme Court agreed, holding that the state's sodomy statute was unconstitutional as it pertained to private, consensual, and noncommercial acts.[152] The court held that the right to privacy protected acts of consensual sodomy, and that no compelling state interest justified state regulation in this area.[153] Because the Georgia Constitution expressly grants its citizens the right of privacy, however, the

147. *See, e.g.*, United States v. Henderson, 34 M.J. 174, 178 (C.M.A. 1978) (referring to Massachusetts).

148. *See* United States v. Scoby, 5 M.J. 160, 164 (C.M.A. 1978) (referring to New Jersey and New Mexico).

149. Powell v. State of Georgia, 510 S.E.2d 18 (Ga. 1998) (citing GA. CODE ANN. § 16-6-2(a) (2000)).

150. *Id.* at 20.

151. *Id.*

U.S. Constitution was not an issue in *Powell.* Thus, *Bowers* did not bind the Georgia Supreme Court.[154]

Arguably, *Powell* and similar state court cases may be distinguished from service court cases that interpret only the U.S. Constitution. The logic of the state court cases should still apply, nevertheless, even though state constitutions grant their citizens a more expansive right of privacy than does the U.S. Constitution. State constitutions expressly grant the right to privacy, unlike the U.S. Constitution, which does not include the right to privacy within the four corners of the document. But state constitutions do not explicitly confer the right to engage in private consensual sexual activity, and state courts must still determine whether the right to privacy protects these acts.[155] Thus, the Georgia court's conclusion is logical, whether or not the right to privacy is expressly granted in a constitution: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity."[156]

b. Montana

In another state court case, the Supreme Court of Montana held unconstitutional a Montana statute that precluded consensual homosexual conduct.[157] A state constitutional provision explicitly granted the "right of individual privacy,"[158] leading the court to conclude that the state's citizens have a right to expect that their private sexual conduct will be free from government intrusion.[159] The Montana court observed that "it is hard

152. *Id.* at 25-26. Interestingly, the statute is still on the books as valid law. GA. CODE ANN. § 16-6-2(a) (2001). In relevant part, the statute reads, "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *Id.* The annotations to the Georgia Code do not refer to *Powell.*

153. *Powell*, 510 S.E.2d at 24-26. "[I]nsofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent, [the statute] 'manifestly infringes upon a constitutional provision'. . . which guarantees the citizens of Georgia the right of privacy." *Id.* at 26 (citation omitted).

154. *Id.*

155. *See id.* at 24; Gryczan v. State of Montana, 942 P.2d 112, 122 (Mont. 1997).

156. *Powell*, 510 S.E.2d at 24.

157. *Gryczan*, 942 P.2d at 115, 126 (holding that no compelling state interest existed to allow regulation of consenting adults who engage in private, same-gender, noncommercial, sexual conduct). Respondents were homosexuals who stated that they engaged in homosexual conduct in the past and intended to do so in the future. *Id.* at 115-16.

to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity."[160] Moreover, the Montana court found no compelling state interest to overcome this right to privacy.[161]

c. Indiana

In 1968, the United States Court of Appeals for the Seventh Circuit evaluated the constitutionality of Indiana's sodomy statute in *Cotner v. Henry*,[162] a case involving a man convicted for consensually sodomizing his wife.[163] Cotner challenged his conviction, arguing that the statute constituted an unwarranted invasion into his marital relationship.[164] Indiana's

158. *Id.* at 121.

> Unlike the federal constitution, Montana's Constitution explicitly grants to all Montana citizens the right to individual privacy. Article II, Section 10 of the Montana Constitution provides:
>
> Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Id.

159. *Id.* at 122. The court wrote:

> It cannot seriously be argued that Respondents do not have a subjective or actual expectation of privacy in their sexual activities. With few exceptions not at issue here, all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation. Quite simply, consenting adults expect that neither the state nor their neighbors will be cohabitants of their bedrooms. Moreover, while society may not approve of the sexual practices of homosexuals, or, for that matter, sodomy, oral intercourse or other sexual conduct between husband and wife or between other heterosexuals, that is not to say that society is unwilling to recognize that all adults, regardless of gender or marital state, at least have a reasonable expectation that their sexual activities will remain personal and private.

Id.

160. *Id.* at 123.
161. *Id.* at 126.
162. 394 F.2d 873 (7th Cir. 1968).
163. *Id.*

sodomy statute was similar to Article 125 because it did not distinguish between consensual and nonconsensual conduct or between married and unmarried individuals.[165] The court reversed Cotner's conviction and sent the case back with instructions that, if it were retried, the Indiana court would need to consider Cotner's right to privacy under *Griswold*.[166] The Court was explicitly clear: under *Griswold*, the state had to show a compelling interest for a statute to limit a married person from engaging in private consensual sexual relations.[167]

In a subsequent case, the Supreme Court of Indiana upheld the constitutionality of Indiana's sodomy statute as it applied to unmarried individuals.[168] The court relied on *Griswold* and *Cotner* to determine that the statute was constitutional when applied to unmarried individuals.[169] The U.S. Supreme Court had not yet decided *Eisenstadt*, which extended the protections afforded by *Griswold* to unmarried individuals.[170] Thus, the Indiana Supreme Court was left to interpret cases that had only extended the right to privacy to married individuals' sexual relations. Judge DeBruler's dissent[171] argued that the statute was void for vagueness and unconstitutionally infringed upon unmarried adults' right to engage in private consensual sexual relations.[172] Judge DeBruler stated also that the law provided no support for treating unmarried individuals differently than married individuals.[173]

The preceding cases and others[174] demonstrate that many courts agree that state regulation of private consensual sodomy unconstitutionally infringes upon individuals' right to privacy, whether granted by the U.S. Constitution or a state constitution. The Court of Appeals for the Armed Forces and the service courts, however, have not embraced these courts' rationale. It is time for the military courts to recognize that the right to pri-

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164. *Id.* at 874.

165. *See id.*

166. *Id.* at 876 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

167. *Id.* at 875.

168. Dixon v. State of Indiana, 268 N.E.2d 84, 87 (Ind. 1971). The court found that the statute was not void for vagueness and that sodomy constituted a crime pursuant to the statute. *Id.*

169. *See id.* at 85-87.

170. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

171. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting). Judge Prentice concurred with Judge DeBruler. *Id.*

172. *Id.* at 87-90 (DeBruler, J., dissenting).

vacy, under the Due Process Clause, encompasses service members' ability to engage in private consensual oral and anal sodomy.

3. Are Service Members Allowed to Engage in Sodomy with Their Spouses?

In military jurisprudence, there is no marital defense[175] to sodomy.[176] The Court of Appeals for the Armed Forces has indicated, however, that a defense may exist in certain circumstances.[177] In 2000, the court had an opportunity to recognize a marital exception in *United States v. Allen*, but chose not to.[178] Thus, a service member can still be convicted of private consensual sodomy with his or her spouse.[179]

Before *Allen*, the Court of Appeals for the Armed Forces granted review to determine whether a service member's conviction for consensual sodomy with his wife violated his right to privacy. In *United States v. Thompson*,[180] appellant placed a loaded handgun to his wife's head, but the weapon would not fire.[181] While appellant attempted to load a second clip into the handgun, his wife performed oral sodomy on him in a successful

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173. *Id.* at 90.

> I believe that private sexual conduct between consenting adults is within that constitutionally protected zone.
>
> It is true that both *Griswold* and *Cotner* concerned the marital relationship. However, I see no valid reason to limit the right of sexual privacy to married persons. The majority opinion offers no reason why being married should make a difference in the applicability of the statute and I believe there is none. The moral preferences of the majority may not be imposed on everyone else unless there exists some harm to other persons. Sexual acts between consenting adults in private do not harm anyone else and should be free from state regulation.

Id.

174. Other courts have held unconstitutional state statutes that regulate sodomy.

In *State of Idaho v. David Holden*, 890 P.2d 341 (Idaho Ct. Apps. 1995), the court determined that a man's conviction for two counts of sodomy performed with his wife was unconstitutional. After thoroughly reviewing the Supreme Court's prior holdings regarding the right to privacy, the Idaho court determined that the right to privacy covers intimate aspects of a marital relationship.

attempt to divert his attention from the weapon. In a *per curiam* decision,

174. (continued):

> Although the scope of the right to privacy has not been fully defined by the United States Supreme Court, in light of the foregoing decisions there can be little doubt that it encompasses the most personal and intimate aspects of a marriage relationship. It is thus apparent that a constitutionally protected privacy interest is invaded when a statute like Section 18-6605 purports to prohibit particular sexual acts practiced consensually in private by married couples.

Id. at 347. The court explicitly indicated that it did not consider *Bowers* to have any effect upon the privacy rights of married couples. *Id.* at 348. Finally, the court did not consider whether the statute affected the rights of unmarried individuals since the issue was not before the court. *Id.* at 349.

In *State of Iowa v. Robert Eugene Pilcher*, 242 N.W.2d 348 (Iowa 1976), the Supreme Court of Iowa found a sodomy statute unconstitutional because it invaded the constitutional right to privacy. Pilcher was convicted of engaging in sodomy with someone other than his spouse. *Id.* at 350. The statute Pilcher violated was similar to Article 125 in that it did not distinguish between consensual or nonconsensual acts and married or unmarried individuals. *Id*. at 352. The court interpreted the long line of privacy cases in American jurisprudence to mean that individuals had a right to privacy to engage in private consensual sexual conduct. *Id.* at 358. The court determined that, because the right to privacy applied to married couples, the right had to apply to unmarried individuals as well under the Equal Protection Clause. *Id.* at 359. The holding was limited to heterosexual sodomy. "We therefore hold the statute cannot be constitutionally applied to alleged sodomotical acts performed in private between consenting adults of the opposite sex. We do not intimate any view of the constitutionality of the statute as applied in any other factual situation." *Id.* at 360.

In *Commonwealth of Pennsylvania v. Bonadio*, 415 A.2d 47 (Penn. 1980), the Supreme Court of Pennsylvania found unconstitutional a statute prohibiting sodomy between unmarried individuals. The state argued that it was important to create different classifications for married and unmarried individuals to "further a state interest in promoting the privacy inherent in the marital relationship." *Id.* at 51. The court did not determine whether there is a right to privacy to engage in sexual relations. *Id*. at 51. Rather, the court held that the statute's sole applicability to unmarried individuals constituted a violation of the Equal Protection Clause. The court stated:

> Similarly, to suggest that deviate acts are heinous if performed by unmarried persons but acceptable when done by married persons lacks even a rational basis, for requiring less moral behavior of married persons that is expected of unmarried persons is without basis in logic. If the statute regulated sexual acts so affecting others that proscription by law would be justified, then they should be proscribed for all people, not just the unmarried.

Id. at 51-52.

175. A spousal exception exists for indecent assault, MCM, *supra* note 2, pt. IV, ¶ 63b(1), and for carnal knowledge, UCMJ art. 120(b)(1) (2000).

the court held that there was no furtherance of the marital relationship because the case involved brutality.[182] The court wrote: "The extent to which the constitutional right to privacy prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable rela-

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176. United States v. Allen, 53 M.J. 402, 410 (2000); United States v. Scoby, 5 M.J. 160, 166 (1978). *See also Allen*, 53 M.J. at 411 (Sullivan, J., concurring) ("In the military, the law seems clear—any type of sodomy remains a crime. I will continue to apply the law as written, which makes no mention of a marital exception."); *Kulow*, 1997 CCA LEXIS 484 at *39 (Clark, S.J., concurring):

> Since neither the Congress nor our superior Court has indicated the existence of a spousal exception to the offense of consensual sodomy, I am reluctant to venture so far from my brethren as to engage in judicial activism by finding such an implied exception. Nevertheless, since the trend in other jurisdictions is so clear, I find the absence of guidance in this area to be troubling.

Id.

177. In *United States v. Bygrave*, 46 M.J. 491, 495 (1997), the court wrote that "the fact that appellant was unmarried at the time of these sex acts may also be of constitutional significance." (citation omitted). The court continued, "Nor need we consider whether our evaluation of the interests in the present case would differ if appellant had been prosecuted for sexual acts within the context of a marital relationship." *Id*. at 497 (involving an assault where a service member who was HIV positive engaged in consensual sexual intercourse; the government had an interest in proscribing unprotected sex by HIV infected service members with other service members); *Scoby*, 5 M.J. at 166 ("Here, it suffices that we record our agreement with the general rule, and leave to a case directly involving a married couple consideration of whether the exception exists and can properly be applied to the military community."). *See also Kulow*, 1997 CCA LEXIS 484, at *35-36 (Clark, S.J., concurring) ("Had this offense been charged as consensual sodomy I would find it more troubling than I do in its present context—a lesser included offense of the charged forcible sodomy.").

178. *See Allen*, 53 M.J. at 411. The court could have found a marital exception, but it did not mention the existence of one or the lack thereof. *Id*.

179. It is highly unlikely that a convening authority would refer a single charge and specification for engaging in consensual oral sodomy with one's spouse in violation of Article 125. A courts-martial may convict a married individual for consensual oral sodomy, however, if the court finds the individual guilty of consensual sodomy as a lesser included offense of forcible sodomy. The government may also charge consensual oral sodomy in cases where a service member allegedly committed several other offenses.

180. United States v. Thompson, 47 M.J. 378 (1997).

181. *Id*. at 379.

182. *Id*.

tionship to activity that is in furtherance of or supportive of the interests of the marital relationship."[183]

The Court of Appeals for the Armed Forces came closest to recognizing a marital exception to Article 125 in *Thompson* and *Allen.* Rather than conclude that there is a marital defense, however, the court determined that the acts were violent and did not advance the marital relationship.[184] Having never expressly ruled out the existence of a marital defense in previous cases, the court may find the act constitutionally protected by the right to privacy if faced with a situation where a service member is convicted of private consensual sodomy without a hint of force.[185]

Neither *Thompson* nor *Allen* discussed the meaning of the phrase "in furtherance of or supportive of the interests of the marital relationship."[186] Rather, the Court of Appeals for the Armed Forces merely determined in both cases that, because force and brutality were involved, there was no furtherance of the marital relationship. The court did not indicate that the ability to bear children had anything to do with furthering the marital relationship.[187] Thus, by refusing to acknowledge that unmarried service members have the constitutional right to privacy to engage in consensual oral and anal sodomy, the Court of Appeals for the Armed Forces may be taking steps in that direction by failing to adequately explain what constitutes a sexual act in support of the marital relationship.

Although no marital exception to Article 125 currently exists, the Supreme Court precedents remain clear—the government should not invade marital relationships absent a compelling state interest.[188] State courts have interpreted *Griswold* and its progeny to mean that married couples have a right to privacy concerning their private sexual intimacies.[189] The right to privacy to engage in such intimacies is a fundamental right even though the Constitution does not expressly mention it.[190] The courts

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183. *Id.*

184. *See id.*; United States v. Allen, 53 M.J. 402, 410 (2000).

185. *See* United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *36 (N-M. Ct. Crim. App. Aug. 29, 1997) (Clark, S.J., concurring) ("I find it ironic that a spousal privilege exists which allows either party to a marriage to prevent the other from disclosing confidential communications between them, yet one of the most intimate types of confidential communications between married persons—consensual sexual relations—is subject to criminal sanctions.").

186. *Thompson*, 47 M.J. at 379. *See also Allen*, 53 M.J. at 410.

187. *See Thompson*, 47 M.J. at 379; *Allen*, 53 M.J. at 410.

188. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

189. *See supra* notes 166, 174 and accompanying text.

clearly hold that a married couple's ability to engage in private sexual relations with each other absent intrusion from the government is one of the most valued rights that American citizens enjoy.[191]

The Supreme Court has left open the specific issue of whether married couples' right to privacy encompasses their ability to engage in consensual oral sodomy.[192] Courts have not interpreted the Court's silence to mean, however, that married couples do not enjoy this right.[193] *Bowers* offers little guidance, because it truly has no impact on cases dealing with any type of heterosexual relationship.[194] Moreover, the *Bowers* majority should have followed the lead of the dissenting judges, examined the Georgia statute as it applied to all individuals, and held that the right to privacy encompassed sexual intimacy. Instead, the majority found a way to prohibit conduct, namely homosexual sodomy, of which it disapproved. *Bowers* aside, the law clearly supports a right to privacy, which allows people to freely engage in consensual oral sodomy in private with one's spouse. As later discussed, the distinction between married and unmarried individuals also appears to be diminishing.

Although military courts have not yet recognized a marital defense to Article 125, they presumably would do so if faced with the proper fact pattern.[195] Thus, in all probability, married service members can engage in purely consensual sodomy with their spouses under the UCMJ.[196] The tough issue is not whether married service members can engage in private

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190. *See Griswold*, 381 U.S. at 483.

191. *See supra* notes 160, 166-67, 173-74 and accompanying text.

192. *See* Carey v. Population Srvs. Int'l, 431 U.S. 678, 689 (1977); Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

193. *See* United States v. Henderson, 34 M.J. 174, 178 n.8 (C.M.A. 1992).

194. *See Bowers*, 478 U.S. at 190.

195. Although Judge Sullivan appears unwilling to recognize a marital defense, the other four judges who joined in the *Allen* majority opinion appear willing to do so. *See* United States v. Allen, 53 M.J. 402, 410 (2000).

196. *But see supra* notes 177-79 and accompanying text.

consensual oral sodomy; rather, it is whether all service members, regardless of marital status, can engage in such conduct.[197]

4. Unmarried Service Members Should Be Allowed to Engage in Sodomy

The next step is to determine whether unmarried service members should also enjoy the constitutional right to privacy to engage in private consensual oral sodomy with others. The Supreme Court has not spoken on this issue. In this area, however, state courts have determined that unmarried individuals should enjoy the same rights as married persons.[198]

If the Supreme Court was faced with a case in which it had to determine whether unmarried individuals have the constitutional right to engage in private consensual oral sodomy, the Court should, based on its past decisions concerning the right to privacy, hold that the right exists. First, the Court should determine that married people have a constitutional right to privacy, which allows them to engage in private consensual oral sodomy. Second, under *Eisenstadt*, the Court should find that the Equal Protection Clause requires the government to treat unmarried individuals the same as married individuals, thereby extending the right to all individuals regardless of marital status. Finally, the Court should defer to the numerous state court decisions, and adopt their well-considered rationale as its own.

There is no justification for the government to deny unmarried individuals the right to privacy to engage in consensual private oral and anal sodomy.[199] States have been unable to show a compelling governmental interest for creating statutes that criminalize only unmarried individuals' behavior.[200] Additionally, a married couple consists of two individuals who have made a decision to spend their lives together. Underneath the marriage lies two individuals, each with a right to privacy equal to that of an unmarried individual. The Supreme Court held in *Eisenstadt* that unmarried individuals are a protected class, and that the Equal Protection Clause of the Fourteenth Amendment prohibits states from creating legis-

197. United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978). The Court of Appeals for the Armed Forces recognizes that there may be a problem if Article 125 is made only applicable to unmarried individuals. The court wrote, "There is no claim, and no evidence, that the article has been intentionally and discriminatorily applied to unmarried persons as distinguished from married individuals." *Id.* (citations omitted).

198. *See supra* notes 153, 157-58, 173-74.

lation that treats certain groups of individuals differently based on criteria unrelated to the statute's purpose.[201] Thus, although individuals are unmarried, they should be treated the same as married individuals with regards to the right to enter into sexual intimacies.[202]

Finally, opponents of this position would argue that allowing unmarried individuals to engage freely in private consensual oral and anal sodomy would not further the marital relationship, and thus such acts should not be protected by the right to privacy. This argument ignores *Eisenstadt*, which held that the Equal Protection Clause affords individuals the right to be treated the same as married individuals in certain circumstances.[203] Also, the courts have not perfected a test for what constitutes an act that is in furtherance of the marital relationship. Traditionally, courts have

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199. United States v. Jones, 14 M.J. 1008, 1012-13 (A.C.M.R. 1982) (Badami, J., dissenting). Judge Badami, in his dissenting opinion, wrote:

> This language [of *Eisenstadt*] makes it clear that the right of privacy is a right of all persons, whether married or not . . . . I believe that in view of *Griswold* and *Eisenstadt* and the cases following them, no sound argument can be made that the right of privacy in sexual conduct between consenting heterosexual adults is "fundamental" only when the consenting adults are married to each other. The right of privacy is deemed fundamental because it is basic to the concept of the individual in our American culture and because it is a necessary prerequisite to the effective enjoyment of all our other fundamental rights. As *Eisenstadt* and its progeny have recognized, these reasons are wholly unrelated to the existence *vel non* of a marriage relationship. I believe that a right of sexual privacy between consenting heterosexual adults is fundamental.

Id. Judge Badami added that he was not bound by *Scoby*, which found Article 125 to be constitutional, because it only involved homosexual conduct. *Id.* at 1014.

200. *See supra* notes 153, 157-58, 173-74 and accompanying text.

201. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). *See also* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686-87 (1977).

202. While the author recognizes the argument can be made that married individuals are different than unmarried individuals in that the former have made a lifelong commitment to stay together, that rationale does not apply here. First, Congress provided no reason in its legislative history why unmarried individuals should be treated differently than married individuals. Second, nothing suggests that the distinction between the two groups of individuals is related to Article 125's purpose. Third, the Supreme Court and state courts have found that, in certain circumstances, unmarried individuals deserve the same rights as married individuals. *See supra* notes 57-59, 153, 157-58, 173-74 and accompanying text.

203. *See Eisenstadt*, 405 U.S. at 447. Although unmarried individuals should be treated the same as married individuals under the Equal Protection Clause, the latter often enjoy protections not afforded to the former. *See supra* note 175 (citing spousal exceptions for indecent assault and carnal knowledge).

looked to such things as the ability to bear children, but under that rationale, sodomy would not be legal since it does not produce offspring. While courts have not perfected a test, they have clearly watered down the meaning of the phrase "in furtherance of marriage."[204] The phrase now offers scant guidance when dealing with the right to privacy concerning the ability to engage in private consensual sodomy, thus further diminishing the distinction between married and unmarried individuals.

According to many cases, nothing outweighs individual liberties.[205] The right to privacy grants all individuals, whether married or unmarried, heterosexual or homosexual, service member or civilian, the liberty to make certain decisions and engage in certain acts. This should include an adult's right to decide to and engage in private consensual sexual relations—regardless of type—without government intervention. Assuming the right to privacy encompasses these sexual relations, the courts should only examine the underlying sexual conduct to determine whether a compelling governmental interest justifies its regulation. As demonstrated in Part C.5, no compelling governmental interest is served by criminalizing private consensual sodomy. Thus, absent the required compelling interest, the right to privacy should protect all individuals' ability to engage in private consensual sexual relations, including oral and anal sodomy.

Applying *Eisenstadt*'s rationale, homosexuals should also be allowed to engage in private consensual oral sodomy.[206] Whether homosexuals themselves constitute their own protected class is irrelevant because they are entitled to the privacy rights that all individuals share. *Bowers* focused too narrowly on an individual's right to engage in homosexual sodomy. The constitutional issue is not whether homosexuals can engage in sodomy, but whether all individuals can do so.[207] If all individuals can do so, then homosexuals can too. If the government wishes to regulate such conduct, it can do so only if there is a compelling governmental interest to intrude into the constitutional right of privacy.[208] This article next demon-

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204. *See* State of New York v. Onofre, 415 N.E.2d 936, 942 (N.Y. 1980).

205. *See supra* note 43 and accompanying text.

206. *Eisenstadt* does not discuss whether homosexuals are a protected class. Rather, the case holds that legislation cannot treat certain groups of individuals differently based on criteria that are unrelated to the statute's purpose. *Id*. at 447.

207. The right to privacy may protect individuals' ability to engage in all intimate, consensual, and private sexual relations. This article, however, only proposes that the portion of Article 125 restricting individuals from engaging in consensual, private, noncommercial oral sodomy be deemed unconstitutional.

strates that no compelling governmental interest justifies criminalizing private consensual sodomy.

5. No Compelling State Interest Justifies Criminalizing Consensual Sodomy

Assuming the right to privacy protects individuals' ability to engage in private and consensual oral and anal sodomy, one must recognize that no right is absolute. A compelling governmental interest may limit or intrude upon that right.[209] Although "compelling" is the key word, its definition is not set in stone, and the state carries the burden to demonstrate its interest.[210]

No court has identified a compelling state interest that justified regulating private consensual sodomy. Rather, the cases simply avoid the issue by holding that there is no right to privacy allowing people to freely engage in such conduct. Thus, the cases never reach the second part of the constitutionality test. Likewise, Congress apparently never considered whether regulating private consensual sodomy in the military would prevent any harm.[211] Therefore, when it enacted Article 125, Congress articulated no compelling governmental interest that would be served.[212]

The Supreme Court has held that there must be a compelling state interest to overcome a "significant encroachment upon [a] personal liberty."[213] Statutes that regulate the private sexual conduct of consenting

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208. Even if the courts or legislature were to change Article 125, current military regulations still prohibit homosexual conduct and serve as grounds for an administrative discharge. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL ch. 15 (1 Nov. 2000); U.S. DEP'T OF ARMY, REG. 600-8-24, PERSONNEL-GENERAL: OFFICER TRANSFERS AND DISCHARGES para. 15-2 (21 July 1995). *See also* Able v. United States, 155 F.3d 628 (2d Cir. 1998) (holding that the military services do not violate the Constitution when they administratively discharge a service member for homosexual conduct).

209. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

210. *See* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686 (1977) The Court wrote, "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* (citations omitted).

211. *See supra* note 30.

212. That is not surprising, however, since this particular right to privacy was not yet recognized. Congress had no compelling reason, nor was it required to provide one.

adults generally do not serve a valid state purpose,[214] and individuals should be free to make their own moral decisions if their conduct "*does not harm others.*"[215] Protecting someone's health or life, including service members or their spouses, is a valid governmental interest.[216] States also have a role in preventing offensive public sexual behavior, forcible sexual conduct, sexual misuse of minors, and cruelty to animals.[217] As a result, most states justifiably prohibit conduct such as rape, bestiality, indecent assault, statutory rape, and corruption of minors.[218] By analogy, Article 125 serves a compelling interest by regulating forcible or public sod-

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213. Bates v. Little Rock, 361 U.S. 516, 524 (1960). *See also Roe*, 410 U.S. at 154-55.

214. *See*, *e.g.*, Commonwealth of Pennsylvania v. Bonadio, 415 A.2d 47, 49-51 (Pa. 1980) (holding unconstitutional a Pennsylvania statute prohibiting adults from engaging in private oral sodomy). The case also discussed equal protection because the statute applied only to unmarried individuals. *Id.*

215. *Id.* at 50.

