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

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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-

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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).