216. United States v. Bygrave, 46 M.J. 491, 496 (1997). The court found a compelling governmental interest in restricting HIV-positive service members from engaging in unprotected sexual intercourse. The court did not determine whether there exists a constitutional right to engage in private heterosexual sex. *Id.*

217. *See Bonadio*, 415 A.2d at 49; Powell v. State of Georgia, 510 S.E.2d 18, 24 (Ga. 1998).

218. *See, e.g.*, *Bonadio*, 415 A.2d at 49 (Pennsylvania); *Powell*, 510 S.E.2d at 24 (Georgia).

> Implicit in our decisions curtailing the assertion of a right to privacy in sexual assault cases involving sexual activity taking place in public, performed with those legally incapable of giving consent, performed in exchange for money, or performed with force and against the will of a participant, is the determination that the State has a role in shielding the public from inadvertent exposure to the intimacies of others, in protecting minors and others legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will. The State fulfills its role in preventing sexual assaults and shielding and protecting the public from sexual acts by the enactment of criminal statutes prohibiting such conduct. . . ."

Powell, 510 S.E.2d at 24 (citations omitted).

omy.[219] Regulating private consensual sodomy, however, serves no such interest.[220]

Community opinion is not a compelling state interest.[221] Even if people disapprove of sodomitical behavior or find it reprehensible,[222] that does not create a compelling state interest justifying state intrusion into the right of privacy.[223] The Supreme Court of Montana stated specifically that "legislative distaste of what is perceived to be offensive and immoral sexual practices of homosexuals" did not constitute a compelling governmental interest.[224] The court then held that the Montana statute prohibiting private and consensual sexual relations between homosexuals was unconstitutional.[225] Other state courts have held that regulating private consensual sodomy between individuals, regardless of marital status, serves no compelling state interest.[226]

These cases demonstrate that criminalizing private consensual sodomy serves no compelling state interest. Admittedly, obvious state interests are served by regulating certain types of sodomy, such as sodomy without consent or with a minor. Private consensual sodomy between two adults harms no one. The military justice system should acknowledge this reality by decriminalizing that portion of Article 125, which prohibits a service member from engaging in private consensual sodomy with another adult.

6. The Military's Unique Environment Does Not Create a Compelling Governmental Interest

In domestic jurisdictions, no compelling state interest allows intrusion into the right to privacy as it pertains to one's ability to engage in private consensual sodomy. Due to differences between the civilian and military justice systems, however, the question remains as to whether the

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219. *See* Hatheway v. Secretary of the Army, 641 F.2d 1376, 1383 (9th Cir. 1981).

220. *See* United States v. Jones, 14 M.J. 1008, 1014 (A.C.M.R. 1982) (Badami, J., dissenting) ("I am unable to perceive of any injury or any danger that will accrue to anyone by allowing private consensual sodomy by heterosexual adults.").

221. *Powell*, 510 S.E.2d at 26 ("While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity.") (citations omitted).

222. Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tx. 1970), *vacated on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971). The Texas court stated that sodomy "is probably offensive to the vast majority" of people. *Id.*

military retains a compelling interest to regulate such conduct. Mere differences between the systems do not provide cause for military courts to disregard the civilian courts' constitutional decisions pertaining to sod-

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223. State of New Jersey v. Saunders, 381 A.2d 333, 342-43 (N.J. 1977) (dealing with fornication and holding that the state should not regulate private morality).

> Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he sum of behavior is to retain a man's own dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.

Id. (citation omitted). *See also Powell*, 510 S.E.2d at 26. *But see* Carter v. State of Arkansas, 500 S.W.2d 368 (Ark. 1973). In a case involving homosexual sodomy committed in public, the Arkansas Supreme Court refused to find that a state statute prohibiting sodomy, which applied to consenting adults, was unconstitutionally overbroad or in violation of Carter's right to privacy. *Id*. at 370. The court summarily disposed of the constitutional claim and chose instead to focus on the broadness allegation. The court acknowledged that societal changes towards sodomy may "have rendered our sodomy statutes unsuitable to the society in which we now live," but it was up to the legislature to acknowledge the appropriateness of making those changes. *Id*. at 371. The court found that the sodomy statute was "a legitimate exercise of the police power by the General Assembly to promote the public health, safety, morals and welfare." *Id*. at 372 (citations omitted). The court found that the behavior took place at a rest area frequented by travelers, and that the sheriff had received many complaints about public homosexual conduct. *Id.* at 372.

Carter is distinguishable from other cases. It contains no references to Supreme Court cases on the right to privacy, and the court found no right to privacy. Thus, the court did not explore whether there was a compelling governmental interest to uphold the statute. Finally, the case involved homosexual acts committed in a public area about which the authorities had received numerous complaints, not private, consensual sexual intimacy.

224. Gryczan v. State of Montana, 942 P.2d 112, 126 (Mont. 1997).

225. *Id*.

226. State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995); State of Iowa v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976). *See supra* note 174 (discussing these cases).

omy.[227] Thus, it is possible to apply state court rationales to a military setting.[228]

Generally, the protections afforded by the Constitution apply to service members.[229] In *Parker v. Levy*,[230] the Supreme Court remarked that the "military is, by necessity, a specialized society separate from civilian society."[231] Conduct that is acceptable in civilian society may cause problems in a military setting.[232] For example, fraternization that is acceptable for a civilian business may diminish the effectiveness of a military unit.[233] The military's unique circumstances may thus allow regulation of a right that may otherwise be allowed in the civilian sector. Therefore, it is possible that—even if the right to privacy allowed service members to engage in consensual sodomy—the conduct could still be proscribed if it was committed "under service discrediting circumstances" or if it was "prejudicial to good order and discipline."[234]

It is disingenuous to argue that private consensual sodomy is prejudicial to good order and discipline or service discrediting. If two adults engage in private consensual sodomy, the act causes no harm to anyone or any military unit, and it does not compel others to look with disfavor upon the military. That is, because private and consensual, the conduct neither affects good order and discipline, nor discredits the service. Of course, if an act of sodomy is nonconsensual or committed in public, then it should remain prohibited under Article 125. Under those circumstances, others

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227. *See* United States v. Witham, 47 M.J. 297, 300-01 (1997). "It is beyond cavil that there are differences between our military justice system and the various civilian criminal justice systems in our country. However, these differences do not necessarily dictate that constitutional decisions on civilian criminal justice be found per se inapplicable to the military justice system." *Id.* (citations omitted).

228. This can be done even if the state constitutions grant a more expansive right of privacy than the U.S. Constitution (while some state constitutions expressly grant the right to privacy, the right clearly exists under the U.S. Constitution as well). Moreover, state courts use an analytical approach identical to federal courts when they determine whether there is a compelling governmental interest, which justifies an intrusion into the right to privacy. *See infra* Part III.A.

229. United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *25 (N-M. Ct. Crim. App. Aug. 29, 1997).

230. 417 U.S. 733 (1974).

231. *Id.* at 743.

232. *Kulow*, 1997 CCA LEXIS 484, at *25-26.

233. *Id.* at *26.

234. *Id.* at *24-25 (discussing married individuals, but rationale should be extended to all individuals).

are affected, someone is harmed, the service is discredited, and the government's interest to regulate such conduct is compelling.[235]

While service members sometimes have limited constitutional rights, the government still must show a compelling interest to limit those rights.[236] Military necessity may be a compelling interest[237] because the military must maintain a strong force.[238] No case suggests, however, that allowing service members to engage in private consensual oral or anal sodomy would detract from the military's ability to meet this objective. To the contrary, Judge Badami of the Army Court of Criminal Appeals wrote, in a dissenting opinion in *United States v. Jones*,[239] that the "absolute need for a disciplined armed force" did not outweigh a service member's right to engage in private and consensual sexual relations.[240] In a concurring opinion in an Army Court of Military Review case, moreover, Senior Judge Miller noted that the military has the obligation "to curb promiscuity and sexual misconduct among service members," but those interests must be balanced against the right to privacy.[241]

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235. Not only should these acts remain a crime under Article 125, but depending on the facts and how the alleged offense is charged, they could satisfy the elements of other military crimes, such as indecent acts or indecent assault. *See* UCMJ art. 134 (2000). *See generally* Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 104 (1991) (arguing that the military has an interest to prohibit a service member from engaging in sexual relations either with an inappropriate partner or in an inappropriate place).

236. United States v. Allen, No. ACM 32727, 1999 CCA LEXIS 116, at *4 (A.F.Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

237. *See* Middendorf v. Henry, 425 U.S. 25 (1976); *Parker*, 417 U.S. at 758 ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); United States v. McFarlin, 19 M.J. 790, 792 (A.C.M.R. 1985).

238. Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir. 1981). It appears the court would have found Article 125 to violate the right to personal autonomy, but the case concerned homosexual conduct, behavior the court found inappropriate. *Id.*

239. United States v. Jones, 14 M.J. 1008, 1014 (A.C.M.R. 1982) (Badami, J., dissenting).

240. *Id.* (discussing heterosexual sexual relations).

241. *Id.* at 1011 (Miller, S.J., concurring) ("[The c]ourt need not reach the difficult determination of whether a compelling military interest underlies and justifies the application of the sodomy statute to this conduct."). Although appellant was charged with consensual sodomy, Senior Judge Miller did not believe the conduct was consensual. If the conduct was consensual, he wrote, it "would doubtless make more difficult an attempt by the military to intrude on the intimate sexual relations between consenting adults, carried out under secluded conditions." *Id.* (citation omitted).

7. Proposed Revision to Article 125

To acknowledge all service members' right to privacy, a right that outweighs any governmental interest to regulate private consensual sodomy, Article 125 should be revised to read:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person by force, with an individual under the age of 16, or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

The proposed language specifically removes the phrase "with another person of the same or opposite sex," to acknowledge the constitutionally protected status of consensual oral and anal sodomy committed in private. There is no specific language added concerning marital status or sexual orientation because the right to privacy applies equally to all individuals. Also, the phrase "unnatural carnal copulation . . . with an animal" remains to address bestiality, which should remain prohibited due to compelling state interests. Therefore, the net effect of the change is to eliminate private consensual sodomy as a crime under the UCMJ, and thus protect the constitutional right to privacy.

IV. Conclusion

Service members have a constitutional right to privacy, which protects their ability to engage in private consensual sodomy with another adult. Currently, Article 125 does not allow any service member to legally participate in sodomy of any type. Military courts suggest that married service members may participate in oral or anal sodomy, although they have not definitively ruled on the issue. Under equal protection principles, unmarried individuals should share the same right to privacy that married individuals enjoy. The fundamental right to privacy thus protects married and unmarried individuals' ability to decide to and to engage in private consensual sodomy with another adult.

The state, or in this case, the military, must show a compelling governmental interest to restrict this right to privacy. Regulating sodomy serves no governmental interest, let alone a compelling one. Thus, either

Congress should revise Article 125, or the Court of Appeals for the Armed Forces should declare unconstitutional that portion of Article 125, which prohibits private consensual sodomy.

GENOCIDE: PREVENTION THROUGH NONMILITARY MEASURES

MAJOR JOSEPH A. KEELER[1]

Genocide is the ultimate crime and the gravest violation of human rights it is possible to commit.[2]

Genocide is horrible, an abomination of our species, and totally unacceptable. It is an obscenity—the evil of our time that all good people must work to eradicate.[3]

I. Introduction

Genocide is the vilest, most abhorrent form of aggression.[4] It should be a word of antiquity, not a vexing plague in our modern, civilized world. Yet millions of innocent men, women, and children have been slaughtered in this century.[5] In fact, in the last decade alone, almost one million lives were lost to genocide.[6] It is astonishing that with a technologically and

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1. Judge Advocate General's Corps, United States Army. Presently assigned as Instructor, Military Justice Division, U.S. Air Force Judge Advocate General School, Maxwell Air Force Base, Alabama. LL.M., 2001, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1992, J. Reuben Clark Law School, Brigham Young University; B.A., 1988, Brigham Young University. Previous assignments include Chief, Client Services, 21st TSC (Provisional), Northern Law Center, Mons, Belgium, 1998-2000; Administrative Law Attorney and Trial Counsel, V Corps, Darmstadt Branch Office, Darmstadt, Germany, 1996-1998; Chief, Operational Law, and Chief, Legal Assistance, U.S. Army South, Fort Clayton, Panama, 1993-1996. This article was submitted in partial completion of the Master of Laws requirement of the 49th Judge Advocate Officer Graduate Course.

2. Benjamin Whitaker, Special Rapporteur, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. B. Whitaker, U.N. ESCOR, Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 38th Sess., at 5, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter 1985 Special Rapporteur].

3. R.J. RUMMEL, DEATH BY GOVERNMENT 31 (1994).

socially advanced world, the international community has not yet found a solution to genocide.

Significant efforts to prevent genocide germinated with the creation of the United Nations (U.N.),[7] which was established to promote peace and prevent conflict.[8] Shortly after the U.N. was organized, the General Assembly drafted a Convention for the prevention of genocide, the Convention on the Prevention and Punishment of the Crime of Genocide

4. Genocide is defined as: "The deliberate and systematic extermination of an ethnic or national group." The word is derived from Latin *genus* or Greek *yévos* [birth or race] and French *cide* or Latin *cida* [cutter, killer, or slayer]. THE COMPACT OXFORD ENGLISH DICTIONARY (2nd ed. 1998). Genocide is also defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention], *available at* http://www.unhchr.ch/html/menu3/b/treaty1gen.htm. *See infra* Appendix (providing the complete text of the Genocide Convention). *See also infra* notes 30-32 and accompanying text. A comparison of these sources demonstrates that the Genocide Convention's definition of genocide is far more expansive than the *Oxford English Dictionary*'s. This broader definition of genocide will be explained in Section II of this article.

5. RUMMEL, *supra* note 3, at 4. The author estimates that genocide caused over thirty-eight million deaths in this century. Excluding war dead, when politicide and mass murder are added into the number of dead, the numbers killed exceeds 169 million people in this century alone. *Id.*

6. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 1, 15 (1999) (estimates 500,000 to 800,000 Tutsi killed in Rwanda); Philip J. Cohen, *The Complicity of Serbian Intellectuals in Genocide in the 1990's*, *in* THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA 46 (Thomas Cushman & Stjepan G. Meštrović eds., 1996) [hereinafter THIS TIME WE KNEW] (estimating the number of victims by Serbs into the tens of thousands).

7. Boutros Boutros-Ghali, *Challenges of Preventive Diplomacy: The Role of the United Nations and Its Secretary-General*, *in* PREVENTIVE DIPLOMACY: STOPPING WARS BEFORE THEY START 16 (Kevin M. Cahill, M.D. ed., 1996) [hereinafter PREVENTIVE DIPLOMACY]. "Since the end of the Cold War, preventive action has become a top priority for the United Nations." *Id. See* U.N. CHARTER art. 1, para. 3. The purpose of the U.N. is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . . ." *Id.* The General Assembly is responsible for initiating studies and recommending solutions to "promote international cooperation" in political, economical, social, cultural, educational, and health fields. *Id.* art. 13, para. 1. Moreover, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25.

8. U.N. CHARTER art. 1, para. 3.

(Genocide Convention), dated 9 December 1948.[9] The Genocide Convention entered into force on 12 January 1951.[10]

Although the Genocide Convention was a positive step[11]—over 132 nations have signed or acceded to it—neither it nor the U.N. has been able to prevent genocide.[12] In fact, three recent genocides in Cambodia,[13] Yugoslavia,[14] and Rwanda[15] occurred in U.N.-member countries that had signed or acceded to the Genocide Convention.[16] Even though the Genocide Convention and the U.N. have been unable to prevent genocide, nei-

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9. Genocide Convention, *supra* note 4.

10. *Id.* The United States signed the Genocide Convention on 11 December 1948, as one of the original signatories. *Id.* The United States Senate, however, did not give its advice and consent to ratify the Genocide Convention until 10 February 1986. The Senate included two reservations, five understandings, and one declaration. Marian Nash Leigh, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612 (1986) (citing 132 CONG. REC. S1377-78 (daily ed. Feb. 19, 1986)). The Genocide Convention Implementation Act of 1987 (the Proxmire Act) outlines the basic offense and the maximum punishments that may be imposed. 18 U.S.C. § 1091 (2000).

11. *See* Vratislav Pechota, *Establishing Criminal Responsibility and Jurisdiction for Genocide*, *in* GENOCIDE WATCH 198 (Helen Fein ed., 1992).

12. Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. LAW 415 (1998). *See* United Nations, *Genocide Convention*, *at* http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last modified Oct. 9, 2001) (providing an updated list of the original parties and states that have acceded to the Genocide Convention and their reservations).

13. Genocide Convention, *supra* note 4. Cambodia acceded to the Convention on 14 October 1950 without making any reservations. *Id.*

14. *Id*. The Socialist Federal Republic of Yugoslavia was one of the original Contracting Parties to the Genocide Convention by signing it on 11 December 1948. The Republic of Yugoslavia made no reservations either before or after the succession of Slovenia, Croatia, and Bosnia and Herzegovina, except that on 15 June 1993, the U.N. Secretary-General received a communication from the Republic of Yugoslavia that said the following:

> Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the [said Convention], but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide.

Id.

ther is a futile idea.[17] In truth, both are essential ingredients of the solution.[18]

This article proposes the use of nonmilitary measures to prevent genocide. Military intervention can end genocide; however, offense-oriented armed intervention by the U.N. or under authorization of the U.N. generally does not occur until after thousands or hundreds of thousands of people have been slaughtered.[19] The key to preventing genocide is to quash it at its embryonic stage.[20]

To prevent genocide without military intervention, one must ascertain its causes and indicators. When the indicators are known, information gathering and assessment will be more efficient and timely, and this will enhance the effectiveness of an early warning system.[21] A properly functioning early warning system will permit the international community to intervene, with nonmilitary measures, at the nascent stage of genocide or soon thereafter to extinguish its flame before it becomes a conflagration.[22]

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15. *Id.* Rwanda was first a party to the Genocide Convention on 13 March 1952 as a trust territory of Belgium. After Rwanda became a nation-state, it acceded to the Convention on 16 April 1975. *Id.*

16. *Id.* Cambodia became a member of the U.N. on 14 December 1955, the Socialist Federal Republic of Yugoslavia became a member on 19 October 1945 (Bosnia and Herzegovina became a member of 22 May 1992 by General Assembly Resolution A/RES/46/237), and Rwanda became a member on 18 September 1962. *Id*. *See also* United Nations, *U.N. Membership*, *at* http://www.un.org/Overview/unmember.html (last modified 18 December 2000).

17. LEO KUPER, THE PREVENTION OF GENOCIDE 15, 210 (1985).

18. *Id.* at 18.

19. *See* DES FORGES, *supra* note 6, at 692-701.

20. SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 274 (1995).

> The most serious failure of existing international and regional institutions with regard to the war in Bosnia-Herzegovina was their inability to prevent it . . . . This is particularly important to emphasize because the perception that the war inevitable grew as the ferocity and duration of the war increased and as outsiders sought to absolve themselves from any responsibility.

Id.

21. Ted Robert Gurr, *Early-Warning Systems: From Surveillance to Assessment to Action*, *in* PREVENTIVE DIPLOMACY, *supra* note 7, at 123.

22. *Id.*

In addition, action by the international community must be quick, effective, and occur wherever the problem of genocide exists.

To formulate a nonmilitary solution, this article discusses and analyzes the Genocide Convention, the U.N., and the genocides in Bosnia and Herzegovina (Bosnia-Herzegovina) and Rwanda.[23] Section II reviews the vital elements of the Genocide Convention. Section III briefly outlines the U.N. and discusses its ability to alter or control conduct of leaders in sovereign nations. This is important because the ironic tragedy of genocide is that it is almost always caused by its victims' political or military leaders.[24] Section IV examines the recent genocides in Bosnia and Rwanda. It reviews the underlying rationale for the genocides, describes the U.N.'s efforts to prevent and terminate the genocides, and explains how or why the genocides ended. Section V provides a list of distinctive characteristics or events that caused the genocides in Bosnia and Rwanda and explains why the Genocide Convention and the U.N. were ineffective in preventing them. Section VI uses the above information to advocate how and why a protocol to the Genocide Convention would help prevent or significantly reduce genocide.

II. The Genocide Convention

The Genocide Convention is a relatively short document that embodies four general principles.[25] It strongly condemns genocide,[26] defines genocide,[27] encourages nations to enact legislation prohibiting and punishing genocide,[28] and recognizes and encourages criminal jurisdiction either in local courts or in an international criminal tribunal.[29]

First, in its preamble, the Contracting Parties remind themselves and the world of the immense toll genocide has inflicted on mankind.[30] They

23. This article only focuses on the genocides in Bosnia-Herzegovina and Rwanda. It does not intend to minimize or diminish other genocides or suggest that they did not occur. The genocides in Bosnia-Herzegovina and Rwanda were chosen for their recency and world-wide interest.

24. RUMMEL, *supra* note 3, at 1.

25. Genocide Convention, *supra* note 4. The Genocide Convention consists of only nineteen Articles. *Id.* arts. 1-19.

26. *Id.* art. 1.

27. *Id.* arts. 2, 3.

28. *Id.* art. 4.

29. *Id.* art. 6.

30. *Id.*

also recognize and declare that genocide will be eliminated only with the combined efforts of the international community.[31] In Article 1, the Contracting Parties reinforce the principles set forth in the preamble by stating their conviction that genocide is a crime under international law, whether in times of war or peace.[32]

Second, having declared genocide a crime, Article 2 defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[33] This definition excludes isolated murders or even mass murders if the killer has no intent to destroy, in whole or in part, a stated group, thus elevating genocide above random killings. Although the definition seems to cover all groups, it excludes political groups.[34] This void is significant because its perpetrators often use genocide to eliminate a particular group who are also members of an opposing political party.[35]

The methods that constitute genocide are surprisingly broad. Most people consider genocide as only the act of killing members of a group. The Convention's definition of genocide, however, includes many levels of injustice committed against a group, in whole or in part: "killing members of the group," "causing serious bodily or mental harm," "deliberately inflicting . . . conditions . . . calculated to bring about [the group's] physical destruction," "imposing measures intended to prevent births," and even "forcibly transferring children of the group to another group."[36] In Article 3, punishable "acts of genocide" include: "conspiracy," "direct and public incitement," "attempt," and "complicity" in genocide.[37] The Convention's broad definitions could stop genocide before the killing begins, provided nations enact implementing legislation and actually enforce the law.

Third, the Contracting Parties agree to prevent and punish genocide.[38] In Article 5, the Contracting Parties agree to "undertake to enact" legisla-

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31. *Id.*

32. *Id.*

33. *Id.* art. 2.

34. William A. Schabas, *International Law Weekend Proceedings: Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375, 377 (2000). *See* Lippman, *supra* note 12, at 455; KUPER, *supra* note 17, at 15.

35. KUPER, *supra* note 17, at 100.

36. Genocide Convention, s*upra* note 4, art. 2.

37. *Id.* art. 3.

38. *Id.* art. 1.

tion to prevent and punish genocide or any of the acts of genocide.[39] In Article 4, the Contracting Parties agree to punish all perpetrators of genocide, whether they are political leaders, officials, or individuals.[40]

Fourth, the Contracting Parties agree to try individuals accused of committing genocide or one of the acts of genocide in the country where the act is committed.[41] If no criminal legal action is taken there, the Parties also recognize that an international criminal tribunal could have jurisdiction, but only if the specific Contracting Party accepts the court's jurisdiction.[42] In addition, the Parties agree that genocide is not a political crime and, therefore, will not prevent extradition of an accused.[43]

III. The United Nations and Its Ability to Control Actions of Sovereign Nations

During World War II, the United States, the United Kingdom, the Soviet Union, and other Allies made agreements and combined as "United Nations" to defeat the Axis nations.[44] Toward the end of the war, the overwhelming devastation and incalculable human suffering caused by the war weighed heavily on the Allied leaders. In an effort to prevent future wars, they formed an organization that would, with the exception of defense, claim a monopoly on the collective use of force.[45]

On 24 October 1945, with fifty-one original members, the U.N. was formally established.[46] The U.N. may not have commenced with universal

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39. *Id.* art. 5.

40. *Id.* art. 4.

41. *Id.* art. 6.

42. *Id.* The Genocide Convention did not establish a criminal court nor has the U.N. established a permanent international criminal court. KUPER, *supra* note 17, at 19, 102.

43. *Id.* art. 7.

44. Adam Roberts & Benedict Kingsbury, *Introduction: The U.N.'s Roles in International Society Since 1945*, *in* UNITED NATIONS, DIVIDED WORLD: THE U.N.'S ROLES IN INTERNATIONAL RELATIONS 6 (Adam Roberts & Benedict Kingsbury eds., 2nd ed. 1993) [hereinafter UNITED NATIONS, DIVIDED WORLD].

45. U.N. CHARTER art. 1.

46. UNITED NATIONS, DIVIDED WORLD, *supra* note 44, at 6. At the beginning, the U.N. was widely known as the United Nations Organization. The name distinguished this new organization from the original association of the Allied Nations that joined to defeat the Axis countries in World War II. *Id.*

authority or a worldwide mandate, but it has since become a universal organization.[47] Currently, almost every nation has joined the U.N.[48]

The U.N.'s foundational document is its Charter.[49] The Charter describes the U.N.'s underlying purpose, authority, and structure. The U.N.'s basic purpose or mission, as described in the preamble, is to achieve and maintain international peace and respect for the human rights of all people without distinction of race, religion, sex, or nationality.[50]

The U.N. Charter addresses both sovereign rights and international intervention.[51] The Charter recognizes the inherent authority of nation-states to handle their domestic or internal affairs without interference from the U.N.[52] This hesitation to enter internal conflicts is based on the belief that each country is responsible for its domestic concerns, and no country wants an outside organization interfering with its internal affairs.[53] On the other hand, the Charter was written and is interpreted to allow the U.N. to intervene into the affairs of sovereign nations under certain circumstances.[54] It allows the U.N. Security Council to breach a country's domestic shield under the enforcement measures of Chapter VII.[55] For example, an internal conflict may threaten the peace and security of the region when it expands beyond the states' borders.[56] Thus, the U.N.'s

47. *Id.* at 6-7.

48. *Id.* The only nation-states that are not members of the United Nations are Switzerland and Taiwan, and the entities of Western Sahara, Palestine, and Northern Cyprus, which are not considered states. *Id.*

49. U.N. CHARTER.

50. *Id.* pmbl., art. 1. The Preamble and Article I provide the purposes and the principles of the Charter. The Charter declares as its goal: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging *respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .*" *Id.* art. 1, para. 3 (emphasis added).

51. *Id.* art 2, para. 7. The Charter is a non-interventionist treaty. *See id.*

52. *Id.*

53. Kenneth Dadzie, *The U.N. and the Problem of Economic Development*, *in* UNITED NATIONS, DIVIDED WORLD, *supra* note 44, at 297.

54. U.N. CHARTER chs. VI-VII.

55. *Id.*

56. LINDA B. MILLER, WORLD ORDERS AND LOCAL DISORDERS, THE UNITED NATIONS AND INTERNAL CONFLICTS 18 (1967).

foremost concern, as the Charter clearly expresses, is to prevent and remove threats of peace, suppress acts of aggression, and promote peace.[57]

The Charter created six separate suborganizations or "organs" to accomplish its mission: the Security Council, the General Assembly, the Secretariat, the International Court of Justice, the Trusteeship Council, and the Economic and Social Council.[58] Each has specific responsibilities and authority.[59] For its specific purpose, this article details the Security Council, but only briefly mentions the other U.N. organs.

The Security Council consists of representatives from fifteen U.N. member states.[60] Five nations are permanent members: the United States, United Kingdom, France, Russia, and China.[61] The General Assembly elects the ten other members as temporary or non-permanent members of the Security Council. Non-permanent members rotate every two years.[62]

When making decisions, each member of the Security Council has one vote.[63] Nine votes determine a decision on procedural matters. Substantive matters require nine sustaining votes, and all five permanent mem-

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57. U.N. CHARTER art. 1.

58. *Id.* art. 7.

59. *See id*. chs. IV (The General Assembly), V (The Security Council), X (Social Council), XII & XIII (the Trusteeship Council), XIV (the International Court of Justice), XV (the Secretariat). *Id.*

60. *Id*. art. 23.

61. *Id.* The actual language of the Charter is: "The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America." *Id.* The seat for the Soviet Union was changed to the Russian Federation after 1989 when the Soviet Union divided, and Taiwan was removed in 1971 for the People's Republic of China. UNITED NATIONS, DIVIDED WORLD, *supra* note 44, at 7.

62. U.N. CHARTER art. 23. The non-permanent members are supposed to be chosen based on the member's contribution "to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution." *Id.* As of January 2001, the non-permanent members are Tunisia, Ukraine, Bangladesh, Mali, and Jamaica (until 31 December 2001), and Colombia, Mauritius, Singapore, Ireland, and Norway (until 31 December 2002). United Nations, *Security Council Membership (2001), at* http:/www.un.org/documents/scinfo.htm (last modified 30 January 2001).

63. U.N. CHARTER art. 27.

bers must either concur or abstain.[64] If one permanent member vetoes a decision, it cannot be approved.[65]

The Security Council's primary responsibility is to maintain international peace and security.[66] The type of assistance or "intervention" it authorizes depends on the situation. The U.N. Charter defines two categories of international disturbances.[67] The lesser is a "dispute," and the more serious is a "threat to the peace, breach of the peace, or act of aggression" (collectively referred to as "threat to the peace").[68]

The Security Council's authority focuses on non-intrusive measures. It arises when disputes between U.N. members, or between members and non-members, would likely jeopardize international peace and security if prolonged.[69] This authority includes: investigating any dispute; calling upon parties to settle disputes through negotiations, arbitration, or other peaceful means; and when all parties agree, recommending a peaceful settlement method.[70]

When a threat to the peace occurs, the U.N. Charter grants the Security Council greater authority to "maintain or restore international peace."[71] The Security Council, however, generally uses nonmilitary measures before implementing military measures.[72] For nonmilitary measures, the Security Counsel may call on the parties to comply with provisional resolutions; sever diplomatic relations; interrupt, partially or completely, economic relations of the parties, to include rail, sea, air, communications; or call upon other members of the U.N. to take such measures.[73] Interrupting economic relations includes the concept of sanctions.[74] The U.N. rarely used sanctions before 1990, but has used

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64. *Id.*

65. *Id.* Under Article 25 of the Charter, members of the United Nations agree to execute the decisions of the Security Council. Other U.N. organs only make recommendations that the member states may follow, but technically, if the Security Council makes a decision, all members of the U.N. must follow that decision. *Id.*

66. U.N. CHARTER art. 24, para. 1.

67. *Id.* arts. 33, 39.

68. *Id.*

69. *Id.* arts. 33-38.

70. U.N. CHARTER ch. VI; Anthony Parsons, *The U.N. and the National Interests of States*, *in* UNITED NATIONS, DIVIDED WORLD, *supra* note 44, at 123.

71. U.N. CHARTER art. 39.

72. *See id.* arts. 33-42

73. *Id.* arts. 39-40.

them frequently since then.[75] Sanctions imposed by the Security Council may require all member states to comply.[76]

If the Security Council believes that nonmilitary measures would be or are inadequate to end the threat to the peace, it may take military action "as may be necessary to maintain or restore international peace and security."[77] "Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[78]

Other preventive measures available to the U.N. include public diplomacy or condemnation by the General Assembly. The General Assembly

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74. N.D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 106-07 (1997).

75. SWISS FEDERAL OFFICE FOR FOREIGN ECONOMIC AFFAIRS DEPARTMENT OF ECONOMY, EXPERT SEMINAR ON TARGETING U.N. FINANCIAL SANCTIONS 208 (1998) [hereinafter Interlaken 2], *available at* http://www.smartsanctions.ch/Papers/I2/2finrep.pdf. States may impose sanctions against another nation on their own accord, but this is an individual act and not a collective measure as provided when the Security Council mandates a sanction. *Id.*

76. U.N. CHARTER art. 25, 39, 41; WHITE, *supra* note 74, at 107.

77. *Id.* art. 42.

78. *Id.* The United Nations Web site provides a brief description of the mission and authority of the Security Council when disputes lead to conflicts:

> When a dispute leads to fighting, the Council's first concern is to bring it to an end as soon as possible. On many occasions, the Council has issued cease-fire directives which have been instrumental in preventing wider hostilities. It also sends United Nations peace-keeping forces to help reduce tensions in troubled areas, keep opposing forces apart and create conditions of calm in which peaceful settlements may be sought. The Council may decide on enforcement measures, economic sanctions (such as trade embargoes) or collective military action.
>
> A Member State against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly on the recommendation of the Security Council. A Member State which has persistently violated the principles of the Charter may be expelled from the United Nations by the Assembly on the Council's recommendation.

United Nations, *Security Council*, *at* http://www.un.org/documents/scinfo.htm (last modified Jan. 30, 2001). Nations value their membership in the U.N. No government has withdrawn its membership from the U.N. in protest for actions taken by the U.N. or with a belief that withdrawal would be more advantageous. South Africa remained a member during the years when it was pressured to end apartheid. Iraq has suffered under significant U.N. sanctions, yet still remains a member of the U.N. In fact, no state has withdrawn its membership from the U.N. Parsons, *supra* note 70, at 104.

and the Social and Economic Council may also investigate specific matters and forward a report to the Security Council.[79] The U.N. may involve its financial subsidiaries, the International Monetary Fund and the World Bank, as tools to persuade the disputing parties.[80] In addition, private diplomacy of the "good offices of the Secretary-General have apparently been confidential, impartial, and successful."[81] The Secretary-General has also sent individuals from outside the Secretariat on "missions" of fact-finding or goodwill.[82]

Internal crises, which sometimes include genocide, have historically been considered the responsibility and interest of the sovereign state; however, the U.N. has increasingly intervened.[83] By characterizing genocide as an international crisis that was a threat to international peace and security, the Security Council has authorized intervention into sovereign states where genocide was being committed.[84] Where "the measures of Article 41 would be inadequate or have proved to be inadequate," the U.N. is permitted to implement "any and all measures necessary to maintain and restore international peace and security."[85]

The U.N. is the international organization recognized to address and resolve disputes and threats to the peace. The U.N. has increasingly intervened throughout the world to end crises, including genocide, that cause a threat to the peace.[86] The U.N. has many tools at its disposal to prevent genocide and other threats to the peace. At the very least, the U.N. will monitor civil unrest. It may also deploy observers, humanitarian workers,

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79. Nicole M. Procida, *Notes: Ethnic Cleansing in Bosnia Herzegovina, A Case Study: Employing United Nation Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 671 (1995) (explaining the U.N. Charter, the organs of the U.N., and their ability to investigate and deter genocide, including a brief history of the genocide in Bosnia and the U.N. response).

80. *See* U.N. CHARTER art. 41.

81. Parsons, *supra* note 70, at 105.

82. Marrack Goulding, *Observation, Triage, and Initial Therapy: Fact-Finding Missions and Other Techniques*, in PREVENTIVE DIPLOMACY, *supra* note 7, at 146.

83. KUPER, *supra* note 17, at 104.

84. S.C. Res. 713, U.N. SCOR, 3009th mtg., U.N. Doc. S/Res/713 (1991) (justifying its decision by citing a rapid loss of human life and widespread material damage as a threat to the international peace and security); David M. Malone, *The Security Council in the 1990s: Inconsistent, Improvisional, Indispensable?*, *in* NEW MILLENNIUM, NEW PERSPECTIVES: THE UNITED NATIONS, SECURITY, AND GOVERNANCE 27 (Ramesh Thakur & Edward Newman eds., 2000).

85. U.N. CHARTER art. 42; WHITE, *supra* note 74, at 59.

86. UNITED NATIONS, DIVIDED WORLD, *supra* note 44, at 538-41 (providing a chronological list of U.N. peacekeeping and observer forces).

or peacekeepers. The following historical accounts of the genocides in Bosnia-Herzegovina and Rwanda describe the U.N.'s actions in specific crises, thus providing a basis to consider whether the U.N. should have intervened sooner, and if so, how and when.

IV. The Genocides in Bosnia-Herzegovina and in Rwanda

A. Bosnia-Herzegovina

The history of the Balkans provides vital background information to understand the true cause of the genocide in Bosnia-Herzegovina. Either for simplicity or because of ignorance, officials, politicians, and the media believed "ancient hatred" caused the genocide in Bosnia-Herzegovina.[87] However, just as smoldering coals do not relight themselves, something had to fan a dormant hatred to re-ignite the flames of genocide in Bosnia-Herzegovina.[88]

Slavic tribesmen, including Croats and Serbs, originally conquered and settled the area of the Balkan region now known as Croatia, Bosnia, and Serbia.[89] Religious conflict between the Catholics in the west and the Orthodox Christians in the east divided the groups. To the west, the Croats converted to Roman Catholicism, and to the east, the Serbs became Orthodox Christians.[90] Both Croats and Serbs populated the region of Bosnia, which lies in between the regions of Croatia and Serbia.[91]

On the 28th day of June 1389, the Ottoman army (Muslims from the area now known as Turkey) conquered the Serbs in Kosovo.[92] About seventy-five years later, the Ottoman army conquered the country of Bosnia.[93] Over the next several hundred years, thousands of the Serbs and Croats in Bosnia converted to Islam.[94] Many joined to gain the economic and social

87. RICHARD HOLBROOKE, TO END A WAR 22 (1998).

88. *Id.* at 23. "Yugoslavia's tragedy was not foreordained. It was the product of bad, even criminal, political leaders who encouraged ethnic confrontation for personal, political, and financial gain." *Id.*

89. CHUCK SUDETIC, BLOOD AND VENGEANCE: ONE FAMILY'S STORY OF THE WAR IN BOSNIA 8 (1998).

90. *Id.*

91. *Id.*

92. *Id.* at 9.

93. *Id*. In the 1300's, the Bosnians apparently had not followed either the Roman Catholic or the Eastern Orthodox religions, but followed a local religious belief. *Id.*

94. *Id.*

advantages enjoyed by first-class, Islamic citizens.[95] The years under Ottoman reign were relatively peaceful.[96]

In the early twentieth century, as the Ottoman Empire faded, the region's religious and ethnic divisions ignited World War I.[97] The Croats cooperated with the Austrians and Germans in an alliance that they would repeat in the next world war.[98] After WWI, the region enjoyed about twenty years of peace. During WWII, the Croats again aligned themselves with the Austrians and Germans while the Serbians united with the Russians.[99] As WWII progressed, many Croats and some Muslims created an organization called the *Ustashe*.[100] This military group became extremely brutal in its quest to punish the Serbs.[101] The *Ustashe* death squads "raided Serb villages all over Croatia and Bosnia and killed their inhabitants, often by locking the peasants inside their homes or churches and setting them afire."[102] Near the end of the war, as the Serbs took control of different

95. *Id.* at 10. "Conversion to Islam brought reduced taxes and the full benefits of citizenship in a vigorous, overarching power that seemed predestined to conquer the continent." *Id.*

96. *Id.* Other than periodically being forced to give a male child to the sultan to serve in his imperial army, the period was reasonably peaceful for the Christians living in Bosnia. *Id.*

97. *Id.* at 21.

98. *Id.*

99. *Id.* at 25.

100. *Id. But see* Serbian Unity Congress, *Setting the Record Straight, War in Former Yugoslavia*, *at* http://www.suc.org/politics/war_crimes/srebrenica/ustashi.html (last visited 22 March 2001) [hereinafter Setting The Record Straight]. The Serbian United Congress is a group that supports the cause of Serbians. It claims that the *Ustashe* was not a minority group of Croatians, but was actually supported by the Croatian leadership. The Web site quotes a high ranking Croatian state official, Mile Budak. According to the site, Mr. Budak declared on 22 July 1941:

> We shall slay one third of the Serbian population, drive away another [third], and the rest we shall convert to the Roman Catholic faith and thus assimilate into Croats. Thus we will destroy every trace of theirs, and all that which will be left, will be an evil memory of them . . . .

Id. The Serbian United Congress also claims that the newly independent country of Croatia has adopted the same symbols as the *Ustashi* Nazi state during WWII, and that in many instances its military and paramilitary units have adopted the same uniforms of the 1941-45 *Ustashi* Black Legions. *Id.*

101. SUDETIC, *supra* note 89, at 26.

102. *Id.* The *Ustashe* also took entire families into concentration camps where they were massacred with clubs or knives. Apparently, to save bullets, the *Ustashe* did not use its guns. *Id.*

areas in Bosnia, the Muslims became victims of retaliatory "blood vengeance."[103]

Ironically, during times of brutality, individuals sometimes acted in kindness.[104] Moreover, sandwiched between the brief periods of genocide were years of peace and friendship, if only superficial.[105] After WWII, Josep Broz Tito, a heavy-handed leader who was half-Croat and half-Slovene, took control of Yugoslavia.[106] Yugoslavia then consisted of six large republics: Serbia, Slovenia, Croatia, Bosnia-Herzegovina, Montenegro, Macedonia, and the two autonomous provinces of Kosovo and Vojvodina.[107] For thirty-five years, Tito forced the ethnic groups to live in harmony.[108] In fact, many Croats, Serbs, and Muslims in Bosnia intermarried.[109]

Tito died in May 1980.[110] Soon after his death, the simmering coals of nationalism and hate were stirred again. Some of the propaganda that fueled the flame of hate began with the Serbs.[111] In 1986, the Serbian Academy of Science and Art issued a memorandum expressing the necessity to expand Serbia.[112] The Serb media also published pieces suggesting that Croatians and Muslims hated the Serbian people.[113] In 1987, Slo-

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103. *Id.* at 31-32. The author described a specific incident in which local Serbs rounded up Muslim men. The Muslims were bound and gagged and were marched up the rocky trail of a nearby mountain. At the end of their two-hour hike, the Serbs forced them towards the opening of a deep mineshaft. The Serbs then shot some and cut the throats of the others. The bodies of the innocent Muslims were then pushed down into the shaft. *Id.*

104. HOLBROOKE, *supra* note 87, at 23.

105. Jasminka Udovički, *Introduction*, *in* BURN THIS HOUSE: THE MAKING AND UNMAKING OF YUGOSLAVIA 8 (Jasminka Udovički & James Ridgeway eds., 2000) [hereinafter BURN THIS HOUSE].

106. SUDETIC, *supra* note 89, at 26, 36; Mirko Tepavac, *Tito: 1945-1980*, *in* BURN THIS HOUSE, *supra* note 105, at 64-65.

107. Tepavac, *supra* note 106, at 65.

108. *Id.* Tito's slogan was "Brotherhood and Unity." Tito treated nationalism and fascism as national crimes. He was so successful that within a few years after taking power, Yugoslav citizens could travel from one side of the country to the other, without regard to nationality or religious beliefs. *Id. See* SUDETIC, *supra* note 89, at 36. "Anyone who dared utter an unkind word to someone of another nationality would sit for ten days in jail; if the unkind word was about someone's mother, the sentence would be for three months." *Id.*

109. HOLBROOKE, *supra* note 87, at 23.

110. LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 29 (1995).

111. *Id.* at 23-24. *But see* Setting The Record Straight, *supra* note 100 (stating that the Serbs believe that the conflict was the result of the republics seeking independence).

112. Roy Gutman, *Serb Author Lit Balkan Powder Keg*, NEWSDAY, June 28, 1992, at 1, *cited in* Cohen, *supra* note 6, at 40.

113. Cohen, *supra* note 6, at 39; HOLBROOKE, *supra* note 87, at 23-24.

bodan Milosevic, a communist leader, emerged on the political scene to become President of the Serb Republic.[114] He spoke of Serbian strength and expressed strong nationalistic views, alarming the other Yugoslavian republics with his comments and opinions.[115] In 1989, the Serbian Orthodox Church published several articles to remind the Serbian people of World War II and the atrocities committed against the Serbs by Croatians.[116]

Animosity deepened and nationalism increased in 1990, when the Republic of Croatia overwhelmingly voted Franjo Tudjman as its president.[117] Serbs living in Croatia feared they would be mistreated as they were in WWII.[118] At the same time, Croats feared that Serbia was planning to annex the Croatian region of Krajina as part of a "Greater Serbia."[119]

Tension significantly increased in early 1991, when Serbian separatists in Croatia killed Croatian civilians.[120] In May 1991, in the town of Borovow Selo, a group of Serbians captured twelve Croatian police officers and several civilians.[121] The Serbs tortured their captives in the cruelest manner, beating them, plucking out their eyes, and cutting off their limbs and genitalia before finally killing them. The Croatians' bodies, some of them decapitated, were thrown onto the town square.[122]

In 1991, Slovenia, Croatia, and Bosnia pressed for independence. The leader of Serbia, Slobodan Milosevic, strongly opposed the succession.[123] The Serbs, who controlled the Yugoslav Federal Army, threatened

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114. Jaskinka Udovički & Ivan Torov, *The Interlude: 1980-1990*, *in* BURN THIS HOUSE, *supra* note 105, at 83.

115. *Id.* at 84.

116. Cohen, *supra* note 6, at 42; Udovički & Torov, *supra* note 114, at 89-90.

117. Udovički & Torov, *supra* note 114, at 83.

118. *Id.* at 95.

119. *Id.*

120. Cohen, *supra* note 6, at 45-46.

121. *Id.* at 42-43.

122. *Id.* (The author of the book requests readers to examine a book prepared by the Croatian government that documents some of the atrocities committed against the Croatian civilians in 1991-92.). *See* MASS KILLING AND GENOCIDE IN CROATIA 1991-92: A BOOK OF EVIDENCE (Ivan Kostović and Miloš Judaš eds., 1992)). *But see* Setting The Record Straight, *supra* note 100, *at* http://www.suc.org/politics/chronology/chron91.html (last visited Mar. 22, 2001). The detailed chronology identifies problem in Borovow Selo as an armed conflict between Serbians and the Croatian police. It does not mention that any police died nor does it describe any atrocity committed. *Id.*

123. Procida, *supra* note 79, at 670.

to use its power to prevent the break up.[124] In May 1991, the Croatian electorate voted for independence,[125] and on 25 June 1991, Croatia and Slovenia declared independence.[126] Two days later, the Yugoslav Army commenced fighting.[127]

The battle began near Slovenia, the northernmost republic, but the Yugoslav Army quickly withdrew.[128] Historians believe that the Yugoslav Army retreated for two basic reasons. First, the Yugoslav Army units in that area underestimated the Slovenian forces.[129] Second, and more importantly, Milosevic had no nationalistic interest to keep Slovenia because few Serbs lived there.[130] Instead, he focused his military efforts in Croatia where thousands of Serbs lived.[131] The Yugoslav Army and local Serb militias quickly seized one-third of Croatian territory.[132] The Serbs then established "labor" camps in Croatia where civilians were tortured and killed.[133]

In 1991, the European Community and the United Nations lethargically began to address the troubles in Yugoslavia. The European Union focused on diplomatic measures, sending observers and helping implement several cease-fire agreements.[134] On 5 July 1991, the European Community imposed an arms embargo on all parties in the conflict.[135] On

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124. *Id.* at 671.

125. Cohen, *supra* note 6, at 43.

126. *Id.*

127. *Id.*

128. *Id.*

129. Stipe Sikavica, *The Army's Collapse*, *in* BURN THIS HOUSE, *supra* note 105, at 140. The Yugoslav Federal Army was unprepared to fight in Slovenia. Even though it had over twenty thousand troops in Slovenia, it used less than one tenth to prevent the secession. It used only a few tanks and no artillery or air support. In addition, the Yugoslav Federal Army soldiers who fought were experienced. In less than thirty days, the Yugoslav Army withdrew from Slovenia. *Id.*; *see also* Cohen, *supra* note 6, at 43.

130. Cohen, *supra* note 6, at 43. Slovenia is ninety-six percent Slovene. Almost no Serbs lived in Slovenia. *Id. See* JONATHAN EYAL, EUROPE AND YUGOSLAVIA: LESSONS FROM A FAILURE 3 (1993).

131. Cohen, *supra* note 6, at 44.

132. *Id.*

133. *Id.* at 46.

134. EYAL, *supra* note 130, at 30. *See also* S.C. Res. 713, *supra* note 84 (taking note of the cease-fire agreements signed on 17 and 22 September 1991 and strongly urging all parties to abide by the cease-fire agreements); S.C. Res. 721, U.N. SCOR, 3018th mtg., U.N. Doc. S/Res/721 (1991) (referring to another cease-fire agreement that was signed in Geneva on 23 November 1991).

135. Cohen, *supra* note 6, at 44.

25 September 1991, the Security Council passed its first resolution on the Balkans situation, strongly urging all parties to abide by cease-fire agreements, and banning the sale of weapons and military equipment to anyone in Yugoslavia.[136] These efforts did not stop the killing.

On 3 March 1992, Bosnia declared itself an independent state.[137] Yugoslav forces and Bosnian-Serbs immediately attacked cities in Bosnia to carve out a large section of territory for the Serbs.[138] The Bosnian-Serbs then began to "cleanse" their territory of Croats and Muslims.[139] Muslims and Croats were beaten, tortured, raped, and killed as the Bosnian-Serbs forced them to leave.[140] Muslim homes were destroyed and hundreds of mosques and Catholic churches were razed.[141] Croats and Muslims later responded with their own genocidal acts, though not in the magnitude committed by the Bosnian-Serbs.[142] "Ethnic cleansing" soon became the *mode d'affair* of the war.[143]

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136. S.C. Res. 713, *supra* note 84. Many scholars believe that this facially neutral measure actually helped the well-armed, Serbian-controlled Yugoslav Army. In addition, most of the weapons factories were in Serbia. Cohen, *supra* note 6, at 44; HOLBROOKE, *supra* note 87, at 30.

137. Jasminka Udovički & Ejub Štitkovac, *Bosnia and Hercegovina: The Second War*, *in* BURN THIS HOUSE, *supra* note 105, at 179. In the Plebiscite, the vote in favor of independence was almost unanimous. The percentage was abnormally high because the Bosnian-Serbs refused to vote to protest the independence movement. Bosnian-Serbs, comprising about thirty-five percent of the population, vehemently opposed being subject to a Croatian or Muslim-led government. *Id.*

138. *See* EYAL, *supra* note 130, at 64. The Croatians also claimed sections of Bosnia. Many battles ensued between the Croats and Serbs over the ownership of cities and territories. In addition, Bosnian-Serbs declared their own republic, the Republic of Srpska. Udovički & Štitkovac, *supra* note 137, at 182, 186. It is believed that the Serb forces in Bosnia received orders from Slobodan Milosevic. Michael T. Kaufman, N.Y. TIMES, July 18, 1992, at A1, *cited in* THIS TIME WE KNEW, *supra* note 6, at 3.

139. Udovički & Štitkovac, *supra* note 137, at 186. The Serbian paramilitary unit called the Tigers, led by Zeljko Raznjatović-Arkan, committed some of the worst atrocities. *Id.*

140. Cohen, *supra* note 6, at 45.

141. *Id.* at 47. In the city of Banja Luka, Bosnia, Serb forces destroyed 200 of 202 mosques and razed or damaged ninety-six percent of the Catholic churches. *Id.*

142. Cohen, *supra* note 6, at 15 (asserting that Bosnian-Serbs committed over ninety percent of the region's genocide).

143. Thomas Cushman & Stjepan G. Meštrović, *Introduction*, *in* THIS TIME WE KNEW, *supra* note 6, at 14-15. The general public may believe that the battle was between armies, but most of the destruction and death was committed by military forces against civilians. *Id.* at 4.

The Serbian leadership very competently used the media to garner support and sympathy for their cause.[144] The government-controlled media in Serbia cleverly portrayed Serbs as victims. The Serb people were convinced that the genocide was "justified," and many believed that nothing could be or should be done to stop it.[145] This message was so masterfully presented that the U.N. hesitated and postponed intervention.[146] On 22 May 1992, the General Assembly admitted the Republics of Slovenia, Croatia, and Bosnia-Herzegovina as members of the United Nations after considering the recommendation of the Security Council that these republics be admitted.[147]

In an effort to halt the genocide, the Bosnian government requested assistance from the U.N.[148] The Security Council knew of the continuing human rights abuses in Bosnia-Herzegovina, and in July 1992, it passed a resolution that reaffirmed individual responsibility for perpetrators who breached humanitarian law.[149] After receiving more reports of human rights violations, the Security Council strongly condemned ethnic cleansing and demanded that all parties end the practice.[150] Reports of ethnic cleansing included the murder of thousands of unarmed Muslim detainees, the use of artillery and snipers to kill innocent civilians in unguarded cities, destruction of Muslim homes, and the killing or expelling of Muslims.[151]

Three months later, in October of 1992, the Security Council requested from the Secretary-General a commission of experts to collect evidence of human rights abuses.[152] Not until February 1993, however, did the Security Council condemn ethnic cleansing as "a threat to international peace and security."[153] Other than condemn the atrocities, the Security Council failed to do anything of consequence to stop the acts of

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144. *Id*. at 16, 25.

145. HOLBROOKE, *supra* note 87, at 23.

146. *See id*. at 28-30.

147. Admittance for the Republic of Slovenia is found in G.A. Res. 236, U.N. GAOR, 46th Sess., Supp. No. 49A at 5, U.N. Doc. 46/236 (1992); for the Republic of Croatia, G.A. Res. 238, U.N. GAOR, 46th Sess., Supp. No. 49A at 5, U.N. Doc. 46/238 (1992); and for the Republic of Bosnia and Herzegovina at G.A. Res. 237, U.N. GAOR, 46th Sess., Supp. No. 49A at 5, U.N. Doc. 46/237 (1992).

148. *See also* Letter dated 13 July 1992 from the Permanent Representative of Security Council, U.N. SCOR, U.N. Doc. S/24266 (1992) (explaining the Bosnian plea for U.N. intervention to prevent genocide), *cited in* Procida, *supra* note 79, at 675.

149. Procida, *supra* note 79, at 675.

150. S.C. Res. 780, U.N. SCOR. 3119th mtg., at 1, U.N. Doc. S/Res/780 (1992).

151. SUDETIC, *supra* note 89, at 229-30.

152. S.C. Res. 780, *supra* note 150, at 1.

genocide. While the Security Council established an international criminal tribunal on 22 February 1993,[154] the tribunal had no preventive effect on the continuing genocide.

In April 1993, the Security Council created safe areas in Bosnia designed to allow Muslims to live free from Bosnian-Serb aggression.[155] These safe areas, however, simply became easy targets for the Bosnian-Serb military forces.[156] The cycle of ethnic cleansing, cease-fire agreements, further ethnic cleansing, and international condemnations continued until August 1995 when the North Atlantic Treaty Organization (NATO) used significant force to end the genocide.[157]

The NATO air attacks compelled the Serbs to genuinely negotiate a peace agreement. Until the bombings, the Serbs had no reason to bargain; they were winning the battles. On 14 December 1995, the Serbs, Croats, and Muslims officially signed the Dayton Peace Accords.[158] The Peace Accords permitted NATO to deploy peace-enforcement forces into the region. Since then, murders against civilians have not completely stopped, but they have been drastically reduced.[159]

B. Rwanda

Like the genocide in Bosnia-Herzegovina, the genocide that reddened Rwanda's soil in 1994 was based on a complex history and an unscrupulous desire of leaders to retain their power. The countries may be thousands of miles apart and have ethnic and religious differences, but they share parallel historical experiences that caused both genocides.[160]

Rwanda is a very small, but densely populated country in the heart of Africa. With seven million people, it has the highest population density in

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153. S.C. Res. 808, U.N. SCOR. 3175th mtg., at 2, U.N. Doc. S/Res/808 (1993). These words are significant because they place the world on notice that the Security Council believes it has the right to use its Article VII authority to intervene. *See* U.N. CHARTER art. 39.

154. S.C. Res. 808, *supra* note 153, at 2.

155. S.C. Res. 836, U.N. SCOR, 3228th mtg., U.N. Doc. S/Res/836 (1993) (reaffirming creation of safety-zones).

156. Procida, *supra* note 79, at 677.

157. HOLBROOKE, *supra* note 87, at 99-104. On 30 August 1995, Operation Deliberate Force used more than sixty aircraft to bomb pre-selected Bosnian-Serb targets. *Id.*

158. *Id.* at 321-22.

159. *Id.* at 334-59.

Africa.[161] Three main groups constitute Rwanda's people: the Hutu with approximately eighty-five percent of the population, the Tutsi with fifteen percent, and the Twa with the small remainder.[162] About 400 years ago, the Tutsi established a feudal system.[163] Tutsi kings ruled with absolute power. The king divided the land into different districts, and each district was sub-ruled by chiefs having three distinct responsibilities: chief of the land, chief of the agriculture (pastures), and chief of the men/soldiers.[164] Tutsi chiefs governed the land and men, but the Hutu were often appointed as chiefs over the agriculture.[165] Their system united both Tutsi and Hutu through mutual responsibilities and obligations. They lived together, spoke a common language, and even intermarried.[166] Their mythology and tribal religion deepened this unity and created a delicate, yet peaceful balance that lasted hundreds of years.[167]

The Germans, and later the Belgians, colonized Rwanda or Rwanda-Urundi as the Germans referred to it.[168] This colonization began to destroy the delicate balance between Tutsi and Hutu.[169] Both European nations believed the Tutsi to be the more intelligent and racially advanced group.[170] When the Tutsi began to accept Catholicism, they were given greater educational opportunities, and the Belgians favored them even

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160. MARIO I. AGUILAR, THE RWANDA GENOCIDE AND THE CALL TO DEEPEN CHRISTIANITY IN AFRICA (1998). In the Balkans and in many other circumstances of genocide and war, religious intolerance, competition, and hatred are at the base. Aguilar notes, however, that seventy percent of the Rwandan population was Catholic and that Christians were killing Christians. He asserts that true believers of Christianity would not commit these heinous acts of brutality and murder. Moreover, he submits that those committing acts of genocide in Rwanda only professed to be Christian, but they were not truly converted to Christ. *Id.*

161. GUY VASSALL-ADAMS, RWANDA: AN AGENDA FOR INTERNATIONAL ACTION 11 (1994).

162. DES FORGES, *supra* note 6, at 37.

163. VASSALL-ADAMS, *supra* note 161, at 7. The Tutsi kings governed the land area now known as Rwanda and Burundi. Burundi is directly south of Rwanda. *Id.*

164. GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 11 (1995). In peaceful areas, one chief could govern the three responsibilities. In rebellious areas, three chiefs were appointed. *Id.*

165. *Id.* at 12.

166. *Id.* at 5.

167. VASSALL-ADAMS, *supra* note 161, at 7. In their mythology, Tutsi Kings were ordained from the Gods, infallible, and had to be obeyed, and the Tutsi people were superior in intelligence. *Id.*

168. *Id.* When the Germans colonized the area, they considered Rwanda and Burundi as a single state. They called the entire area Rwanda-Urundi. *Id.*

169. *Id.*

more.[171] Over time, Tutsi chiefs replaced all Hutu chiefs.[172] This and other seemingly minor changes caused a great division among them.[173]

In the 1950's, the U.N. pressured the Belgians to allow the people of Rwanda to elect their own government.[174] The Tutsi recognized that as a small minority of the population, they would most likely lose the election.[175] Hundreds of deaths marred the resulting elections in 1960 as the Tutsi resisted change.[176] Because the Hutu comprised almost eighty-five percent of the population, many were voted into office.[177] The newly elected Hutu mayors began to persecute the Tutsi, causing tens of thousands to flee Rwanda.[178] Several times over the next ten years, the Tutsi fought and lost in their pursuit to regain control.[179] Hutu gangs, angered by Tutsi aggression, killed many Tutsi civilians and again caused tens of thousands to flee the country.[180] In 1973, General Juvenal Habyarimana, a Hutu, lead a military coup to overthrow a Hutu president.[181] The Tutsi

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170. PRUNIER, *supra* note 164, at 7. Apparently, it is easy to distinguish the Hutu—a generally short, stocky group—from the Tutsi, usually tall and thin. Mr. Prunier provides descriptions of the Hutu, Tutsi, and Twa from accounts written in the early 1900's. The description of the Tutsi is one of a superior being: "Gifted with a vivacious intelligence, the Tutsi displays a refinement of feelings which is rare among primitive people. He is a natural-born leader, capable of extreme self-control and calculated good will." *Id.* at 6.

171. *Id.* at 31. Over time when the Hutu began to join the Catholic faith, they quickly outnumbered the Tutsi in membership and number of clergy. *Id.* at 75.

172. VASSALL-ADAMS, *supra* note 161, at 8.

173. *Id.* The Belgians created labor camps. The Tutsi were supervisors and the Hutu were the laborers. The Belgians conducted a census and classified everyone with ten cows or less as Hutu. The Belgians also established a requirement that everyone have identity cards. A person's ethnic group was written on the identity card. *Id.*

174. *Id*.

175. *Id.*

176. DES FORGES, *supra* note 6, at 39.

177. PRUNIER, *supra* note 164, at 51-53.

178. *Id.* at 7. By 1964, about 336,000 Tutsi were forced to flee to neighboring countries. *Id.*

179. *Id*. at 56-58.

180. *Id*. at 74. The forced exodus of Tutsi from Rwanda caused significant pressure on the fragile governments that surrounded Rwanda. Over the years, this refugee population in the surrounding countries caused several problems. First, many Tutsi wanted to return to Rwanda, even if by force. Second, when the foreign government committed violence against the visiting Tutsi, massive numbers of Tutsi returned to Rwanda at one time. Third, the international community pressured President Habyarimana to allow the Tutsi refugees to return, which forced him to introduce unwanted change into his government. *Id.* at 73-74 and 121-58.

181. *Id.* at 75.

lost all remaining political authority under General Habyarimana,[182] who also strongly opposed the return of Tutsi refugees.[183]

Several factors increased tension in Rwanda. First, in nearby Burundi, the Tutsi-lead military retaliated against Hutu civilians causing hundreds of thousands of Hutu to flee north to Rwanda. Second, Tutsi refugees in Uganda wanted to return to Rwanda. Third, the economy in Rwanda drastically declined.[184]

Burundi, the southern half of Rwanda-Urundi, was another battleground between the Tutsi and Hutu. In 1962, a Tutsi military coup toppled the government and declared Burundi an independent nation.[185] The Tutsi were the minority in Burundi, but because they controlled the military, they controlled the government.[186] In 1972, a Hutu group attacked Tutsi civilians, killing 2000.[187] The Tutsi army retaliated and killed between 80,000 to 300,000 Hutu.[188] President Pierre Buyoya of Burundi, a Tutsi, initiated political reforms in 1991, and even allowed a presidential election in 1993.[189] His Hutu opponent, Melchior Ndadaye, won the election, but Ndadaye was then killed in a military coup.[190] The ensuing conflict caused from 50,000 to 200,000 Hutu and Tutsi deaths, and approximately 300,000 Hutu refugees fled to Rwanda.[191]

In neighboring Uganda, the police and military brutality assaulted and harassed the Tutsi refugees.[192] This compelled many Tutsi to devise a way to return to Rwanda.[193] In 1990, several thousand Rwandan Tutsi exiles formed a military group called the Rwandese Patriotic Front (RPF).[194] The

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182. *Id.* Under the former Hutu President, the Tutsi were able to hold a few minor offices in the government. *Id.*

183. VASSALL-ADAMS, *supra* note 161, at 10.

184. PRUNIER, *supra* note 164, at 159-62. The war in Rwanda consumed most of the local resources and forced imports and therefore debt to significantly increase. *Id.*

185. LINDA MELVERN, A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE 21 (2000). Before 1962, the large republics of Burundi and Rwanda were treated as one country. *Id.*

186. *Id.*

187. VASSALL-ADAMS, *supra* note 161, at 18.

188. MELVERN, *supra* note 185, at 21.

189. VASSALL-ADAMS, *supra* note 161, at 19.

190. *Id.*

191. *Id.* at 19.

192. DES FORGES, *supra* note 6, at 48.

193. *Id.*

194. PRUNIER, *supra* note 164, at 73.

RPF invaded northern Rwanda with the goal of reaching the capital city of Kigali, but they were unable to penetrate very far south.[195] In less than a month, they were beaten back to Uganda.[196]

The RPF attack caused several problems for the Tutsi living in Rwanda. First, President Habyarimana and extremist Hutus took advantage of the Hutu fear that the RPF would invade again.[197] Government propaganda constantly reminded the Hutu not to allow another invasion.[198] The propaganda also claimed that every Tutsi living in Rwanda conspired with the RPF.[199] All Tutsi were labeled "the enemy within."[200] Second, the French government sent soldiers to Kigali in support of the Hutu Presidency.[201] This and other incidents caused President Habyarimana to believe that France, a permanent member of the Security Council, would support the Hutu no matter what happened.[202] Third, President Habyarimana increased his army from 5200 on 1 October 1990, to 30,000 by the end of 1991, and to 50,000 by mid-1992.[203] He also purchased a significant amount of military equipment and weapons.[204] Fourth, the president helped establish the Coalition for the Defense of the Republic (CDR), a Hutu organization that believed in Hutu supremacy.[205] The government

195. *Id.* at 96.

196. *Id.*

197. *Id.* at 108. The Habyarimana government arrested over eight thousands supposed RPF supporters. In reality, they arrested educated Tutsi and conservative Hutu. These detainees were beaten, raped, and even killed. Only a few were ever charged with a crime, and only a handful received trials. *Id.* at 108-09.

198. DES FORGES, *supra* note 6, at 66. Government-controlled Radio Rwanda was the only radio station in Rwanda until 1990. It was actively involved in the anti-Tutsi propaganda. *Id*. *See* MELVERN, *supra* note 185, at 85. After 1990, Radio-Télévision Libre des Mille Colline (RTLMC), another government-controlled radio station was established and broadcast propaganda. *Id.*

199. *Id.* at 74. The propaganda also alleged that Tutsi were "infiltrating" into Hutu political parties, and that Tutsi civilians were taking Hutu jobs. *Id.*

200. VASSALL-ADAMS, *supra* note 161, at 23.

201. PRUNIER, *supra* note 164, at 106.

202. *Id.*

203. *Id.* at 113.

204. VASSALL-ADAMS, *supra* note 161, at 27. It is estimated that the Rwandan government purchased over $12 million dollars worth of arms. *Id.*

205. *Id.* at 23. *But see* DES FORGES, *supra* note 6, at 52-53 (stating the belief that the CDR was established without President Habyarimana's assistance, but later supported him).

encouraged this group and another Hutu political organization to form militias.[206]

Human rights abuses inflicted upon the Tutsi by the Habyarimana government did not go unnoticed. In 1992, several human rights non-governmental organizations (NGOs) wrote about numerous human rights violations committed by the Habyarimana government.[207] Amnesty International documented the extrajudicial execution of over 1000 Tutsi civilians.[208] Even after other atrocities were committed, no one was prosecuted for the human rights abuses.[209]

International pressure "forced" President Habyarimana and the RPF to meet and subsequently sign a peace accord, the Arrusha Accords, in August 1993.[210] The Arrusha Accords required the Rwandan government to implement significant reforms.[211] Some of these included the requirement that Tutsi and members of the RPF be integrated into the government and the military.[212] The pro-nationalist Hutus did not gladly accept the Accords.[213]

In response to the Secretary-General's request that the U.N. help implement the Accords, the Security Council passed Resolution 872 on 5 October 1993, creating the U.N. Assistance Mission for Rwanda (UNAMIR).[214] The UNAMIR was given the mission to monitor the situation in Rwanda, provide minor security, assist repatriation of refugees, clear mines, coordinate humanitarian assistance, and investigate non-com-

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206. *Id*.

207. VASSALL-ADAMS, *supra* note 161, at 25. African Watch and Amnesty International listed numerous human rights violations since 1990. *Id.*

208. DES FORGES, *supra* note 6, at 91.

209. VASSALL-ADAMS, *supra* note 161, at 25.

210. MELVERN, *supra* note 185, at 52. It took over thirteen months to convince the parties to sign the Arrusha Accords in August 1993. The success occurred because of combined efforts of the United States, Belgium, and the Organization of African Unity. *Id.*

211. *Id.*

212. *Id.* The Arrusha Accords required the creation of a transitional government that would include leaders from the RPF. This commission would oversee the return of refugees and ensure their protection. *Id. See* VASSALL-ADAMS, *supra* note 161, at 24. The Accords also provided that the RPF would be integrated into the armed forces with forty percent of the new soldiers and fifty percent of the commanders. Legislative and parliamentary elections were to be held in 1995. *Id.*

213. MELVERN, *supra* note 185, at 53-55. The Accords troubled many Hutu. Colonel Theoneste Bagosora, a Hutu army colonel who had attended the negotiations, was especially angered and left the negotiations early. *Id.*

214. S.C. Res. 872, U.N. SCOR. 3288th mtg., at 2, U.N. Doc. S/Res/872 (1992).

pliance.[215] When the U.N. troops arrived in October 1993, it was clear that many of the provisions of the Accord were not being followed.[216] In addition, radio stations partly owned by the Habyarimana family and the CDR continued broadcasting that all Tutsi in Rwanda deserved to die because they supported the RPF's treacherous return.[217]

In 1993 and 1994, the Habyarimana military began to equip and train Hutu militias.[218] It also formulated death lists.[219] By March 1994, the UNAMIR consisted of 2539 soldiers.[220] Despite the U.N.'s presence, the violence increased, and actions by pro-Hutu forces prevented UNAMIR from accomplishing its mission.[221] In April 1994, the six-month mission of UNAMIR was to end. Even though violence was increasing and the UNAMIR commander, General Romeo Dallaire, warned his superiors of the potential massacre, the Security Council sought to reduce the UNAMIR forces to save money.[222]

Propaganda and unchecked violence by Hutu militias continuously fueled the suffocating atmosphere of anger and hate, making the situation ripe for catastrophe.[223] On 6 April 1994, two anti-aircraft missiles shot down the plane carrying President Habyarimana and the Burundi President

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215. *Id*.

216. VASSALL-ADAMS, *supra* note 161, at 29. Neither the new government nor the Parliament was in place.

217. *Id.* A new radio station called the RTLMC pronounced messages of anti-Tutsi and anti-Arrusha messages. Its propaganda argued that the Tutsi must die. Several Belgian officials, including the Belgian Ambassador in Kigali, recognized the destructive nature of the messages. MELVERN, *supra* note 185, at 70-72.

218. VASSALL-ADAMS, *supra* note 161, at 30; DES FORGES, *supra* note 6, at 104-09. After the genocide, a small book of Colonel Bagosora's was found. It described the methodology of his "civilian self-defense" plan in which the local police officers were to train militias. Colonel Bagosora even listed the number of weapons and hand grenades needed for each group. *Id.*

219. VASSALL-ADAMS, *supra* note 161, at 30; DES FORGES, *supra* note 6, at 205. The leaders notified the militias to kill specific individuals, both Tutsi and Hutu, and Tutsi in general. The targeted individuals were those who had certain authority or ability to stop the massacres. DES FORGES, *supra* note 6, at 205.

220. *Id.* Over twenty-four countries provided soldiers. Bangladesh provided the most with 942, and Ghana was second with 843. *Id.*

221. MELVERN, *supra* note 185, at 96; PRUNIER, *supra* note 164, at 204-09.

222. VASSALL-ADAMS, *supra* note 161, at 31; *see* DES FORGES, *supra* note 6, at 18, 141-79 (describing in detail a chronology of events occurring from November 1993 to April 1994 before the genocide ignited). Vassall-Adams strongly believes that the warning signals were evident and recognized, and that the Secretary-General and the Security Council were notified of the warnings before 7 April. *Id.*

223. DES FORGES, *supra* note 6, at 18, 141-79.

just before it landed in Kigali.[224] The perpetrator's identity was and remains unknown; however, the Hutus immediately blamed the Belgians and the RPF.[225] Rwandan media broadcast that the RPF killed the president and was planning to kill the Hutu people.[226] In Kigali, the Hutu militias went immediately from house-to-house to find and kill Tutsi.[227] Tutsi men, women, and children were butchered with machetes and clubs.[228] No Tutsi was spared.[229] Even Hutu were killed if they tried to protect a Tutsi.[230] The RPF tried to protect the Tutsi civilians, but their numbers in Kigali were few[231] because their main presence was in the north.[232]

After ten Belgian peacekeepers were killed, Belgium removed all its UNAMIR soldiers and civilians from Rwanda.[233] On 21 April 1994, the Security Council reduced UNAMIR to 270 troops.[234] The United States and the United Kingdom may have played a role in the reduction because they constantly strived to cut or reduce the resources for the mission.[235] Numerous human rights organizations and many of the African nations opposed the decision to reduce the U.N. troops.[236] With only one-tenth of their original number, the UNAMIR troops were given the impossible mission to attempt to secure a cease-fire, act as intermediaries between the RPF and the Hutu, and monitor the safety and security of Rwandans who sought refuge with the UNAMIR.[237] The massacres increased and began to spread to the south and west.

The systematic genocide continued in an eerie, robotic-like manner.[238] The propaganda of hate and fear worked.[239] Murderous gangs combed the cities and countryside to search for Tutsi and to loot.[240] As the situation grew increasingly dim, the Security Council passed Resolution

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224. *Id.* at 181.

225. PRUNIER, *supra* note 164, at 205-12; VASSALL-ADAMS, *supra* note 161, at 32.

226. PRUNIER, *supra* note 164, at 220-23.

227. *Id.* at 224; DES FORGES, *supra* note 6, at 208.

228. DES FORGES, *supra* note 6, at 207-14. *See* PRUNIER, *supra* note 164, at 231 (noting that even priests and nuns were killed if they tried to stop the killing).

229. PRUNIER, *supra* note 164, at 231.

230. *Id.*

231. *Id.* at 223.

232. VASSALL-ADAMS, *supra* note 161, at 34.

233. *Id.* at 35.

234. PRUNIER, *supra* note 164, at 275. *See also* S.C. Res. 912, U.N. SCOR. 3368th mtg., at 2, U.N. Doc. S/Res/912 (1994).

235. MELVERN, *supra* note 185, at 93, 133.

236. VASSALL-ADAMS, *supra* note 161, at 36.

237. S.C. Res. 912, *supra* note 234, at 2.

918 to create UNAMIR II.[241] At its inception, however, none of the permanent five members of the Security Council provided troops for this new mission.[242] With little support, UNAMIR II floundered and additional U.N. forces did not arrive until after the genocide was over.

The genocide in Rwanda ended due to military intervention, but the military force was not from the U.N., the United States, or the European Union.[243] The RPF, who the Habyarimana government had demonized, launched a major offensive from the north that ended the slaughter.[244] By the time the RPF forces were finally able to stop the genocide, the Hutu militias had butchered over 600,000 unarmed Tutsi civilians.[245] The geno-

238. ROSAMOND HALSEY CARR, LAND OF A THOUSAND HILLS: MY LIFE IN RWANDA 207 (1998). Carr had several Tutsi workers, and Hutus came to her house to find and kill the Tutsi workers. At first they found none, so they left. They later returned and asked for only one person because they had already killed the other workers. Ms. Carr said, "You don't mind killing old women. If you want to kill someone, here I am. Kill me. They looked at me in horror and said, 'Oh, no. Madame!'" *Id.*

239. VASSALL-ADAMS, *supra* note 161, at 33. The author provides one eyewitness account of a lady who worked in a Catholic mission. When she tried to reason with several Hutus to stop the killings, the Hutu militiamen explained their mission. "The Tutsi had murdered the President and were trying to take over the country by force, so Tutsi had to die." *Id.*

240. *Id.*

241. VASSALL-ADAMS, *supra* note 161, at 43; S.C. Res. 918, U.N. SCOR. 3377th mtg., at 2, U.N. Doc. S/Res/918 (1994).

242. VASSALL-ADAMS, *supra* note 161, at 44. In September 1994, when UNAMIR II forces reached 4167 personnel in Rwanda, it consisted of 606 soldiers from the United Kingdom, but no soldiers were sent from the United States, Russia, China, or France. France, however, coordinated troops from several African countries for its own humanitarian mission. *Id.*

243. DES FORGES, *supra* note 6, at 692.

244. *Id.* The RPF saved thousands more from being slaughtered. The RPF targeted Hutu, but were focused more on ending the massacre than inflicting revenge. *Id.* at 692-98.

245. DES FORGES, *supra* note 6, at 15. The number of Tutsi slaughtered represents almost seventy-five percent of the Tutsi living in Rwanda. VASSALL-ADAMS, *supra* note 161, at 44. Extremist Hutus labeled the thousands of Hutu moderates that were also killed in the slaughter as co-conspirators with the Tutsi. The Hutu beat, tortured and murdered their victims with guns, machetes, rocks, and clubs. *Id.*

cide took less than 100 days.[246] Not even the gas chambers and crematoriums of the Holocaust annihilated human life so quickly.[247]

V. Analysis

A. Similarities and Distinctive Characteristics of the Genocides in Bosnia and Rwanda

To formulate a solution to genocide, it is necessary to discern the common causes and distinctive characteristics that preceded the killings.[248] The precursors to the genocides in Bosnia and Rwanda were very similar. The likelihood of preventing genocide increases if the international community recognizes and understands these indicators, and then intervenes in a timely and appropriate manner.

1. The Existence of Distinctive Groups that Generally Vote or Believe as a Group

The existence of distinct groups that generally vote or believe as groups provides a very basic indicator that cannot be overlooked.[249] If racial or ethnic groups become so intertwined with the general population that they do not vote or believe independently, then conflicts between groups are unlikely to occur. On the other hand, even if racial or ethnic

246. DES FORGES, *supra* note 6, at 1.

247. MELVERN, *supra* note 185, at 4. The rate of slaughter was five times greater in Rwanda than in Nazi Germany during the holocaust. *Id.* "It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki." PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 3 (1998).

248. Gurr, *supra* note 21, at 136 (providing basic principles to identify risks, and citing additional sources that have conducted statistical analyses and case studies).

249. The conjunction "or" is specifically used in this sentence because many nations will not permit their citizens to vote. *See* RUMMEL, *supra* note 3, at 1. Genocide definitely occurs in nations where the citizens may not vote. In fact, the greatest number of deaths due to genocide occurred in non-democratic nations. *Id. See* Gurr, *supra* note 21, at 139-40.

groups vote or believe as one, this does not necessarily mean that genocide will occur. It only connotes that defined demarcations exist.[250]

In Bosnia-Herzegovina, even though the Muslims, Croats, and Serbs intermarried, a large portion of each group existed separately.[251] They may have descended from the same racial lineage, but they distinguished themselves by religion, and that became the ethnic division. This religious fervor clearly divided them, and as seen in the plebiscites for independence, the groups voted along their religious and ethnic lines. When the parliament of Croatia voted for independence, the Croat representatives voted unanimously for it while the Serb representatives left the meeting in protest.[252] In Bosnia-Herzegovina's vote for independence, the Muslims and the Croats overwhelmingly approved the idea.[253] The Bosnian-Serbs passionately opposed it, and refused to vote.

In Rwanda, the ethnic and physical differences between the Tutsi and Hutu were clearly evident. Even foreigners could distinguish them from afar.[254] Some intermarried, but overall they remained in separate groups. Their political differences were unmistakable.[255] The Hutu wanted a Hutu-lead government, while the Tutsi sought Tutsi leadership. One significant difference between Bosnia and Rwanda was that in Rwanda, the Hutu and Tutsi shared similar religious affiliations. Over seventy percent of the Rwandan population was Catholic.[256]

2. A History of Genocide or Hatred Between the Groups (Whether Recent or Ancient)

A history of genocide, whether recent or ancient, can be a powerful tool for those planning to commit or orchestrate genocide. Perpetrators of genocide build support for their cause by reminding their group of past atrocities committed against them. By constantly focusing on past brutality and injustice, the perpetrators foster feelings of fear and anger. These strong emotions can then be forged into forceful nationalistic feelings that

250. *See* Gurr, *supra* note 21, at 139-40.

251. *See supra* notes 104-09 and accompanying text.

252. Ejub Štitkovac, *Croatia: The First War*, *in* BURN THIS HOUSE, *supra* note 105, at 160.

253. *See supra* note 137.

254. *See supra* note 170.

255. *See supra* notes 174-83 and accompanying text.

256. *See supra* note 160.

lead to genocide based on "self-defense" (kill them before they kill us) or revenge.

In Bosnia-Herzegovina, the Catholic Croats and the Muslims fought the Orthodox Serbs in the distant and recent past.[257] The Serbs focused their hatred on their infamous defeat by the Muslims on 28 June 1389, and on the atrocities committed by the Croats and Muslim *Ustashe* during WWII. The Croats and the Muslims remembered the Serbs' cruelty at the end of WWII when the Serbs carried out their "blood vengeance" against Croats and Muslims.

In Rwanda, the Tutsi and Hutu lived together peacefully for hundreds of years.[258] It was not until the late nineteenth and early twentieth centuries that their ethnic differences collided. In the last forty years, the ethnic clashes have caused the deaths of over one million Hutu and Tutsi. In fact, enormous numbers of Hutu and Tutsi were killed only two to three years before the massive genocide of 1994.[259]

A history of genocide or extreme aggression against another group, however, should not paralyze the response of the international community. This bloody history should be recognized as an indicator of genocide, not an excuse for inaction.[260]

3. One Group Desires Independence

Independence movements create significant disputes between the group in power and the group seeking independence.[261] The situation can lead to crisis and possibly have a genocidal outcome if either side uses weapons.[262] If the seceding group uses no military force and the government engages military forces to oppose and extinguish the secession, the military may end up killing civilians. Though this may not be genocide, it could lead to genocide or genocidal acts if the military systematically tries to destroy the group.[263] The volatility and danger of the situation significantly escalates when the "rebellious" minority seeks independence

257. *See supra* notes 89-103 and accompanying text.
258. *See supra* note 167.
259. *See supra* notes 174-91 and accompanying text.
260. KUPER, *supra* note 17, at 56.
261. *Id.* at 44.
262. Gurr, *supra* note 21, at 142-43.
263. Genocide Convention, *supra* note 4, art. 2.

through military means.[264] Both sides may then try to win through genocide.

In the Balkans, the republics of Slovenia, Croatia, and Bosnia all voted for independence. None of them wanted to remain a subordinate unit of the Serbian-lead Republic of Yugoslavia. To diffuse the rebellion, the Yugoslav Army attacked and killed civilians.[265] In Bosnia, the Muslims and the Croats wanted independence, but the Bosnian-Serbs vehemently opposed it.[266] The Serbian separatists initiated an independence movement within the Bosnian independence movement,[267] and the Bosnian-Serbs claimed a specific territory and called it "Srpska." To create an "ideal" Republic of Srpska, they systematically used genocide to cleanse their new country of Muslims.[268]

In Rwanda, the struggle for political power was undeniable. The Tutsi may not have voted for independence in Rwanda, but they did create the independent nation of Burundi.[269]

4. An Economic Recession or Imbalance

Economic instability may cause a strain on the racial or ethnic relationships. It was not a significant indicator in the Bosnian genocide, but it did play a role in Rwanda. Rwanda is an extremely small country, and the economy was not functioning well.[270] The government-controlled radio station warned the Hutu that the Tutsi would try to take their jobs.[271] In addition, the influx of hundreds of thousands of Hutu from Burundi placed a great strain on their fragile economy.

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264. Gurr, *supra* note 21, at 141-42 (containing a list of "Rebellious Groups at Highest Risk of Victimization").

265. *See supra* note 133.

266. Udovički & Štitkovac, *supra* note 137, at 180.

267. *Id.* at 186.

268. *Id.*

269. *See supra* notes 185-91 and accompanying text.

270. MELVERN, *supra* note 185, at 7.

271. *See supra* note 199.

5. The Group in Power Publishes Messages of Hate and the Need to Kill the Other Group

The media has a substantial effect; it can influence people for good and for evil.[272] Propagating hate is extremely divisive, and if it encourages genocide, it is a punishable act under the Genocide Convention.[273]

The Serbs claimed that they did not publish messages of hate in the media.[274] They discernibly disseminated the idea of a greater Serbia, however, and they often reminded the Serb people that the Croats and Muslims were going to treat them like the *Ustashe* did during WWII.[275] This constant reminder created a fear that definitely affected the Serb population. The Serb people apparently believed the messages printed by their government, and they seemingly supported the cold-blooded murders of civilian women and children.[276]

In Rwanda, the government's propaganda of hate and the necessity to kill the Tutsi was obvious.[277] The government-controlled radio station frequently instilled hate and fear in the Hutu, telling them that the Tutsi were the cause of their problems. The Hutu seemed convinced that if they did not kill the Tutsi first, the Tutsi would kill them. The propaganda indelibly implanted the message of fear; when the President's plane was shot down, the Hutu believed the Tutsi caused it, so the Tutsi deserved to die.[278] Hutu militiamen were so convinced that they even killed Hutu who tried to stop

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272. Michael J. O'Neill, *Preventive Diplomacy and the Media*, *in* PREVENTIVE DIPLOMACY, *supra* note 7, at 75. An example of the influence media has on people and political leaders relates to the Kurds in Northern Iraq. The plight of the Kurds has been around for years, yet after the Gulf War, the media focused on the difficulties the Kurds faced as the Iraqis attacked them and forced them to leave their homes. Television constantly displayed their tragedy. In a short time, the world pressured the Western leaders to intervene, even if reluctantly. The United States then deployed troops to Northern Iraq to help protect the Kurds. *Id.*

273. Genocide Convention, *supra* note 4, art. 3(c). *See also* 1985 Special Rapporteur, *supra* note 2, at 23 (detailing how propaganda to incite genocide is punishable and that many national laws also prohibit public statements to incite hatred towards a racial, ethnic, or religious group).

274. ZIVOYA IVANOVIČ, MEDIA WARFARE: THE SERBS IN FOCUS (1995). The Serbians considered the conflict a civil war and that the murders, or "ethnic cleansings," were not caused by one ethnic group alone, but by individuals of each warring faction. They also believed that Western media was completely biased against the Serbs. *Id.*

275. *See supra* note 116 and accompanying text.

276. *Id*.

277. *See supra* notes 198-200 and accompanying text.

278. *See supra* notes 224-26 and accompanying text.

the genocide. One commentator wrote of the government's propaganda effort:

> But the willingness of the ordinary rank-and-file person to enter the deadly fray cannot be accounted for by material interests. Ideas and myths can kill, and their manipulation by elite leaders for their own material benefit does not change the fact that in order to operate they first have to be implanted into the souls of men.[279]

6. Genocide First Occurs on a Small Scale, as if to See if the International Community Will Intervene

Perpetrators often systematically kill a small portion of the hated group, then they pause. If their government or the international community does nothing substantial to stop the crimes, the murders recommence and the death toll rapidly escalates. This is a significant early warning indicator.

The Serbs "tested the water" in 1991 when they tortured and killed Croats in so-called labor camps. In 1992, when the Bosnian-Serbs instigated their ethnic cleansing campaign against the Muslims, the Serbs began to torture, rape, and kill innocent civilians. The atrocities brought no international wrath and no painful sanctions, only verbal condemnations. Because the Muslims and the Croats were unable to stop the Bosnian-Serbs, and the international community did not seem to care, the genocide simply accelerated.[280]

For over three years in Rwanda, small militias and Hutu thugs beat, tortured, and killed Tutsi civilians and stole their goods.[281] Yet the government of Rwanda did nothing.[282] Even if Rwandan laws did not specifically prohibit genocide, its criminal code would surely have prohibited assault, rape, and murder. No Hutu was arrested, however, and no Hutu was tried for committing obvious criminal misconduct.[283] The Security Council voiced its grave concern about the violence in March 1993, but its resolu-

279. PRUNIER, *supra* note 164, at 40.
280. *See supra* notes 128-54 and accompanying text.
281. DES FORGES, *supra* note 6, at 87.
282. *Id.* at 91.
283. *Id.*

tion did nothing more.[284] For Hutu thugs, who relished killing Tutsi civilians, the Security Council's expression of concern had no effect. The killings continued.

7. Failure of the National and Local Governments

National governments commit or contribute to genocide in three significant ways. First, the government leader may be the architect of the genocide. This scenario is more likely to occur when the government leader has total control over all aspects of the government.[285] In fact, genocide most often occurs when the head of state has complete control of the government as with communist or totalitarian regimes.[286] Second, the government may acquiesce to genocide because it neither aids the murders nor stops them, but this situation occurs infrequently. Third, the national government may be either inexperienced or inept, and therefore unable to arrest and prosecute the perpetrators of genocide. This happens when the government is newly formed or unable to control the military or police force, and when the nation has a nonfunctioning judiciary.[287]

In Bosnia-Herzegovina, the Serb leadership supported the ethnic cleansing.[288] In addition, the newly formed government of Bosnia-Herzegovina was unable to prevent or arrest the Bosnian-Serb forces committing the ethnic cleansing.[289] In Rwanda, President Habyarimana's government and his political party clearly planned and orchestrated the genocide.

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284. S.C. Res. 812, U.N. SCOR. 3183rd mtg., at 1, U.N. Doc. S/Res/812 (1993).

285. Gurr, *supra* note 21, at 139. Democratic societies are less likely to commit acts of genocide. They may discriminate against a minority, but they tend to resolve problems through a generally peaceful political process as minorities join to form political coalitions. *Id. See* KUPER, *supra* note 17, at 102.

286. RUMMEL, *supra* note 3, at 2.

> Power kills; absolute Power kills absolutely . . . . The more power a government has, the more it can act arbitrarily according to the whims and desires of the elite, and the more it will make war on others and the more it will make war on others and murder its foreign and domestic subjects . . . . [T]otalitarian communist governments slaughter their people by the tens of millions; in contrast, many democracies can barely bring themselves to execute even serial murderers.

Id. at 1-2

287. *See* Udovički & Štitkovac, *supra* note 137, at 180, 186.

288. *Id.* at 180.

289. *See id.* at 186.

Colonel Bagorosa of the Rwandan military was one of the leading architects of the slaughter by the Hutus.[290] Moreover, even if the government did not specifically coordinate some murders, it did not arrest or prosecute any of the perpetrators either.[291]

B. The Genocide Convention: Why It Failed to Prevent Genocide in Bosnia-Herzegovina and in Rwanda and Why It Will Fail in the Future if Not Modified

Several commentators have written about the effectiveness and deficiencies of the Genocide Convention.[292] This section focuses on the Convention's shortcomings when a government causes genocide or acquiesces to genocide through its inaction.

The Genocide Convention encourages states to enact anti-genocide legislation, yet it lacks authority to enforce either local or international criminal jurisdiction. Thus, when governments cause genocide, the Genocide Convention falls short.[293] The international community must understand this deficiency and find a solution because the military of the victim's own country, with the clear support of the government, most often commits genocide.[294]

Condemning genocide and preventing it are two completely different issues. The Genocide Convention effectively condemns genocide and acts of genocide, but it places the responsibility on states to pass laws that prohibit genocide and punish perpetrators. The Convention does not require states to enact laws condemning and punishing perpetrators of genocide.[295]

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290. MELVERN, *supra* note 185, at 61-68.

291. DES FORGES, *supra* note 6, at 91.

292. Lippman, *supra* note 12, at 45; Lawrence J. LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13 YALE J. INT'L L. 268, 269 (1988) (voicing concern that the Genocide Convention does not include political groups as one of the stated groups in the definition of genocide).

293. *See* KUPER, *supra* note 17, at 195-208.

294. *Id*.

295. *Id.* at 14. It should be remembered that most countries have penal codes that prohibit murder, rape, and torture. If used, these laws would condemn a perpetrator of genocide because the perpetrator commits murder, rape, battery, and related crimes. *See generally id*. at 15. The United States did not enact anti-genocide legislation until 1986. *See supra* note 10.

Even if all states enacted laws prohibiting genocide, however, this is not enough. The Genocide Convention cannot enforce local law. If state officials and their judiciary do not enforce domestic laws, the Convention remains impotent.[296] The Convention does not require police to arrest individual perpetrators of genocide, nor is it able to force judges to hear cases of genocide or to adjudicate them correctly.

The Genocide Convention also has no authority to compel a nation to accept jurisdiction of an international court or to compel its citizens to accept the jurisdiction of an international criminal court.[297] It is unlikely that a political leader will freely submit to the jurisdiction of an international criminal court while in power. When wide-scale genocide occurs, it suggests that the perpetrators are winning. A leader who incites anger and hatred that causes his people to commit unthinkable atrocities against another group is not going to suddenly stop and admit wrongdoing. Moreover, the Genocide Convention does nothing to coerce or convince the leader to stop and submit to the jurisdiction of an international court.

In Bosnia and Rwanda, no invading foreign force committed the genocide; military forces from within their respective countries committed the atrocities. The Federal Republic of Yugoslavia was one of the original parties of the Genocide Convention. Yugoslavia specifically notified the U.N. that Bosnia could not be a party to the Genocide Convention, but considered it bound by the Convention's requirements. Still, Serb military forces committed genocide.[298] Rwanda acceded to the Genocide Convention in 1975. In Rwanda, Hutu militias and gangs murdered thousands of innocent Tutsi civilians before the massive genocidal slaughter in 1994. President Habyarimana knew that the genocide and acts of genocide were desecrating his country. He did nothing to stop it, and the Genocide Convention was unable to prevent it, require prosecution, or help prosecute anyone. Perpetrators thus ignore the Convention with impunity due to its lack of any enforcement mechanism.

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296. KUPER, *supra* note 17, at 14.

297. *See generally* Genocide Convention, *supra* note 4.

298. *See supra* note 13.

C. Deficiencies in the Current Process Used by the U.N. and Security Council to Prevent Genocide

Many writers and political officials blame the U.N. and the West for their failure to intervene in a timely and effective manner to prevent the deaths in Bosnia and Rwanda.[299] Analyzing the events leading up to the genocides in Bosnia and Rwanda reveals six basic factors that delayed and weakened the U.N.'s intervention.

1. Personal Interests of the Members of the Security Council

The Security Council consists of representatives from fifteen different nations. Each nation has different goals, beliefs, agendas, and treaties.[300] Each nation has unique allies, economic partners, and other ties. A member of the Security Council is much more likely to veto a decision if it will adversely affect one of its allies.[301] Unanimous decisions or consensus on many complicated issues have been difficult to obtain.[302]

In Bosnia-Herzegovina, members of the Security Council stood by their historical allies. In World War II, Russia and the West allied themselves with the Serbs, and Russia has been a close ally with the Serbs ever since. On the other hand, Croatia was Germany's ally. Even though Germany is not a permanent member of the Security Council, it is an influential member of the European Union. Both France and England, permanent members of the Security Council, are members of the European Union. Many considered Germany's influence the motivating force that con-

299. MELVERN, *supra* note 185, at 236; Jean Baudrillard, *When the West Stands for the Dead*, *in* THIS TIME WE KNEW, *supra* note 6, at 87-89. *See also* Cushman & Meštrović, *supra* note 143, at 20.

300. KUPER, *supra* note 17, at 55. Kuper gives an example of the Security Council's inability to agree on a solution to end the conflict between India and Pakistan in 1971 and 1972. This was based on conflicted interests between the permanent members of the Security Council. The United States favored Pakistan, the Soviet Union had a treaty with India, and China was antagonistic toward both the Soviet Union and India. *Id.*

301. *Id.* at 55.

302. *Id.* at 53, 57.

vinced the Security Council, and thus the U.N., to grant official nation-state status to Croatia and Bosnia-Herzegovina.[303]

In Rwanda, France personally involved itself by sending troops to Rwanda. It supported President Habyarimana's government. This influence may have caused the Security Council to focus more on the Tutsi RPF forces invading Rwanda than on the Hutu militias committing genocide.

2. Disinterest of the Members of the Security Council

If the Security Council is not interested in a nation, little will be done to prevent or end genocide that occurs there. Disinterest exists for several reasons.[304] In general, most nations do not worry about problems that occur far from their borders.[305] Some authors argue that the West is unconcerned when conflict arises in African nations or that the Security Council is ambivalent if Muslims are the victims of the genocide.[306] Rwanda is a small African nation far away from all permanent Security Council members. Even if an enormous battle engulfed Rwanda, it would have little to no effect on the nations comprising the Security Council.

3. Aversion to Intervene in Internal Matters of a Sovereign Nation

The U.N. Charter recognizes that each state has rights to sovereignty and should manage its domestic issues without international intervention.[307] The governing bodies of the U.N. clearly understand the principle of sovereignty.[308] Most nations do not want the U.N. or any international body to intervene unless requested.[309] Nevertheless, the Charter allows the

303. HOLBROOKE, *supra* note 87, at 31.

304. Mohammed Bedjaoui, *Preventive Diplomacy: Development, Education, and Human Rights*, *in* PREVENTIVE DIPLOMACY, *supra* note 7, at 38-39.

305. *Id.* at 39.

306. Cushman & Meštrović, *supra* note 143, at 4-5.

307. U.N. CHARTER art. 2, para. 7.

308. Kenneth Hackett, *The Role of International NGO's in Preventing Conflict*, *in* PREVENTIVE DIPLOMACY, *supra* note 7, at 22.

309. KUPER, *supra* note 17, at 98. One reason the United States did not ratify the Genocide Convention was a fear of international interference into domestic issues. *Id.*

Security Council to intervene under the enforcement provisions in Chapter VII of the Charter.[310]

4. Belief that the Groups Were Reciprocating Deeply Engrained Hatred or Prior Genocidal Acts

Both Bosnia-Herzegovina and Rwanda have histories of genocide. In Bosnia-Herzegovina, genocide last occurred in the 1940's, and the news media from Serbia and the West reminded the world of this fact in the 1990's. Some leaders incorrectly believed that the hatred was so deeply engrained that no outside force could end the bloodshed.[311] In addition, the media mentioned a few current minor atrocities committed against the Serbs.[312] This caused the world to question who was at fault.[313] In Rwanda, by comparison, genocide happened only a few years earlier. In that case, the Tutsi killed Hutu civilians.

It is important for the U.N., especially the Security Council, to recognize that prior genocidal acts presage future genocide. Evidence of past genocides, however, should not confuse or paralyze U.N. actions. If the Security Council intervenes, it can end the cycle of genocide; otherwise, continuing mass atrocities simply enrage the victims and cause them to seek revenge.

5. Desire to End the Conflict Peacefully as a "Neutral" Intermediary

The basic purposes of the U.N. are to maintain international peace, prevent threats of peace, and end acts of aggression.[314] The U.N. Charter

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310. U.N. CHARTER art. 2, para. 7.

311. HOLBROOKE, *supra* note 87, at 23. The author quoted Lawrence Eagleburger, former American Ambassador to Yugoslavia:

> I have said this 38,000 times, and I have to say this to the people of this country as well. This tragedy is not something that can be settled from outside and it's about damn well time that everybody understood that. Until the Bosnians, Serbs, and Croats decide to stop killing each other, there is nothing the outside world can do about it.

Id.

312. *See* Cushman & Meštrović, *supra* note 143, at 21-27.

313. *Id.* at 21.

314. U.N. CHARTER art. 1.

clearly recommends that these purposes be accomplished "by peaceful means."[315] When describing the authority of the Security Council, the Charter also begins with and focuses on peaceful means to end disputes.[316] Therefore, the Security Council carefully analyzes a crisis before deploying forces into a sovereign nation.

Initially, the U.N. attempted diplomatic actions in Bosnia, and it carefully avoided the appearance of taking sides in the conflict. When the U.N. arms embargo was initiated, it prevented arms from being sold to any of the parties. When the U.N. finally deployed peacekeeping troops to protect several areas, their mandate required neutrality. When the Bosnian-Serbs attacked these "safe-areas," the U.N. soldiers were concerned for their own safety as well as the noncombatants'.[317] The U.N. "neutrality" definitely did not help the situation, and meaningful negotiations with the Serbs were difficult to obtain as a result. The Serbs had no reason to negotiate or comply with the U.N. because they were winning. Only the later NATO bombardments could force the Serbs to the negotiation table.[318]

Rwanda suffered the same fate because U.N. neutrality seemed to cause more harm than good. The resulting genocide was worse, however, because the U.N. reduced UNAMIR forces instead of increasing them when the Rwandan crisis erupted.[319]

Lessons can be drawn from both genocides. In Bosnia and Rwanda, the identity of the murderers and their political sources was evident. Political leaders who orchestrated the genocides in both nations either would not sign agreements or would not fulfill those they had signed as long as genocide was serving their purposes. Nor would the leaders submit voluntarily to international authority. If the leaders were concerned for their citizens, of course, the genocides would not have happened in the first place. Therefore, the U.N. cannot remain neutral in the face of genocide; that luxury must wait until after the parties comply with peace accords. Significant measures must be applied against the perpetrators of genocide before the killings begin. If the international community withholds an effective

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315. *Id.*

316. *Id.* art. 6.

317. Udovički & Štitkovac, *supra* note 137, at 197, 237-38.

318. *See supra* notes 155-59 and accompanying text.

319. Michael N. Barnett, *The Politics of Indifference at the United Nations and Genocide in Rwanda and Bosnia*, *in* THIS TIME WE KNEW, *supra* note 7, at 128-30.

response until after extensive numbers of the targeted group are killed, then offensive military intervention may be the only remaining option.

6. Inadequate Funding

The cost of deploying and maintaining a military force, whether peacekeeping or peace-enforcing, is extremely expensive.[320] In Rwanda it was clear that the Security Council wanted to reduce the UNAMIR forces because of the cost.[321] The United States sought to keep UNAMIR's costs to about $10 million dollars per month.[322]

VI. Proposed Solution: Negotiate a Protocol to the Genocide Convention

The Genocide Convention is a valuable document that offers a foundation on which to build an effective mechanism to prevent genocide. The U.N. remains the principal organization to maintain international peace and security, including intervention to resolve disputes that could lead to genocide. A protocol to the Genocide Convention is needed, however, to correct the deficiencies of the Genocide Convention and eliminate the inabilities of the U.N. to prevent genocide.

To do this, the protocol must contain five essential concepts. First, it must re-emphasize the devastation of genocide. Second, the signatories must agree that automatic measures will be implemented if certain genocidal indicators occur. Third, it must create the Department for the Prevention of Genocide within the Secretariat. Fourth, it must create an effective early warning system for genocide. Finally, it must designate the specific automatic measures that will be implemented when genocidal indicators occur.

If the members of the U.N. negotiate such a protocol to the Genocide Convention, it will correct the deficiencies of the Genocide Convention and the U.N. regarding the prevention of genocide. Negotiating a protocol

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320. Boutros-Ghali, *supra* note 7, at 17. From 1986 to 1993, the U.N.'s annual costs of peacekeeping rose from $234 million to $2.984 billion U.S. dollars. The U.N. figures do not include individual costs that states incurred when they directly deployed their troops. *Id.*

321. MELVERN, *supra* note 185, at 93, 133.

322. *Id.* at 85. The UNAMIR operated on a very limited budget. The mission lacked many essential personnel, ammunition, fuel, and other necessary items. *Id.*

will also demonstrate a greater resolve within the international community—by signing the protocol, nations would be agreeing to a stated methodology on how to prevent genocide. This addresses many third world countries' concern that the U.N. simply represents a continuation of imperialism.[323] It would also increase support for Security Council action to prevent genocide.[324]

A. Re-Emphasize the Devastation of Genocide

The starting point to prevent genocide is for leaders, especially those of states who are members of the Security Council, to express their abhorrence of genocide and agree that it must be prevented.[325] This expression must make clear that genocide, the deliberate and systematic extermination of an ethnic, religious, or national group, is the world's most repugnant crime. Moreover, it must be agreed that measures to prevent genocide will apply indiscriminately, whether the targeted group is Muslim, Jewish, Christian, Tutsi, Cambodian, or Indian.

B. Statement of Understanding

A phrase in the preamble of the protocol should declare that the parties to the protocol understand that genocide and mass murders have been committed in the past and neither the parties to the protocol nor the U.N. can erase past atrocities. It must go on to state that evidence of a previous genocide, acts of genocide, or mass murder does not justify future genocide in retaliation. Moreover, the parties must agree that genocide is so repugnant and destructive that it is unacceptable conduct by any nation for any reason. Therefore, to prevent and eradicate genocide, the parties must understand and agree that the automatic measures set forth in the protocol will take effect unless the subject state takes corrective actions.

This Statement of Understanding would eliminate the U.N.'s hesitation to respond due to historical acts of genocide, as in Bosnia-Herzegov-

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323. Roberts & Kingsbury, *supra* note 44, at 45.

324. *See id*. "Perceptions that the U.N. is dominated by particular states can have serious consequences. They have led to refusals to make contributions to various parts of the U.N. budget; to disregard of General Assembly resolutions; and to mixed support for Security Council enforcement initiatives." *Id.*

325. KUPER, *supra* note 17, at 1. "The emphasis on human rights would be quite meaningless without the survival of living subjects to be the carriers of these rights." *Id.*

ina. It would also place all states on notice that preventive, automatic measures will occur in any state wherever genocide occurs.

C. Establish the Department for the Prevention of Genocide Within the Secretariat

Essential to a workable U.N. system to prevent genocide is the ability to efficiently and effectively communicate necessary information to the Secretary-General and the Security Council. The best way to accomplish this would be to create a genocide prevention department within the Secretariat, and more specifically, within the Department of Political Affairs.[326] This department would be called the Department for the Prevention of Genocide (DPG).[327] As described in greater detail below, the DPG would identify and gather information about nations that meet the requisite criteria, assess and analyze underlying causes that could contribute to genocide, formulate preventive plans, and ascertain the occurrence of triggering criteria that activates corresponding automatic measures to prevent genocide.[328] The DPG would communicate this information to the Secretary-General who would then communicate it to the Security Council.[329]

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326. Boutros-Ghali, *supra* note 7, at 23. In 1992, all political departments of the Secretariat were placed in this department to effectively monitor political activities. *Id.*

327. 1985 Special Rapporteur, *supra* note 2, at 43 (showing that support exists for the creation of an international body to handle genocide). The United Nations has previously created sub-organizations to monitor and protect human rights. Two examples are the Commission on Human Rights and the U.N. High Commissioner for Refugees. C.V. NARASIMHAN, THE UNITED NATIONS: AN INSIDE VIEW 250, 262 (1988).

328. Article 99 of the U.N. Charter provides, "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." U.N. CHARTER art. 99. While infrequently used, Article 99 seems to allow the Secretary-General the authority to gather information to bring to the Security Council. *See generally* SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 111 (3d ed. 1998). Gathering information and notifying the Security Council of potential situations that may threaten international peace and security would not negate the right of the Security Council to determine the existence of any threat to the peace as provided by Article 39. *Id.*

329. James S. Sutterlin, *Early Warning and Conflict Prevention: The Role of the United Nations*, *in* EARLY WARNING AND PREVENTION CONFLICT 122 (1998) [hereinafter EARLY WARNING]. "For purposes of the United Nations, early warning must be understood as having three elements: information, analysis, and a communication channel." *Id.*

D. Create an Effective Early Warning System

To successfully prevent genocide, the protocol must establish an effective early warning system. Ideally, this system would be managed by the DPG who would monitor countries according to certain categories, which correspond with the indicators of genocide. The DPG would also identify and monitor nations that are clearly moving towards internal conflict against a distinct group, even if the indicators of genocide were not present.[330]

To be effective and efficient, the DPG would need assistance to gather information. Therefore, the DPG would coordinate with other organs of the U.N., obtain information or complaints from individual states or groups, and communicate with NGOs.[331] Often, human rights observers in NGOs, like Amnesty International and Human Rights Watch, first recognize and document the early warning indicators of potential genocide.[332]

Suspect states would be classified into five early warning categories based on the indicators of genocide:

> Category I. This category would include states having the foundational indicators of distinct groups that vote or believe as a group and a history of genocide.[333] The DPG would maintain a file on each state containing a brief historical account of any past genocide, including its causes, the perpetrators' identity, how the genocide ended, efforts made by international organizations to prevent or end the genocide, and the effectiveness of such efforts. The DPG would assess this information, as well as relevant government policies during the period of genocide, to predict potential future cycles of genocide.[334] In addition to collecting this initial information, the DPG would monitor the coun-

330. Gurr, *supra* note 21, at 137.

331. *Id.* at 126-29. The book provides a valuable table of organizations that gather information regarding human rights violations, armed conflicts, and refugee situations. *See* Howard Adelman, *Difficulties in Early Warning: Networking and Conflict Management*, *in* EARLY WARNING, *supra* note 329, at 51-82 (Adelman effectively describes the benefits and challenges of gathering information through NGO's or other organizations.).

332. *See generally* Gurr, *supra* note 21, at 124.

333. *Id.* at 138-39. Minorities are at risk in 112 countries. However, not all of these countries have histories of genocide. *Id.*

334. *Id.* at 141.

tries in this category, and provide bi-annual or annual updates to the Secretary-General.

Category II. This category would consist of states having Category I characteristics and either one or more groups actively seeking autonomy or a severe economic recession.[335] The DPG's additional efforts for this category would include assessing the current situation in the state, ensuring the U.N. had credible fact-gatherers in the state to monitor adverse changes, and coordinating with other U.N. organs or subcommittees to formulate contingency plans to help the state avoid internal conflicts. In addition, the DPG would provide its assessment, contingency plans, and updates to the Secretary-General.[336]

Category III. A state in Category III would include the additional criterion that the state's government or a significant political party is publishing messages encouraging hate, murder, or rape against members of a distinct group.[337] In addition, if the DPG believed that a non-state actor or minor political party is publishing such genocidal messages, the DPG would confer with the Secretary-General to determine if the state should be placed in Category III. The DPG would continue its information gathering, formulating assessments, and making recommendations for contingency plans, but it would also immediately notify the Secretary-General when a state meets the criteria of Category III. The Secretary-General, in turn, would immediately notify the

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335. *Id.* at 124.

> At the beginning of 1996, forty communal (national, ethnic, religious) groups were enmeshed in violent conflicts with governments over issues of autonomy and collective rights. International bodies were committed to containing some of them, as in Bosnia and Iraq, but most were ignored. Another ninety communal groups throughout the world were targeted by discriminatory public policies that substantially and selectively limited their political, economic, or cultural rights.

Id.

336. *Id.* at 138.

337. O'Neill, *supra* note 272, at 77. O'Neill describes a survey that was conducted of 187 countries to determine how many countries truly allowed the press and media to publish without restraint. Sixty-two countries had freedom, sixty-two were partly free, and the remaining sixty-three countries had no freedom of the press. Therefore, he concludes, most of the media in the world is controlled by state governments. *Id.*

Security Council because automatic preventive measures would be implemented for Category III states.

Category IV. A state in Category IV would be on the verge of genocide. This would include states in which, on a small scale, the government's military or police force either murders or commits acts of genocide against a particular group. It would also include states where the government is unwilling to prevent, arrest, or prosecute individuals who murder, rape, or commit acts of genocide against a particular group. The DPG would continue fact-gathering, assessing, and planning, and would still communicate through the Secretary-General to the Security Council. The DPG would also determine the severity of the situation in Category IV states, and divide those states into three classes: Class 1 – when the government is unable to arrest or prosecute individuals murdering or committing acts of genocide against a particular group, and when the incidents are infrequent and minor. Class 2 – when the government is unwilling to arrest or prosecute individuals murdering or committing acts of genocide against a particular group, and when the incidents are infrequent and minor. Class 3 – when the government orchestrates murder or other acts of genocide against a particular group, or when the government is either unable or unwilling to prevent and prosecute, but the incidents are frequent, yet not substantial. The DPG would forward this information through the Secretary-General to the Security Council, which would implement automatic preventive measures.

Category V. These states would be clearly implementing or allowing genocide or acts of genocide on a substantial level. The DPG would continue fact-gathering, assessing, and planning, and would communicate through the Secretary-General to the Security Council. As with Category IV, the Security Council would implement automatic preventive measures to stop the genocide.

E. Require Automatic Action upon Occurrence of Certain Events

All U.N. actions would be premised on a requirement to attempt first to assist the state to overcome its challenges without U.N. intervention. Hopefully, through peaceful and positive measures, animosity or unrest

would cease before it expands. If it became obvious that the state's government was the root of the problem or was unwilling to halt the criminal conduct of its citizens, however, the protocol should authorize the U.N. to implement automatic measures to prevent genocide.[338]

The U.N. would initiate automatic measures within a specified time and manner when a state entered Categories III, IV or V. This would ensure that potential genocides are handled appropriately and timely no matter where they occur. The automatic measures would include all options available to the Secretary-General, the General Assembly, and the Security Council except for the deployment of military forces, whether peacekeeping or peace-enforcing.[339] The protocol would specifically state the automatic measure for each of the five categories.[340]

To implement these measures effectively, the Security Council must have authority to increase the scope of the automatic measures. The Security Council, however, must not have authority to reduce or eliminate the measures unless nine of its members, including all five permanent members, either concur or abstain in the decision.[341] If one of the permanent

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338. *See* Robert Skidelsky & Edward Mortimer, *Economic Sanctions as Means to International "Health", in* PREVENTIVE DIPLOMACY, *supra* note 7, at 155 (concluding that sanctions are going to be used more frequently to prevent conflict in its embryonic stage).

339. *See* Boutros-Ghali, *supra* note 7, at 17. Deployment of military forces, whether for peacekeeping or peace-enforcement, is extremely expensive and invasive. *Id.* In addition, automatic deployment of military forces may not be the preferred or desired solution to members of the United Nations, or more specifically, the members of the Security Council. Moreover, because military intervention is so intrusive, if it were one of the automatic measures, the Security Council and many of the states of the United Nations may not agree to the protocol.

340. It is understood that this proposal conflicts with Article 39 of the U.N. Charter. Article 39 designates the Security Council as the U.N. organ that makes recommendations and decides what measures shall be taken to maintain or restore international peace and security. U.N. CHARTER art. 39. This conflict could be resolved through an amendment to the U.N. Charter, specifically for matters of genocide, but an amendment is difficult to obtain. *See* BAILEY & DAWS, *supra* note 328, at 379-80; U.N. CHARTER arts. 108-109 (Article 108 states that amendments come into force only when "adopted by a vote of two thirds of the Members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, *including all the permanent members of the Security Council*." (emphasis added)). If an amendment is not obtainable to resolve the conflict between the proposal and Article 39, the automatic proposals could simply be recommendations to the Security Council. Recommendations, however, would not correct the deficiencies of the Security Council to prevent genocide. *See supra* notes 299-322 and accompanying text.

341. It may be easier for permanent members of the Security Council to allow implementation of automatic measures than to initiate preventive action against an ally.

members vetoes the request to reduce or eliminate an automatic measure, the measure would still occur. This reverse veto would force implementation of preventive measures unless all permanent members of the Security Council concur that it is the wrong action for a specific situation.[342] A reverse veto would also resolve several of the previously noted failings of the Security Council during past genocides.[343]

For example, if a state is in Category III because the government or a significant political party publishes messages of hate, the DPG would notify the Secretary-General and provide suggested preventive plans. The Secretary-General and the Security Council would then have a specific period in which to convince the government to end the harmful media publications before automatic measures are executed.[344] With the assistance of the DPG, the good offices of the Secretariat could make the first attempts at ending the malevolent media by quietly initiating a dialogue with the head of state. If the DPG and the Secretary-General believe that this effort is or would be insufficient, then the Secretary-General may attempt other negotiation measures such as sending a respected envoy on a goodwill or fact-finding mission or coordinating with the General Assembly to formulate an appropriate solution. When the specific period has ended or if the Secretary-General believes that the state will not end the publications, automatic measures would be implemented.

The automatic measures must be significant so that the head of state ends the genocidal propaganda, but not so severe as to cause permanent

342. This "reverse veto" proposal directly targets several deficiencies of the Security Council when dealing with genocide. It effectively implements measures to stop genocide even if several permanent members of the Security Council do not want actions taken against an ally or if they have no interest in the group being destroyed by genocide. *See supra* notes 299-306 and accompanying text. Because this proposal modifies the voting arrangements of the Security Council, an amendment to the U.N. Charter is required. *See* U.N. CHARTER art. 27. The likelihood of the Security Council modifying the voting arrangement, even to prevent genocide, is low. *See* BAILEY & DAWS, *supra* note 328, at 379. This is one reason why this article does not propose deployment of military forces as an automatic measure. None of the permanent members of the Security Council would ratify an amendment if military forces were automatically deployed. In addition, the amendment might be adopted and ratified if proposed during or soon after another tragic genocide.

343. *See supra* notes 299-322 and accompanying text.

344. It is understood that the international community should not "punish" a country for every type of genocidal statements published. In the United States of America, the Constitution mandates freedom of speech. This allows individuals to print or pronounce words of hate. A distinction must be recognized, however, when it is promoted or sanctioned by a country's federal, provincial, or state governments, or by one of the country's significant political groups.

economic damage to the state. The automatic measures could include measures such as withholding financial assistance by the World Bank or International Monetary Fund.[345] As was evident in the genocides of Bosnia-Herzegovina and Rwanda, the head of state either had complete or at least significant control over the media. In both situations, the leaders engaged in genocidal speech themselves or promoted it on the government-controlled media. Therefore, automatic measures would be most effective if they target the interests of the head of state and the government-controlled media.

If a state is in Category IV, Class 1, because the government fails to arrest or prosecute murders or rapes committed against members of a distinct group, the DPG would notify the Secretariat, present preventive plans, and remind the Secretary-General about the time limit before the Security Council must implement automatic measures. The offices of the Secretariat would then offer to assist the government to overcome their inability to prosecute the crimes. The country's legal system may have shortcomings, and the government may need assistance to train impartial judges or otherwise enhance its legal system. The U.N. could send legal experts to teach and train to address the systemic weaknesses. Moreover, if automatic measures were previously implemented because the state was in Category III, they would not abate until the government complied with the purpose of the automatic measures.

If the government is unwilling to prosecute criminals, this Category IV, Class 2, situation would require different measures. The DPG would notify the Secretary-General of this situation. The Secretary-General and the Security Council would then have a specific period—for example sixty days with one possible sixty-day extension—to implement necessary proposals to convince the state to correct the situation before a substantial crisis erupted. When the time elapsed, the Security Council would implement the automatic measures.

Once again, if the government is unwilling to arrest and prosecute the perpetrators of genocide, the automatic measures must be tailored toward the governmental officials. The Security Council could require freezing of the political leaders' personal assets. Any costs involved to freeze the

345. DES FORGES, *supra* note 6, at 91-92. President Habyarimana knew that his country desperately needed financing from the international community, and he tried to maintain some respectability in order to receive financial support from the World Bank and the European Union. *Id.*

assets would be paid by the asset, or real property could be sold to pay for the associated costs. Other automatic measures could include economic sanctions against the state. These sanctions must be narrowly tailored to the cause of the problem, however, and not designed to affect the general population unless absolutely necessary.[346] Overbroad sanctions could worsen the situation, rather than acting as an effective prophylactic measure. Additional sanctions could include "boycotts, embargoes, and capital controls."[347]

Automatic time constraints and measures would be initiated against states classified in Category IV, Class 3, and Category V. For states in these categories, the U.N. would seek assistance from local regional organizations to formulate preventive plans and conduct preventive diplomacy.[348] If the circumstances reach these levels, however, the automatic measures must be stringent. Moreover, if the automatic measures fail to prevent the escalation of events beyond this point, the Security Council should be planning direct military intervention.

VII. Conclusion

The U.N. can better prevent genocide by implementing preventive measures when the indicators of genocide first arise, long before genocide devastates its target group. Not only would this prevent death, rape, and other acts of genocide, but it would also cost significantly less than deploying thousands of troops or sending the necessary humanitarian aid required after genocide occurs. In addition, when genocide is not stopped, each succeeding death deepens the victims' hatred and instills within them a desire for revenge. This considerably increases the difficulty and cost of any subsequent peacekeeping mission.

A protocol to the Genocide Convention offers the most effective tool to prevent genocide. It would correct the Genocide Convention's deficiencies and address the mistakes made during previous U.N. efforts to prevent

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346. Skidelsky & Mortimer, *supra* note 338, at 173.

347. *See id*. at 155. "Capital sanctions restrict or suspend lending to, and investments in, the target state, and may involve the freezing of foreign assets and restrictions on international payments." *Id.*

348. *See* Gilbert M. Khadiagala, *Prospects for a Division of Labour: African Regional Organizations in Conflict Prevention*, *in* Early Warning, *supra* note 329, at 131-61; Salim Ahmed Salim, *Localizing Outbreaks: The Role of Regional Organizations in Preventive Action*, *in* PREVENTIVE DIPLOMACY, *supra* note 7, at 101.

genocide. The protocol would recommit states to the principles of the Genocide Convention, and it would foster international agreement on how to best prevent the devastation of genocide. Moreover, such consensus would lessen the Security Council's concerns about intervening into the internal affairs of a sovereign state on the verge of genocide.

The automatic measures of the protocol would also ensure its timely, universal, and equal application to any country where genocide dawns. Preventive, automatic measures that commence upon the occurrence of certain events would require action by the Security Council even if the permanent members of the Security Council have no political or security interest in the state or region confronting genocide. Automatic actions would also lessen the divisive debate about appropriate U.N. actions in response to genocide. In addition, the measures would eliminate the belief that Security Council action is unlikely if it is uninterested in the state or if its members are on opposing sides of the debate to take action to prevent genocide. It would also ensure that Security Council action reflects the principle that all states are equal sovereigns.[349] Finally, the protocol's automatic measures would guarantee that all potential genocides are presented to and considered by the Security Council.

The U.N. may not be able to solve every problem, but genocide is so destructive that the nations of the world should be able to agree on a protocol to prevent it. There are no simple answers to genocide. Each complex situation presents unique ethnic divisions, economic challenges, and nationalistic tendencies. Genocide does not occur in a vacuum, and it never will.

If the genocides in Bosnia-Herzegovina and Rwanda taught any lesson, it is that, when certain indicators of genocide are present, the international community must quickly gather facts and implement an effective response. The U.N. clearly knew the tension in Rwanda could explode into genocide. In both Bosnia and Rwanda, individual soldiers and civilians did not simply wake up one day and decide to slaughter a group of people without some preceding acts or events. Rather, the path to genocide usually begins with and is fueled by government-produced genocidal propaganda to enflame one ethnic group against another.

A protocol to the Genocide Convention could prevent genocide before a machete is lifted or a gun is aimed against a group targeted for

349. Roberts & Kingsbury, *supra* note 44, at 55.

genocide, whether in Europe, Africa, Asia, or the Americas. A protocol mandating specific and automatic U.N. action could stop genocide before the murders begin. Genocide may not be completely preventable, but the genocides in Bosnia-Herzegovina and Rwanda suggest the best solution to reduce its occurrence: a protocol to the Genocide Convention. One would think an effective protocol would allow our "advanced" and "civilized" world to better prevent genocide, the most destructive human rights violation, without resort to intervention by international military forces.

Appendix

UNITED NATIONS CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Approved and proposed for signature and accession by General Assembly Resolution 260 (III) A of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;
Recognizing that at all periods of history genocide has inflicted great losses on humanity; and
Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 3. The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article 4. Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6. Persons charged with genocide or any of the other acts enumerated in Article 3 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.

Article 7. Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11. The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12. Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13. On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14. The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15. If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16. A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

(a) Signatures, ratifications and accessions received in accordance with Article 11;
(b) Notifications received in accordance with Article 12;
(c) The date upon which the present Convention comes into force in accordance with Article 13;
(d) Denunciations received in accordance with Article 14;
(e) The abrogation of the Convention in accordance with Article 15;
(f) Notifications received in accordance with Article 16.

Article 18. The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article 11.

Article 19. The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL[1]

REVIEWED BY MAJOR KERRY L. CUNEO[2]

> *I would state that on Sunday March 2nd 1879 . . . I saw Lt. L.H. Orleman, 10th Cavalry, having intercourse with his said daughter [Lillie Orleman] . . . . [O]n the following day, March 3rd 1879, Miss Lillie Orleman confessed to me that her father, Lt. Orleman, had been having sexual intercourse with her for the past five years, or since she was thirteen years of age, and that he had placed a loaded revolver to her head, threatening that he would blow her brains out if she did not consent to his horrible desires. Miss Orleman begged me repeatedly and on bended knee to save her, and take her from this terrible life of shame that she had been leading since she was thirteen years of age.*[3]

Such was the alleged basis upon which Captain Andrew J. Geddes, 25th U.S. Infantry, Fort Stockton, Texas, preferred court-martial charges in 1879 against his colleague, First Lieutenant Louis H. Orleman. Lieutenant Orleman countered the charge of incest by bringing charges against Geddes. Orleman alleged two specifications of conduct unbecoming an officer and a gentleman, one count for an attempt to corrupt and abduct Lillie Orleman and the other for accusing Lieutenant Orleman of incest. He additionally accused Geddes of one specification of false swearing for making a written deposition falsely accusing Lieutenant Orleman of sexual intercourse with Lillie. The Department of the Army proceeded to trial solely against Captain Geddes. Lieutenant Orleman, accused by an eyewitness of repeated acts of incest upon his young daughter—arguably the most offensive behavior conceivable in a civilized society—never faced any adverse or disciplinary actions by the military.

Military history fans, criminal law practitioners, and anyone who finds stories of sexual misconduct intriguing ultimately will enjoy reading

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1. LOUISE BARNETT, UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL (2000).

2. United States Army. Written while assigned as a student in the 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BARNETT, *supra* note 1, at 3-4 (quoting deposition testimony of Captain Andrew J. Geddes).

this book. Be warned, however, that author Louise Barnett takes longer than necessary to introduce the reader to excerpts from the actual Geddes general court-martial. Readers who initially picked up the book anticipating an immediate introduction to the facts and circumstances surrounding the charged offenses will find that the initial third of the book moves quite slowly. Barnett uses that portion to paint with a detailed brush the constrained moral environment and unique military community in which events leading to court-martial charges unfolded.

Barnett's chronicling of the environment surrounding this seemingly extraordinary court-martial enables the reader to understand how and why the Geddes court-martial took place. A criminal trial against an incest-*accuser?* Arguably, Captain Geddes, respected by many as a stalwart Army officer and honorable man of good moral character, made for a credible complainant, however shocking the nature of his complaint.[4] Barnett's narrative provides us with a framework in which to give the inconceivable some context. By transporting us to an era of frontier military law and frontier justice, Barnett uses the Geddes court-martial as a vehicle for communicating social attitudes, morals, and taboos of the latter part of the nineteenth century. Her explanations of late eighteenth century society's social values permit us to appreciate more fully why Geddes's complaint offended so many and merited a court-martial in the eyes of military leadership. Barnett depicts a military world composed of highly traditional, masculine males entrenched in a warrior mindset and imbued with rigid, prudish attitudes toward any public mention of sexual behavior.

Barnett hypothesizes that prudish societal morals and horror over the *accusation* of something as scandalous and taboo as incest, combined with traditional male military attitudes and an Army leadership dedicated to ending CPT Geddes's career, allowed for no other trial outcome but the guilty verdict reached in the Geddes case. In support of her argument, she documents a military criminal trial so painfully biased against the accused

4. *Id*. at 27-32. Barnett's research also indicated, however, that Captain Geddes was an adulterer who enjoyed dalliances with various women of legal age throughout his military career. *Id*. at 33-37. Regardless, it remains indisputable that Captain Geddes provided the commander of the Department of Texas, General E.O.C. Ord, a written deposition where he swore he had observed the Orleman father and daughter engaging in sexual intercourse in their Fort Stockton, Texas, billets. Geddes reported under oath that the young woman shortly thereafter begged for his assistance in stopping her father's heinous acts. *Id*. at 4-5. Surely his shocking complaint merited some formal or informal investigation into the affairs of Lieutenant Orleman. Yet the Army elected to criminally pursue Captain Geddes, dragging him through a trial that lasted three months.

that it only could be described as a kangaroo court or witch-hunt. Barnett exposes the dangers of a judicial system led by those who favor politics and personal passion over the interests of justice. A review of the Geddes court-martial reveals trial procedures that offend military lawyers' fundamental sense of fairness and that clearly violate the Constitution's due process rights and protections as well.[5]

Barnett's work will appeal to a broad spectrum of readers. Laypersons who find military and legal terminology more unfamiliar than a foreign alphabet need not turn away in frustration, as Barnett explains these terms in a simple and easily digestible manner. She places asterisks by uncommon military terms and provides brief, meaningful explanations. She also explains military titles and customs of the post Civil War military, as well as legal procedures of the period, which provide context for lay persons as well as modern military law practitioners (those who began practice after the Uniform Code of Military Justice was put into effect in 1950).

For instance, the notion that nineteenth-century military officers could impetuously prefer charges against one another for any perceived slights—and that such complaints typically were resolved at court-martial—seems an excessive and extraordinary remedy to the modern military litigator.[6] Barnett indicates that such behavior by officers was routine during this period of military history. She also presents vignettes to explain a soldier's due process rights as understood during the Civil War era, and offers anecdotes to communicate the moral code under which post-Civil

5. *Id*. at 71-72. Military criminal law practitioners will be confounded by the many flagrant procedural and constitutional errors perpetrated at trial against Captain Geddes. For example, the court permitted key government witnesses to repeatedly testify to the words and actions of others, which served to increase damaging testimony against Geddes and also to bootstrap the credibility (and purported victimization) of the prosecution witnesses. Court members ignored repeated objections by Geddes's counsel, George Paschal, to the consideration of such testimony. The court admitted into evidence (over defense objection) gossip and third-party statements offered on the stand through critical prosecution witnesses such as Lillie Orleman and Lieutenant Orleman. Even more disturbing, the court denied defense efforts to proceed with any significant line of cross-examination of Lillie, even after direct examination of Lillie had indicated significant inconsistencies in Lillie's version of events between her father and herself, and their contact with Geddes regarding events underlying the charges against Geddes. The court appeared to close off the defense line of clearly relevant questioning out of deference to some misguided, archaic sense of womanhood and exaggerated concern for Lillie's sensibilities. *Id*. at 160-62. The court responded similarly to defense attempts to cross-examine a number of prosecution witnesses. The members routinely sustained objections by other court members to relevant lines of cross-examination by the defense, claiming the witness "has stated what he knows and should be excused from irritating and annoying questions." *Id*. at 88-89.

War society functioned. Addressing these matters preliminarily provides context and improves the flow of the latter portion of the book, which chronicles the actual court-martial.

Barnett's writing shines brightest when she simply allows the story of the Geddes court-martial to tell itself. She offers court testimony via transcript excerpts and references to journals kept by some of the court-martial witnesses and spectators, and develops the personalities and motivations of the significant participants in the court-martial process. The Geddes court-martial ensnares the reader and makes for an entertaining experience from a human interest, historical, military, and legal perspective. The very idea that an incest-accuser (rather than the alleged sexual offender) would be taken to trial, combined with the tortured, disgraceful, convoluted legal process he suffered through for three months, astounds the reader. The court-martial makes for captivating reading, particularly for those who have practiced in military courts.

Barnett skillfully describes how the prosecution's relentless manipulation of the court-martial process served to place Geddes at a ridiculous disadvantage; his fate was sealed long before the court concluded its receipt of evidence and closed for deliberation on findings.[7] Through descriptions of trial testimony or excerpts of actual testimony, Barnett shows just how quickly the court moved to stifle defense objections and attempts at critical cross-examination.

The defense had to request witness production through the prosecuting attorney, Judge Advocate John Clous.[8] Clous routinely denied defense witness requests on the basis that the requested witness was "not material to the ends of justice." Barnett suggests that Clous, an ambitious judge advocate who had unchecked power regarding defense witness production, manipulated the system to an extraordinary degree, routinely denying defense witnesses whose testimony may have been damaging to the government's case. The court also permitted the government to present a

6. Modern military regulations encourage commanders to resolve misconduct by military personnel at the lowest level appropriate. Barnett describes many offenses that went to court-martial in the late 1800s, which currently would be handled by commanders either administratively or as nonjudicial punishment.

7. Findings refers to the trial portion in which receipt of evidence has been completed; the factfinder then considers all the evidence in the case, and makes a determination of guilt or innocence as to each charged offense.

8. Barnett never identifies what rank Judge Advocate Clous held at the time of the Geddes trial; she refers to him either as Judge Advocate John Clous or simply Clous.

parade of favorable character witnesses for Orleman but denied most defense witness production requests designed to elicit comparable testimony for Geddes.

Barnett's greatest weakness lies in her persistent sharing of tediously detailed information pertaining to social and cultural attitudes of the late nineteenth century. Admittedly, the Geddes trial permits a fascinating glimpse into human frailties and devotions, unyielding military attitudes, and flawed judicial procedure. The court-martial transcript suggests a trial filled with intrigue, inconsistencies (lies), and detailed discussions of sex and virginity. It documents emphatic praise of key witnesses' good moral character as well as artful attacks on those same persons' character. In other words, the Geddes court-martial offers great drama and a spellbinding journey for most readers.

Unfortunately, Barnett leaves her fascinating storyline too often and pursues with unnecessary zeal what at best should be a distinctly minor theme of post-Civil War society's preoccupation with virginity and sexual purity. Barnett dedicates the first third of the book to contemporaneous matters far outside the scope of the Geddes court-martial. Her disproportionate, persistent, somewhat clumsy emphasis on social mores and prudish social behaviors detracts from the compelling story of the Geddes trial.

Certainly, it is helpful to learn that members of the post-Civil War society viewed Captain Geddes's *allegations* against Lieutenant Orleman as scandalous. Barnett loses the thread of the court-martial, however, by dedicating such a substantial portion of her writing to providing the reader with a contemporaneous moral code. She also gets buried under tangential historical information that, while perhaps painstakingly accurate, contributes nothing to the Geddes saga. For example, Barnett documents in great detail the military exploits of General Ord.[9] This information, while indicating thorough research, adds nothing to the Geddes trial storyline or to the overall coherence of the book. Rather, such extensive forays into irrelevant historical data and other minutiae detract from the powerful court-martial drama by provoking lapses in the reader's concentration.

Barnett's elaborate emphasis on the cultural and physical environment in which the court-martial events unfolded, rather than on the character interplay of the principle witnesses, diminishes the power of the court-martial and detracts from Barnett's work. By her unyielding pursuit

9. BARNETT, *supra* note 1, at 37-49.

of moral and cultural matters far beyond any reasonable nexus to the purported focus of her novel (the Geddes court-martial), Barnett risks losing her audience long before the reader can discover the enthralling court-martial tale that eventually unfolds. The actual testimony from the Geddes trial is quite compelling and provides marvelous drama. Barnett could easily mesmerize her readers by replacing unnecessary background information with more and lengthier excerpts of the trial transcript.

Reading the transcript excerpts allows one to experience the trial emotions and injustices, and to react with indignation over the flagrant violations of trial procedure committed against Captain Geddes. Barnett never portrays Geddes as a wholesome hero; her research indicated that he was quite a womanizer, and that a woman's marital status would not deter him from the pursuit and consummation of a relationship.[10] However, Geddes's human qualities, along with the outrageous and repeated denial of his fundamental trial rights, shine through the testimony transcript and lend a powerful emotional depth to the glimpse of military frontier history that Barnett chooses to share with us.

Military history buffs prone to idolizing forceful military leaders may not appreciate Barnett's portrayal of the personal, perhaps petty sides of notable American warriors of the late nineteenth century. Others may view more enthusiastically Barnett's speculation as to the causes of some military leaders' vendettas against Captain Geddes. By examining senior officers' personal passions and private motivations as possible reasons for the Geddes trial going forward, Barnett portrays senior leaders from an unflattering but thoughtful perspective. In so doing, she challenges her readers to consider some American heroes and military leaders in a new light.

Barnett focuses on the personal characteristics of Generals E.O.C. Ord and William Tecumseh Sherman, two distinguished, powerful soldiers and military leaders of the period. Barnett exposes their personal motives for taking legal action against Geddes, and suggests that their decisions were heavily influenced by their own views on morality as well as their personal dislike of Geddes (and of men holding Geddes's reputation as a philanderer). In fact, Barnett implies that these Army leaders' personal motivations and psychological absorption of the societal standards of the period so overrode their sense of fairness and common sense that they were willing to permit a travesty of justice to bring about Geddes's downfall.[11]

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10. *Id.* at 32.

Barnett documents how these generals—with substantial assistance at trial from Judge Advocate Clous—intentionally muddied the judicial process to serve their own ends. Post-trial, the generals perpetuated further wrongs by permitting unreasonable and unsupportable legal findings and allowing the sentence to stand, at the expense both of Captain Geddes and of the perception of fairness in the military criminal justice process.

Understanding the socio-economic, political, and physical climate surrounding the trial assists the reader in understanding how and why justice was so abused in the Geddes case. Barnett identifies Fort Stockton, Texas, as a bleak and isolated Army frontier post situated on barren land in West Texas.[12] Barnett suggests that the miserable conditions of daily life played a key role in turning much of the community against Geddes.[13] She argues that members of the Fort Stockton military community simply were not willing to open the Pandora's Box that a court-martial over incest charges would have provoked, as this would have proven too threatening to their collective psyche. The military community appears to have determined that it was better to attack the scandalous allegation made by Geddes, the incest-accuser, rather than go after the potential sexual offender himself. Pursuing Orleman would have threatened their psychological, emotional, and moral well being to an intolerable degree. What better way

11. Specifically, Barnett suggests that Ord's deep-rooted attachment to his own eldest daughter, Bertie, heavily influenced his decision-making in the Geddes case. Barnett theorizes that Ord's strong bond with Bertie inevitably colored his perspective and impaired his ability to weigh information impartially in the Geddes matter. In Barnett's opinion, General Ord may well have viewed any lawful displays of physical affection by a father toward a daughter as appropriate, and been personally offended that Geddes could so have besmirched the innocent attentions of a fellow devoted father and military man. Barnett characterizes Ord as an experienced and decisive commander best suited to direct military action, unhappy with his assignment as commander of the Department of Texas. She contemplates that Ord would have identified strongly with Orleman as a fellow military father of a devoted daughter, and, consistent with widespread cultural beliefs of the period, Ord would have preferred to believe Orleman was a devoted protector of his daughter, rather than a violator. Barnett's conviction that Ord's relationship with Bertie permitted his emotions rather than his objectivity to control his decision-making regarding criminal action against Geddes seems awfully attenuated. To support her theory, Barnett relies primarily on the physical composition of a family photo, in which nine-year-old Bertie appears to be "in intimate physical proximity" with her father. *Id.* at 37-49.

12. *Id.* at 49-53.

13. Inadequate living conditions included substandard housing, poor food, and rampant disease. These conditions, along with constant anxiety about Indian attacks and prejudice toward the black regiments stationed at Fort Stockton as well as toward the local Mexican (native) population, combined to create an unhealthy and unstable emotional climate within the Fort Stockton military community. *Id.*

to bury such risks, than to unite against Geddes, the accuser? Barnett also explains that, while the extreme hardships and frustrations shared by Fort Stockton personnel united the community and made for a closer-knit society, these deplorable conditions also allowed gossip to fester and bred deep-seated hatreds between commanding officers.[14] She suggests that such dynamics worked against Geddes and helped to bring about his downfall.

Military law practitioners will appreciate the surprising true hero of the Geddes trial—The Judge Advocate General of the Army. Barnett indicates that a firm voice of reason appeared only in the final stages of post-trial evaluation, in the form of a legal review conducted by the Army's most senior legal advisor, William M. Dunn, The Judge Advocate General. General Dunn logically and dispassionately reviewed the Geddes court-martial evidence. He acknowledged the blatant and repeated violations of trial procedure and due process rights, and he subsequently recommended to President Rutherford B. Hayes that the Geddes conviction be reversed. Dunn's objective professionalism reminds military lawyers of the critical need for disinterested, unbiased parties to lead and monitor our judicial system if we are to achieve and maintain a system that is perceived as fair.

Unquestionably, *Ungentlemanly Acts* provides worthwhile reading. The Geddes trial will fascinate any reader willing to muddle through (or skip over) those segments within the first third of Barnett's work that stray too far from the court-martial storyline. Overall, Barnett successfully conveys a thoughtful analysis of the military and legal issues surrounding a court-martial strongly influenced by the societal values of the late nineteenth century.

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14. *Id.* at 48-53.

DESERTION[1]

REVIEWED BY MAJOR JOHN E. HARTSELL[2]

Careful, circumspect, always with one concern and one concern only— how to protect his own derriere.

-Author and Vietnam deserter Jack Todd mocking someone else's decision-making process.[3]

I. Introduction

Jack Todd's *Desertion* is not just about a man's crime, cowardice, or betrayal. It is also about the colorful life and self-centered choices of a twenty-three year-old draftee who chose to desert to Canada rather than serve as an Army journalist during the Vietnam War.[4] In *Desertion*, Jack Todd colorfully exposes the adventures of an Army deserter as he grew up in Nebraska, fell in lust, went to boot camp, deserted to Canada, and ultimately reveled in a counter-culture lifestyle. The book suffers mortally, however, because Todd appears to have developed a boundless, emotional affinity for the main protagonist: himself.

Throughout the book, Todd offers purposefully selected glimpses of his experiences in an effort to justify his actions to his reader. He states that in 1969 he opposed the Vietnam War, but his true anti-war beliefs were masked by his love for a young girl.[5] When the girl unjustly broke up with him while he is in basic training,[6] Todd explains, he suddenly remembered his opposition to the war and fled to Canada.

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1. JACK TODD, DESERTION (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Jack Todd, *Teflon Corey Secures His Own Job While Axing Others*, The Ottawa Citizen, Oct. 18, 1995, at F3.

4. *Id*. at 97, 113.

5. *Id*. at 12, 14, 60, 97, 110, 112.

6. *Id*. at 99-101.

Todd's endeavor to justify his actions fails because the facts surrounding his sympathetic justifications frame a far different portrait than the one he tries to paint. His attempts to use autobiographical stories to summon morality, exploit his angst, and spin events to his favor are all undermined by his ego-fueled depiction of facts and contradictory recollections. As a result, the book is little more than a boorish collection of self-gratuitous anecdotes, which attempt to explain away a serious offense and lay blame on others.

II. The Life of a Deserter

Todd tells his reader about his life's fortunes and misfortunes. He grew up in a close-knit family, attended college, and became editor of the University of Nebraska newspaper,[7] but he left college in his senior year to work as a reporter for *The Miami Herald*.[8] In Miami, he covered politics, riots, and a multitude of unsavory crimes.[9] He also became smitten with the *femme fatale* of the book, a Miami native named Mariela.[10]

Todd describes Mariela as a quiet, shy virgin who had been pursued for years by a socially inept suitor.[11] Todd recounts how he successfully took the suitor's girl, and later, in far too much detail, how he intrepidly took Mariela's virginity.[12] Then a letter from the draft board destroyed the professional and personal bliss that Todd was enjoying in Miami.[13]

Todd intended to complete his last semester of college at the University of Miami after he quit the University of Nebraska.[14] Inexplicably, however, he decided not to re-enroll in school once he got to South Florida.[15] Shortly thereafter, he lost his student deferment and became eligible for the draft. Surprisingly, the allegedly anti-war Todd did not evade the draft initially. He did not flee to Canada as a draft dodger; instead, he

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7. *Id*. at 45.
8. *Id*. at 14, 22.
9. *Id*. at 17-22.
10. *Id*. at 100.
11. *Id*. at 14.
12. *Id*. at 106.
13. *Id*. at 22.
14. *Id*.
15. *Id*.

received his draft notice, took his oath,[16] and reported to Fort Lewis, Washington, for basic training.[17]

As with practically every military recruit since time immemorial, Todd disliked basic training. He thought the facilities were Spartan,[18] the training pointless,[19] the food and sleep insufficient,[20] and the training instructors Draconian and sadistic.[21] Todd was terribly disturbed that he was bunked with men who actually snored, coughed, and created even more distasteful bodily noises than those.[22] He paints an extraordinarily bleak picture of his basic training experience, and punctuates it with banal stories about having to march,[23] do push-ups,[24] fold socks,[25] and live in a cold public barracks.[26]

Todd's physical longing for Mariela increased along with the rigors of basic training.[27] He reveals that he became more sexually sentimental with each march.[28] Ironically, he complains of basic training's indignities, yet he unabashedly tires his reader with details of Mariela's intimacies.[29] He recounts his confidence in their relationship and in his future. He learned that he was unlikely to ever see combat, and that he would also probably be an Army journalist doing little more than issuing press releases.[30] He also knew that he had a job at the *Herald* waiting for him once he finished his two-year obligation to the Army.[31] He truly believed Mariela would wait for him and that he was the master of his own destiny; he had no idea

16. *Id*. at 72. Todd knew that Muhammad Ali opposed the war and refused to take his oath. When it came time for the allegedly anti-war Todd to take his oath, he recalls: "Standing there waiting to step forward, I think one last time about refusing to take the step, following Ali's example. But Ali knew what he was going to do and had lawyers waiting. This is not the kind of thing you do on impulse." *Id.* These are not the convictions of a man with deep-seated, anti-war sentiment.

17. *Id*. at 12.

18. *Id*. at 79.

19. *Id*. at 85.

20. *Id*. at 73-75.

21. *Id*. at 93, 99.

22. *Id*. at 94.

23. *Id*. at 84.

24. *Id*. at 74.

25. *Id*. at 73.

26. *Id*. at 79, 89.

27. *Id*. at 79.

28. *Id*. at 83.

29. *Id*. at 83, 106.

30. *Id*. at 97, 113.

31. *Id*. at 15.

he had doomed his relationship with Mariela even before he departed Miami.

Todd's sexual bravado lead to his downfall. He writes that back in Miami, when he deflowered Mariela, he was quite pleased with himself. He felt like a "conqueror,"[32] but Mariela confided to him, "So that was sex huh? So what's the big deal?"[33] Her comments "crushed, humiliated, and disgraced" Todd.[34] As a result, he sought the advice of a friend to improve his sexual abilities and mend his bruised ego.[35] Meanwhile, the vengeful, socially inept suitor re-entered the story while Todd was in basic training, telling Mariela that Todd sought sexual pointers for her benefit. She was outraged, and ended the relationship when Todd later called her from Fort Lewis.[36]

Todd's reaction to Mariela's rejection was monumentally excessive: he decided to desert to Canada. He knew that he would not go into combat,[37] that he had a job waiting for him,[38] and that he could at least try to go to Florida to talk to Mariela.[39] Instead, Todd desperately proclaims, he suddenly remembered that he had always been against the war and, as a result, he deserted to Canada to follow his conveniently rediscovered moral conviction.[40] Todd paints a self-serving picture of an emotional catharsis, and he tries to hoodwink the reader into believing that Mariela's rejection awoke his sleeping morality concerning the war. On the contrary, the reader concludes, Mariela obviously hurt his pride and he reacted in the most infantile of ways: by running away.

When Todd left Fort Lewis, he did not act like a man with awakened anti-war morals; instead, he acted like a drunken frat boy on a panty raid. He writes,

> I buy a dozen chocolate bars. Now I unwrap the candy bars and place them carefully here and there inside the footlocker, which happens to sit right next to the radiator, which is always red-hot

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32. *Id*. at 107.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*. at 107-08.
37. *Id*. at 13, 97.
38. *Id*. at 15.
39. *Id*. at 111.
40. *Id*. at 111-12.

> to compensate for the open windows. When the MPs figure out I'm gone, they'll have a nice mess of gooey melted chocolate to clean up. Not much as gestures of defiance go, but it's the best I can do on short notice.[41]

He did not paint peace signs on the installation, did not conduct a sit-in, and never once told his training instructors that he was a conscientious objector. Instead, Todd played a juvenile prank and then ran off in the exact opposite direction of Miami: Canada.

In Canada, Todd engaged in a lifestyle that can, at best, be described as unusual. While "on the lamb," he landed a job with the *Vancouver Sun*,[42] which legitimized his immigration status. A week later, however, he joined a strike against the very paper that helped him remain in Canada.[43] Thereafter, Todd deserted the *Sun* and became a vagabond. He drifted into towns, jobs, and other peoples' lives. At different points he was: a reporter,[44] a dishwasher,[45] a drunk,[46] a pornographer,[47] a leech,[48] a hitchhiker,[49] a poet,[50] a celebrity-gossip writer,[51] a recipient of Canadian unemployment payments,[52] and an ex-American.[53] Interestingly enough, aside from his criminal efforts to desert, he never became an active war protestor while in Canada.

III. Blame of Others

Todd blames three sources for forcing him to abandon his parents[54] and his country. First, he blames the Nixon Administration for continuing

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41. *Id*. at 120.

42. *Id*. at 179-80. The peaceful Todd boasts that during the job interview he got angry at the managing editor and secretly desired to punch him out.

43. *Id*. at 192.

44. *Id*. at 179.

45. *Id*. at 229.

46. *Id*. at 201.

47. *Id*. at 232.

48. *Id*. at 251.

49. *Id*. at 220.

50. *Id*. at 203.

51. *Id*. at 239.

52. *Id*. at 250. "The lax Canadian rules make it possible to live on unemployment for a full year (I've learned they won't deport me if I apply), and I figure that's a year I can devote to serious writing." *Id.*

53. *Id*. at 263.

an immoral war.[55] Second, he blames Mariela for her failure to understand why he publicly revealed the details of their sex life.[56] Third, he blames the cruel and oppressive drill sergeants at Fort Lewis who polarized him against the United States Army.[57] Ironically, Todd himself, through his complaints and justifications, demonstrates that these three sources unwittingly played only a very limited role in his crime. The primary cause of Todd's desertion was his own selfishness. He chose desertion; desertion did not choose him.

Todd waxes pathetic about how he loves America and how Nixon was the real traitor.[58] He argues that the war was wrong, and that fleeing to Canada was one of the few ways to be right.[59] He adamantly maintains that moral conviction drove him north, and moral conviction forced him to desert.[60] His own book undermines his explanation, however, and it demonstrates that his Johnny-come-lately blame of the Nixon administration is disingenuous.

Although Todd insists that he was against the war, he fails to cite a single article, demonstration, protest, or editorial to corroborate his claim. Todd subjects his reader to incredible tales of his experiences in sports,[61] drinking,[62] reporting,[63] and sex.[64] He prattles on endlessly about events he reported,[65] a tooth that was pulled,[66] a party he attended,[67] meals he ate,[68] people he met,[69] songs he heard,[70] weather he endured,[71] cigarettes he

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54. *Id*. at 259. Todd's lamentation that he was unfairly separated from his family is curious in light of how he acted. When his father visited him in Canada, Todd became impatient with him within twenty-four hours. Todd reacted to his father's farewell advice as follows: "I understand that he's trying to tell me something about life, but I'm in no mood to listen to this bizarre old man in a bus station. I just want to see him back on the bus before he does something outrageous." *Id*.

55. *Id*. at 13, 97, , 149-50.

56. *Id*. at 107-13.

57. *Id*. at 74-106.

58. *Id*. at 13, 97, 149-50.

59. *Id*. at 112.

60. *Id*.

61. *Id*. at 57-58.

62. *Id*. at 70, 201.

63. *Id*. at 21.

64. *Id*. at 70, 131, 203, 214, 249.

65. *Id*. at 17-21.

66. *Id*. at 115.

67. *Id*. at 123.

68. *Id*. at 169.

69. *Id*. at 136-41.

smoked,[72] a lesbian that he bedded,[73] threesomes he shared,[74] police he scammed,[75] and pornography he wrote.[76] He fails to detail any active participation in the anti-war effort, however, or any real basis for his purported anti-war beliefs.

Todd claims that he loves America,[77] but his sincerity must be measured against the insults he hurled at Americans in Canadian newspapers:

> · With typical head-up-the-keester Yankee savoir fair, the editors of "The Sporting News" have succeeded in proving only that when it comes to sophistication, your average American falls somewhere between Gomer Pyle and Homer Simpson.[78]
>
> · Americans think Formula One is what you give your kid instead of breast-feeding.[79]
>
> · St. Louis has more fat people per square inch than you'll find at the cheesecake counter in Lester's.[80]
>
> · The Indy 500 is a shadow of the race it used to be, but it does still draw rednecks. One of them locked his keys in his pickup at this year's race, and it took two hours to free his brother and uncle.[81]
>
> · [Describing Cincinnati] What Indianapolis would be if they nuked the place.[82]
>
> · [Describing Buffalo] Cincinnati without the class of Marge Schott.[83]

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70. *Id*. at 124, 144.
71. *Id*. at 78.
72. *Id*. at 82.
73. *Id*. at 146.
74. *Id*. at 214.
75. *Id*. at 157.
76. *Id*. at 242.
77. *Id*. at 111, 265.
78. Jack Todd, *Rating as Least-Best Sports Town Rankles Montrealers*, THE OTTAWA CITIZEN, Aug. 9, 2001, at C3.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.

> · The Leafs are ours, [Boston] fans get drunk and throw up on their shoes on Crescent St., and don't understand hockey anyway.[84]
>
> · [Describing fans attending the Canadian Grand Prix] This is no beer-soaked IndyCar crowd with its ration of six teeth, three six-packs and 60 IQ points per fan.[85]

The book is a monumental failure because Todd loves himself far too much. His clear disrespect for America merely parallels his disrespect for his former girlfriend.

Todd's descriptions of Mariela demonstrate that he viewed her as little more than a sexual object for whom he maintained a constant, lurid interest. Nonetheless, he sophomorically blames her for breaking his heart and causing him to desert. The first time he mentions Mariela, she is portrayed like a mindless Playboy bunny, not a soul mate who supposedly supplanted his deep moral convictions. He writes:

> Mariela dressed for work, me in jeans and a work shirt, ready for a three-day drive to Nebraska. Drained from one last night together, fresh out of ways to say good-bye. Even now, with no make-up after a sleepless night, she is one beautiful woman, my Cuban lover, tantalizing in a crisp white blouse and a short green skirt. I reach too far across the table and brush her left nipple with the backs of my fingers. She pushes my hand away.[86]

His description of their "emotional" farewell is equally sexual.

> It's time to go. The waitress brings our checks. I start to pay but Mariela says no, she'll buy. We splash through the rain to my old white Plymouth and drive the flooded streets and kiss, one last frantic kiss good-bye at the door of her office. Then she is out of the car and gone, the flash of one long, tanned leg under her tight green skirt the last thing I see.[87]

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83. *Id.*

84. Lance Hornby, *Leafs Watch*, THE TORONTO SUN, Feb. 24, 1997, at 68.

85. Dan Proudfoot, *Villeneuve Walks Where Others Fear to Tread*, THE FINANCIAL POST (Toronto), June 18, 1996, at 56.

86. TODD, *supra* note 1, at 12.

87. *Id.* at 15.

Todd shrugs his criminal responsibility for desertion onto Mariela because she had the audacity to break up with him. Yet, his recollections of her are prurient not pure, leering not loving, and sordid not sentimental. When Todd bid farewell to the girl he claims broke his heart, he did not say, "I love you," "I'll miss you," "See you soon," or anything of the sort. He kissed her and then caught one last salacious look at her from behind. Todd should be more honest with both himself and his reader; Mariela simply broke up with him, but he alone broke the law in response. Ego, not Eros drove him to Canada.

Todd's ham-handed efforts to blame the Army instructors for his desertion are as weak and hollow as his efforts to blame Nixon and Mariela. He blames the drill instructors because they tried to change him, teach him about camaraderie, and give him a sense of purpose. They tried to show him that the sum is always greater than its parts, but their lessons were lost on Todd.

Todd refers to Fort Lewis as a "hell-hole."[88] He relates how basic training ignored his personal needs. He complains that there were "no women, no Cokes, no candy bars, few cigarettes, and very, very little conversation."[89] He wanted to be alone and to read.[90] He wanted to smoke.[91] He wanted to masturbate.[92] He wanted to daydream about Mariela and talk to her on the phone.[93] He wanted a great many things, and he ran when he did not get them.

Desertion illustrates that the military did not make Todd desert; he simply wanted to desert. Todd even confides that he could have stayed in the military if he had been given the kind of training that he preferred. He writes that one particular drill sergeant was a "cool hard-ass."[94] The "cool" drill sergeant entertained him. The "cool" drill sergeant sang during marches, and had the ability to "turn a morning march into a Mardi Gras parade."[95] Todd writes that if the "cool" drill sergeant ran the whole U.S. Army, "It might almost be tolerable."[96] Because the U.S. Army didn't

88. *Id*. at 80.
89. *Id*.
90. *Id*. at 95.
91. *Id*. at 82.
92. *Id*.
93. *Id*. at 99.
94. *Id*. at 84.
95. *Id*.
96. *Id*. at 85.

perform to his personal satisfaction and instead challenged him with self-improvement, however, Todd rebelled, deserted, and pointed to others for his own failures.

IV. Conclusion

The supreme irony of Jack Todd's book is that he was even drafted in the first place. Todd was drafted because he "decided" not to complete his last semester of college, thereby losing his draft deferment.[97] If he truly opposed the war and sincerely loved Mariela, he could have easily avoided the draft for the Vietnam War. His decision not to re-enroll at the University of Miami speaks volumes about the strength, depth, and timing of his feelings and convictions.

The story of Todd's life is mildly entertaining. As a journalist, he has a passable gift for storytelling, and he tries to keep his reader entertained. Unfortunately, his narrative writing style is littered with distractions. He continually drops the names of counter-culture heroes and events in a transparent attempt to associate himself with them.[98] His unending awe for his own achievements is equally distracting.[99] Finally, the greatest distraction is Todd's unrelenting effort to distance himself from the crime of desertion, and to blame others for his actions and their consequences.

If Todd accepted some degree of responsibility for deserting, he could have shown that he has grown wiser over the years. At the very least, he could have attributed his actions to youth. But thirty years have passed, and Todd still has not matured. One cannot help but wonder what would have happened if Todd had been caught and court-martialed. If he provided the text of *Desertion* as his unsworn statement at the court-martial,

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97. *Id.* at 22-24.

98. *Id.* at 15 (Peter, Paul and Mary), 17-18 (Altamont), 23 (Woodstock), 24 (*Abbey Road*), 54, 70 (Muhammad Ali), 79 (Rolling Stones), 98 (Jerry Rubin), 150 (Bobby Kennedy), 214 (Haight-Ashbury), 221 (Bob Dylan), 222.

99. *Id.* at 240. "I am full of myself, bragging about the *Herald* and Mariela." *Id.* at 55. "Above all he is a good listener; I am full of myself and inclined to blab, and it will be months before I discover that he knows infinitely more than I do about almost everything." *Id.*

his defense would have been hard pressed to argue that he was rehabilitated or even remorseful.

It is ironic that Todd criticizes the Nixon Administration for misleading the public when Todd himself misleads prospective book buyers. Todd's book jacket reads, "Jack Todd is an award-winning columnist for the Montreal Gazette." The jacket fails to note that he is a sports columnist. Does anyone really care if he is a sports writer rather than a political correspondent? Apparently Jack Todd cares. One can only wonder why Todd felt it necessary to omit a complete description of his job; perhaps he thought it would diminish his credibility. Once again, Todd's actions speak louder than his words.

Regardless, Todd wasted a valuable opportunity to engage in honest self-analysis. Without expressing a single regret, his decision to anoint himself a hero and concomitantly distribute blame to everyone who disturbed his special little world in 1969 truly diminishes the book's value and its credibility. Todd neglected to employ any true introspection and as a result, he defeats his own work. Todd, and Todd alone, is solely responsible for his refusal to serve in the military. He is also solely responsible for failing to attempt to credibly legitimize his justifications after three decades of reflection.

TRAITORS AMONG US: INSIDE THE SPY CATCHER'S WORLD[1]

REVIEWED BY MAJOR R. PATRICK HUSTON[2]

Traitors Among Us provides a fascinating glimpse into the secretive world of counterintelligence. The book immediately thrusts readers into Cold War Berlin where the excitement quickly builds. Readers find themselves peering out the window of a nineteenth century German building, scanning the dimly lit street below:

> Barely visible in the darkness, the unmistakable figure of a man on crutches lurched past the window in the direction of a nearby lakeside restaurant—exactly as instructed. . . . Once inside, the carefully coached double agent would sit facing the door as instructed and await his dinner partner, an English-speaking officer of the Soviet KGB. The trap was set.[3]

As the title reveals, the book is about catching spies. The "trap" above resulted in the arrest and interrogation of three KGB agents. Although successful, this case was relatively minor. The rest of the book focuses on the Army's two most infamous spies: Sergeant First Class Clyde Conrad and Warrant Officer James Hall. The author provides shockingly candid and vivid details of these two cases.

The author, Stuart Herrington, is a retired intelligence officer who commanded the Army's elite spy catching unit, the Foreign Counterintelligence Activity (FCA), during the Conrad and Hall investigations. Colonel Herrington's thesis is that these investigations serve as "textbook example[s] of close cooperation between the military, the CIA, and the FBI."[4] Unfortunately, Herrington fails to prove this thesis. Both investigations were successful, but their success came in spite of the differences between these agencies. Although Herrington's thesis is unconvincing, the book is strongly recommended as a riveting, suspenseful thriller, filled

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1. COLONEL STUART A. HERRINGTON, UNITED STATES ARMY (RETIRED), TRAITORS AMONG US: INSIDE THE SPY CATCHER'S WORLD (1999).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. HERRINGTON, *supra* note 1, at 5.

with valuable lessons for intelligence professionals and lawyers. This review discusses the book's organization and content, and analyzes its strengths and weaknesses.

I. Organization & Content

The book is well organized with three main sections—the introduction, the Conrad investigation, and the Hall investigation—which prove interesting and informative. Herrington starts by introducing readers to basic intelligence principles and tactics. He uses real-world examples from Cold War Berlin. One case involved Sergeant Lowry Wilcox, a soldier assigned to the Berlin Field Station with a Top Secret security clearance. One day, Sergeant Wilcox's bank calls to remind him that his car payment is overdue:

> It was the kind of conversation that happened almost daily to underpaid GIs stationed around the world. But this conversation was different. Crouched at a console on the communist side of the Berlin Wall, a Soviet KGB signals intelligence technician was listening. . . . Intercepts revealing well-placed Americans with personal problems were fed to KGB case officers.[5]

Within days, a KGB agent called Sergeant Wilcox with a "lucrative business opportunity." Sergeant Wilcox reported the suspicious phone call to his boss, and the intrigue thickened. Army counterintelligence officials identified this as "a classic Soviet approach," and recruited Sergeant Wilcox as a double agent.[6] He was the man on crutches who lured the KGB agents into the "trap" at the Berlin restaurant. The author uses this and other stories to show basic Cold War tactics. These spy tactics help readers understand the two complex investigations that follow.

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4. *Id.* at 399. The FBI is responsible for counterintelligence (CI) investigations within the United States. The CIA is responsible for CI operations abroad. Army Intelligence is responsible for CI investigations involving Army personnel or programs. These jurisdictions often overlap.

5. *Id.* at 15-16.

6. *Id.* at 17.

A. Code Name *Canasta Player*

In 1978, the CIA delivered sobering news to the Army's FCA: NATO's war plans for Europe have been compromised. According to CIA sources behind the Iron Curtain, the scale of the leak was devastating. The Soviets received updated copies of war plans within days of every NATO's change. The hunt for the traitor was code-named *Canasta Player.* This investigation lingered for eight years before the FCA got its first solid lead. In 1986, an FCA agent read Clyde Conrad's Army personnel file, and realized that his assignment history fit the profile of the suspected traitor.

The Conrad story is the most intriguing part of the book. The massive, complex investigation was a joint effort between the FCA, the FBI, and the CIA. The team used the full arsenal of investigative techniques, including wiretaps, undercover agents, hidden cameras, and electronic surveillance devices. The book examines the hard work, mistakes, and luck that affected the case. The legal issues encountered during the investigation are also fascinating. Lawyers were deeply involved at all stages, including the complex task of deciding whether to prosecute Conrad in federal court or at a court-martial. In an interesting twist, the case ended up in a German court where Conrad was convicted and sentenced to life in prison.

B. Code Name *Paul*

The day before Conrad's arrest, an unrelated espionage case surfaced. A reliable source said that an American soldier was giving NATO intelligence plans to East German Intelligence. The East German source did not know the soldier's identity, but the soldier's code name was *Paul*. FCA agents then searched for soldiers fitting Paul's profile, and Warrant Officer James Hall's name soon surfaced. Hall's sudden wealth was one of several factors that raised eyebrows. Although his 1988 salary was a mere $20,000, he had a new home in an upscale neighborhood, and two cars in the driveway worth over $40,000. Identifying Hall as the prime suspect was only the first step. Agents continued to uncover evidence for several months.

In December 1988, the FCA and FBI organized an elaborate sting operation to put the nail in Hall's coffin. An FBI agent posing as a KGB agent from the Soviet Embassy met with Hall at a Days Inn in Savannah, Georgia. There, Hall bragged about his past spying exploits. His shock-

ingly detailed confession was caught on video. After Hall's arrest, he pleaded guilty at a court-martial, cooperated with investigators, and was sentenced to forty years in confinement.

II. Strengths

Readers will find *Traitors Among Us* both enjoyable and enlightening. Its three main strengths are the author's credibility and writing style, the book's intelligence lessons, and its legal lessons.

A. Credibility & Writing Style

Leading the FCA during the Conrad and Hall investigations makes Herrington uniquely qualified to tell these stories. Moreover, Herrington does not glorify his role. He notes that spy catching is rarely exciting, and freely admits several mistakes during the investigations.[7] Herrington's candor and humility bolster his credibility.

Herrington's flowing writing style imparts the book's greatest strength. The well-written thriller captivates with stories of media leaks, blown covers, and other near disasters that keep readers on the edge of their seats. Herrington's brilliant use of suspense and foreshadowing leaves readers thirsty for the next page, offering a pleasant reminder that truth can be better than fiction.

B. Intelligence Lessons

Herrington does a fantastic job of extricating real-world intelligence lessons from the investigations. For example, high-tech surveillance equipment is useless unless agents are trained to use it properly.[8] Also, surveillance teams may find it difficult to blend in to their surroundings without female agents.[9] Another lesson is that polygraphs are very useful for preventing and solving espionage crimes.[10] Herrington provides these

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7. *See id.* at 179. Herrington improperly authorized the use of a Top Secret "Maximum Marvel" document (which was so sensitive that the Army would not allow it to be used at trial). This caused major problems at the DOJ.

8. *Id.* at 151. The FCA surveillance photos were so bad that the FBI had to train the Army agents.

9. *Id.* at 9. This was true in Berlin, where the FCA had to "recruit" an agent's wife to help out during an operation.

and other valuable lessons for counterintelligence agents and their immediate supervisors.

At the macro level, Herrington demonstrates the need to anticipate security leaks, and prepare contingency plans for them. Secrecy is a fundamental problem that plagues all spy cases. There is an inherent tension between maintaining secrecy, and conducting necessary interagency and international coordination. Herrington notes several close calls that demonstrate the compelling need to "compartmentalize" investigations. For example, investigators were caught off-guard by a media leak, but they convinced a *New York Times* reporter to voluntarily hold the story until after Conrad's arrest. Also, an Army general nearly caused a disaster by making an unauthorized "courtesy call" to tell another general about the Hall case.[11] Another bizarre twist was that a West German intelligence officer involved with the Conrad case turned out to be an East German double agent. Herrington makes it clear that supervisors must take steps to ensure secrecy, but must also be prepared for inevitable leaks.

Herrington also urges intelligence supervisors to take a balanced approach to solving problems, and discusses two common counterintelligence dilemmas. The first surfaces when a source comes forward and volunteers information. Agents must determine whether he is a reliable source, or a double agent planted by the other side. Herrington encourages the use of polygraphs in such cases. The second dilemma is more fundamental: At what point do you arrest a suspect? In the Conrad case, military commanders wanted an early arrest to stop the flow of war plans, and to ensure that Conrad did not defect.[12] On the other hand, Department of Justice (DOJ) prosecutors wanted to wait until the case was a "guaranteed winner."[13] Intelligence officials were caught in the middle, trying to balance these concerns. Although there is no perfect solution, Herrington convincingly argues that a balanced approach is essential.

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10. *Id.* at 36. Lawyers may be shocked by the routine use of polygraphs in intelligence cases for a variety of legitimate purposes. Intelligence agents use polygraphs far more frequently than criminal investigators.

11. *Id.* at 272. This leak was eventually contained without damage.

12. *Id.* at 201.

13. *Id.* at 167.

C. Legal Lessons

Judge advocates will appreciate Herrington's candid discussions of lawyers throughout the book. Four lessons emerge. Lawyers must be involved in intelligence investigations, make realistic demands, provide accurate legal advice, and understand the complex jurisdictional issues in spy cases.

Herrington states that "when the question of proof surfaces, a true counterintelligence professional knows that it's time to get the lawyers involved."[14] He seems to welcome the presence of lawyers at meetings,[15] and even compliments his staff judge advocate for on-the-scene advice provided immediately before investigators met with Hall at the Days Inn motel.[16] But Herrington is clearly not impressed with all lawyers. In fact, he is very critical of the DOJ prosecutors, whom he perceived as willing to prosecute only airtight cases.[17] He also criticizes Pentagon international lawyers for bad legal advice that caused the FCA to violate Austrian neutrality laws by conducting intelligence operations in Austria.[18]

Although Herrington is not a lawyer, he does a remarkable job of identifying and explaining a myriad of legal issues. He accurately describes the complex *mens rea* element in national security crimes[19], and he details the jurisdictional issues underlying the decision of where to prosecute Conrad. He skillfully analyzes the advantages and disadvantages of federal courts and courts-martial, and explains how the Conrad case ended up in German court.[20] These timeless lessons should be of great interest to lawyers involved in spy investigations or prosecutions.

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14. *Id.* at 114.

15. *See id.* at 199. The author mentions many lawyers, including the Army's Judge Advocate General. Lawyers may take such inclusion for granted, but it is noteworthy since intelligence officers seem to shroud their work in secrecy.

16. *Id.* at 317. Colonel Fran O'Brien was Staff Judge Advocate of the Army's Intelligence and Security Command.

17. *Id.* at 188. Herrington says, "I thought their conditions were overly demanding and probably unattainable."

18. *Id.* at 240-41.

19. *Id.* at 114.

20. *Cf. id.* at 204-24.

III. Weaknesses

Like the characters that line its pages, *Traitors Among Us* has weaknesses. The most significant problem is the unsupported thesis, but there are also minor problems with Herrington's loss of objectivity and lack of documentation.

A. Unsupported Thesis

Herrington asserts that the Conrad and Hall investigations are "textbook example[s] of close cooperation" between the Army, the CIA, and the FBI.[21] This unconvincing thesis is inconsistent with the facts that Herrington provides. First, an intriguing incident revealed that the CIA-Army relationship was not a model of cooperation. The CIA received a letter from a writer claiming to be a Hungarian intelligence agent, and offering information about *Canasta Player* in exchange for money. Rather than coordinating with the Army, the CIA went behind the Army's back to pursue this lead on its own.[22] Second, the CIA-FBI relationship seemed very strained, and the FBI tried to exclude the CIA from the *Canasta Player* steering committee.[23] Third, the Army also clashed with the DOJ (the FBI's parent organization). "We were encountering serious problems with the Department of Justice's hard-nosed attorneys."[24] These incidents illustrate the lack of cooperation that sometimes existed between these intelligence agencies. The cases provide valuable insights into interagency coordination, but to say that they are models of cooperation is inaccurate and unnecessary.

B. Loss of Objectivity

Although Herrington humbly describes his own role in the investigations, he seems to lose his objectivity when he describes the FCA and its personnel. He appears overly complimentary of all FCA personnel, including subordinates who failed to get results, and a superior who nearly

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21. *Id.* at 399.

22. *Id.* at 112. This mission turned out to be an embarrassing failure for the CIA. The CIA gave the potential double agent over $145,000, but never received any information in return. Years later, the CIA found out that the "Hungarian intelligence agent" was actually Clyde Conrad scamming them!

23. *Id.* at 145-46.

24. *Id.* at 183.

compromised the Hall investigation.[25] He calls the FCA "the finest corps of intelligence professionals,"[26] and says that his "elite unit had performed with its usual brilliance."[27] Overall, readers get the impression that Herrington is an old soldier: prone to fondly reminisce about the good times, and forget the bad.

One omission by Herrington is interesting. The Army discovered that Conrad was responsible for safeguarding NATO's war plans for over two years after his security clearance expired. Apparently, Conrad had been overlooked due to a backlog of security investigations. The media was widely critical of the Army for this oversight,[28] yet Herrington fails to discuss it. This omission underscores Herrington's hesitance to criticize Army Intelligence.

Herrington also loses some objectivity by implying that Conrad and Hall were the worst spies in American history.[29] He fails to make any meaningful comparisons to other American spies, such as Navy Warrant Officer John Walker or CIA Agent Aldridge Ames. Herrington's assertions seem somewhat exaggerated in light of his Army background and the absence of any meaningful comparison to other spy cases.

C. Lack of Documentation

The book is also weakened somewhat by Herrington's lack of supporting documentation. The book contains only one footnote, and no reference list or bibliography. Admittedly, Herrington bases most of the book on his personal involvement in the events, which requires no documentation. There are several events, however, that Herrington could not have known firsthand. For example, two scenes contain interesting narrative descriptions of Conrad's personal thoughts.[30] The source of these revealing details is unclear as Herrington states that Conrad died in a German prison, "without ever having spoken of his espionage to investigators of any nationality."[31] This leaves the reader questioning Herrington's ver-

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25. *Id.* at 272.

26. *Id.* at xiii.

27. *Id.* at 74.

28. For a representative article, see Molly Moore & R. Jeffrey Smith, *U.S. Ex-Sergeant Accused in Spy Case Not Given Mandatory Security Check*, WASH. POST, Aug. 27, 1988, at A21.

29. *Cf.* HERRINGTON, *supra* note 1, at 139, 252, 332, 343.

30. *Id.* at 122-26, 157-60.

sion. The opening pages of the book contain a similar lack of documentation regarding the thoughts of a KGB agent.[32]

IV. Conclusion

Traitors Among Us is beautifully written, enjoyable, and enlightening. It provides a rare glimpse into the secretive world of spy catching. The riveting thriller critically analyzes the Conrad and Hall investigations, and provides valuable lessons for intelligence professionals and lawyers. Although the book has weaknesses, including an unsupported thesis, these weaknesses are not fatal. Colonel Herrington leaves his readers thoroughly satisfied and much wiser. In short, *Traitors Among Us* is strongly recommended.

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31. *Id.* at 400.
32. *Id.* at 3-5.

JUDGEMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS[1]

REVIEWED BY MAJOR MARK D. POLLARD[2]

Hundreds of Japanese war crimes trials were held in the Far East following World War II. Were they nothing more than "victors' justice" and revenge for Japanese war victories? Were they "kangaroo courts" directed and controlled by General Douglas MacArthur as part of his plan for the reconstruction of Japan? Or were these trials a sincere effort on the part of the United States and its allies to punish war crimes committed by the Japanese to the extent that justice would allow?

In *Judgment at Tokyo: The Japanese War Crimes Trials*, author Timothy Maga[3] attempts to answer these questions as he decisively responds to the many politicians and scholars who have attacked these trials as shameful examples of "victors' justice."[4] In doing so, Maga presents a strong case that the Japanese war crimes trials were not only honorably motivated, but were also skillfully executed. Maga persuasively argues that these trials provided true justice for some of the more horrible atrocities committed by the Japanese during World War II.

Maga sets out in some detail the most contentious issues of the Japanese war crimes trials. His treatment of individual responsibility, command responsibility, and the differing evidentiary standards used by the tribunals is fascinating. Legal scholars may be disappointed, however, if

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1. TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIME TRIALS (2001). Maga has also written THE COMPLETE IDIOT'S GUIDE TO THE VIETNAM WAR (2000); HANDS ACROSS THE SEA? U.S.-JAPAN RELATIONS, 1961-1981 (1997); PERILS OF POWER: CRISES IN AMERICAN FOREIGN RELATIONS SINCE WORLD WAR II (1995); JOHN F. KENNEDY AND NEW FRONTIER DIPLOMACY, 1961-1963 (1994); THE WORLD OF JIMMY CARTER: U.S. FOREIGN POLICY 1977-1981 (1994); JOHN F. KENNEDY AND THE NEW PACIFIC COMMUNITY 1961-63 (1990); DEFENDING PARADISE: THE UNITED STATES AND GUAM (1988).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Maga is currently the Oglesby Professor of American Heritage at Bradley University, Peoria, Illinois. He previously served as a coordinator in the House of Representatives Subcommittee for Asian-Pacific Affairs. His book, *John F. Kennedy and the New Pacific Community 1961-63*, was a 1990 finalist for the Pulitzer Prize in history.

4. MAGA, *supra* note 1, at 7. *See* JOHN W. DOWER, JAPAN IN WAR AND PEACE (1993); RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

they anticipate in-depth coverage of the legal arguments highlighting the judicial precedents set at the Japanese war crimes trials. Maga also makes no comparison of the Japanese war crimes trials with the more famous Nuremberg trials because he believes the Japanese war trials should stand on their own. Still, *Judgment at Tokyo* provides an intriguing look at the war crimes trials of the Far East.

In an exhaustively researched account, Maga begins his story by documenting the basic facts, the common myths, and the political intrigues surrounding the trials administered by the U.S. Army in Tokyo.[5] He initially focuses on the trial of Tatsuo Tsuchiya, a young prison guard and the defendant in the first war crimes trial held in Tokyo, and then contrasts that case with the trial of General Tomoyuki Yamashita, the first Japanese senior officer to be tried. Through these trials, Maga explores the arguments used by the defense attorneys and those who felt the trials were nothing more than racist Japan-bashing. He then contrasts those arguments with the arguments used by the United States, the American allies, and the prosecutors at trial.

Although Tsuchiya's trial was overshadowed by the later trials of the eighty Class A war crimes suspects, Maga argues that the case was as important for the legal precedents it set for future Japanese trials as it was for the justice it meted out.[6] Tsuchiya was charged with the death of one American prisoner and the torture of many other prisoners through "cruel, inhuman and brutal atrocities."[7] Tsuchiya denied killing the American prisoner, and alleged his brutality resulted from the Japanese wartime culture.[8]

Tsuchiya's attorney argued that low ranking Japanese soldiers were simply products of "the pro-war hysteria" and "Emperor worship" prevalent in Japan at the time.[9] According to Tsuchiya's attorney, the Japanese military was an inherently brutal organization. Japanese officers often

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5. The International Military Tribunal for the Far East (IMTFE) took over responsibility for the Tokyo trials on 3 May 1946. The term IMTFE, however, is sometimes used to refer to all of the Japanese war crimes trials held in the Far East. MAGA, *supra* note 1, at xi.

6. The Class A suspects included former Japanese premiers, foreign ministers, war ministers, generals, ambassadors, economic and financial leaders, and other senior military officers. *Id.* at 2-3.

7. *Id.* at 10.

8. *Id.*

9. *Id.*

slapped subordinates, and Japanese soldiers were taught that any soldier who accepted capture was beneath contempt. Given this wartime atmosphere in Japan, the defense contended it was unjust to hold Tsuchiya to vastly different "Western" standards.[10]

Not surprisingly the court convicted Tsuchiya, and sentenced him to "life imprisonment at hard labor." Maga notes that the court's rejection of the "differing cultures" argument had a tremendous impact on later trials, forcing the defense attorneys to search for other ways to use the Japanese military culture as a shield to prosecution. Also important from a legal perspective, Maga explains that the Tsuchiya trial was the Far East's first test of the use of affidavits rather than the more stringent hearsay rules followed in military courts-martial and the American civilian trial system.[11] Unfortunately for those readers looking at these trials from a legal perspective, Maga never explores the use of affidavits in detail.

To the press and the public, the Yamashita trial was the first Japanese war crime trial of any importance. General Yamashita, one of Japan's most revered generals, was charged with 123 counts of war atrocities. Most of the charges were related to the more than 60,000 Filipinos killed by Japanese soldiers under General Yamashita's command. The prosecution had little or no evidence that General Yamashita ordered the killings. Instead, the prosecution's theory was that General Yamashita was criminally responsible for the war crimes under a theory of "command responsibility." The theory supposed General Yamashita's guilt because he knew the killings were taking place, yet did nothing to either prevent them or to discipline those responsible. Additionally, the prosecutors argued, Yamashita should have known that soldiers under his command were committing war crimes.[12]

Maga also rebuts the critics who allege Yamashita's prosecution was nothing more than General MacArthur's revenge for the devastation of his beloved Philippines.[13] Maga explains that, whatever affect General MacArthur's personal animosity toward Yamashita may have had on Yamashita's prosecution, General MacArthur was serious about the theory of

10. *Id.* at 4-17.
11. *Id.* at 17, 19.
12. *Id.* at 18-25.
13. *Id.* at 24.

command responsibility. As Maga notes, MacArthur personally lobbied President Truman to add the theory to U.S. military law.[14]

Maga next briefly examines the U.S. Supreme Court's determination that charges based on command responsibility were legitimate in the context of war crimes. In its first foray into the Japanese war crimes trials, the Court upheld the theory that a commander's failure to control his troops could be a violation of the law of war. It also validated the more relaxed evidentiary procedures of the Tokyo tribunals.[15]

Maga spends a substantial portion of *Judgment at Tokyo* contrasting the Army's Tokyo trials with the Navy's version of the Japanese war crimes trials held in Guam. The Navy trials were the responsibility of Rear Admiral John D. Murphy, whom Maga clearly admires. Maga initially notes that, when compared to the trials in Tokyo, the trials held in Guam operated in a near vacuum as far as press coverage was concerned. As Maga points out, Admiral Murphy understood that the lack of publicity, coupled with the fact that the more famous, higher visibility suspects were tried in Tokyo, made the Navy's job much easier than the task faced by the Army. Still, Maga documents that Admiral Murphy was openly critical of the Tokyo trials while trumpeting his own agenda to administer what he considered to be the fairest war crimes trials ever conducted.[16]

Admiral Murphy made several substantive departures from the Tokyo procedures to correct what he believed were inequities in the Army system. He first ensured that the Navy trials would not routinely relax the rules of evidence to accept affidavit testimony. Instead, he insisted they stick to the much tougher courts-martial hearsay standard with a few exceptions. Another major difference between the Army and Navy trials was the Navy's lack of enthusiasm for the imposition of the death sentence based solely on the theory of command responsibility. The Navy was also much more likely to give credence, at least as mitigation, to a subordinate's claims that he was influenced by his superiors, was "ignorant of the law," or was "a victim of cultural misunderstanding."[17] The result, at least in Admiral Murphy's view, was the best war crimes trial system ever devel-

14. *Id.* The U.S. Army later recognized the rule of command responsibility. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 ¶ 501 (July 1956).

15. MAGA, *supra* note 1, at 23. The case was *In Re Yamashita*, 327 U.S. 1 (1946).

16. MAGA, *supra* note 1, at 94-95.

17. *Id.* at 97.

oped, for which the Navy never received due recognition. Maga clearly agrees on both counts.[18]

Maga provides a fascinating description of some Guam trials where the Navy had to confront charges of cannibalism and sadistic torture. The case of Lieutenant General Joshio Tachibana was representative of numerous cases in which the defendants faced cannibalism charges. General Tachibana was the commander on Chichi Jima, a small island not far from Japan. As the war neared its end, General Tachibana developed a tendency to behead American POWs and eat their flesh. "Human flesh, he had boasted to his men, toughened him up, making him strong for battle."[19]

Maga points out that the law had never previously considered "the place of cannibalism and torture in war."[20] With the absence of any legal precedent, the Navy chose not to pursue torture convictions. Maga contends that Admiral Murphy, unwilling to take the risk that some technicality would result in an acquittal, instead settled for convictions on simple murder charges.[21] It was not until 1980 that a U.S. court finally addressed torture as a war crime.[22]

Between his examination of the trials administered by the Army and the Navy, Maga pauses to explore the controversial process that placed defendants on the list of Class A category war crimes suspects. In particular, he documents the extremely controversial decision not to prosecute Emperor Hirohito.[23] Although Maga notes that these decisions were often more political than legal, any attorney who has exercised prosecutorial discretion in the face of intense publicity should find them fascinating.

Maga's detailed account of how these decisions were made provides a behind-the-scenes look at the post-war administration of Japan. He not only details the opinions and actions of the major players, but he also describes the roles of the international press and the lobbying efforts of certain congressmen and American allies. His sympathetic presentation of this period from the Japanese point of view makes it one of the most rivet-

18. *Id.* at 96-119.
19. *Id.* at 97.
20. *Id.*
21. *Id.*
22. The case was *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).
23. MAGA, *supra* note 1, at 34.

ing portions of *Judgment at Tokyo*. His account of Emperor Hirohito's flirtation with abdication and suicide is particularly enthralling.[24]

MAGA ENDS *Judgment at Tokyo* by advocating the establishment of a permanent war crimes tribunal. This was something the judges of the International Military Tribunal for the Far East believed was a necessary and desirable "legacy" to their work. Maga obviously concurs, and he bemoans the fact that in 1998 the United States did not support the establishment of the International Criminal Court. He describes the Rome summit in detail, and gives a summary of the arguments both for and against the position of the United States. In doing so, Maga makes no attempt to hide his position.[25] It is clear that he has little regard for the reservations put forth by the Clinton Administration.

Interestingly, *Judgment at Tokyo* fails to address one of the most troubling aspects of the post-World War II war crimes trials—the fact that only the vanquished were tried. Neither the Nuremberg trials nor those held in the Far East ever attempted to investigate alleged Allied war crimes. Certainly many Allied servicemen who committed war crimes were tried by their respective national or military legal systems. Maga, however, misses the opportunity to comment on this important aspect of the "victors' justice" argument. His conclusion that the trials in the Far East meted out true justice and just punishment for horrible atrocities never completely answers the question of whether the trials represented "victors' justice."

Maga does make a strong case against the popular belief that the only fair and legitimate war crimes trials after World War II took place in Nuremberg. His spirited defense of the Japanese war crimes trials should go a long way to correct the historical record. More importantly, Maga demonstrates that the true legacy of the World War II war crimes trials is that they failed in one crucial respect. Over fifty years later, the world is still struggling to determine "proper accountability" for the horrible atrocities of war that have occurred in the past and will assuredly happen in the future.[26]

Judgment at Tokyo has its shortcomings, particularly if you expect an in-depth legal analysis of the Far East war crimes trials. But Timothy Maga is a historian after all rather than an attorney. He never promises or

24. *Id.* at 34-42.
25. *Id.* at 140-45.
26. *Id.* at 151.

attempts to provide a legal treatise. Instead, he has exhaustively researched the historical record to provide a fascinating and thorough account of these often overlooked war crimes trials. Anyone interested in the historical and legal aspects of war crimes will find *Judgment at Tokyo* an intriguing book.

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General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
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