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INTRODUCTION

The Creighton International and Comparative Law Journal is pleased to bring you Volume 6 in which we feature a variety of topics. Rather than restricting each publication to a single area of international and comparative law, the Journal has sought to open up the dialogue to an expansive array of topics on which our authors have diligently researched and insightfully written. The end result, we think, is a summation of discourse on pertinent issues currently facing the world. This edition includes topics ranging from the Responsibility to Protect Doctrine as it pertains to human rights violations in North Korea to the treatment of the LGBT community in Russia through new legislation restricting fundamental freedoms of expression. This edition also features articles by two of our own talented writers: one examines the legality of economic targets in military actions against the Islamic State terrorist group, and another advocates the need for an internationally recognized definition of rape.

We thank the Creighton International and Comparative Law Journal’s dedicated staff, our writers, and the faculty at Creighton University School of Law. Without these hardworking individuals, the Journal could not continue to flourish. We hope that you find these articles intriguing and beneficial as we enter them into the international dialectic.

Hoken Aldrich
Editor-in-Chief, 2014–2015
REPORT OF THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA: GREEN LIGHT FOR HUMANITARIAN INTERVENTION

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“At the end of the Second World War, so many people said ‘if only we had known. If only we had known the wrongs that were done in the countries of the hostile forces. If only we had known that.’ Well now the international community does know, the international community will know, there will be no excusing of failure of action because we didn’t know, we do know.”

— Michael Kirby, Chair of the Commission of Inquiry on Human Rights Violations in North Korea

I. INTRODUCTION

Until August 13, 1948, Korea was one, inseparable and united territory. In 1910, Japan occupied and annexed Korea, during which time the former exercised absolute sovereign powers over the latter. In 1945, following Japan’s surrender to the Allied Forces at the end of World War II, Korea was on a course to become independent. However, it was temporarily divided between the Soviet Union in the north (north of the 38th parallel) and the United States in the south. Unfortunately, due to the politics of the Cold War, the ideal concept of “one unified Korea” quickly vanished, and in 1948 two different governments were established—one in the north and another in the south. Due to the influence of the Soviet, the North Korean’s government (the Democratic People’s Republic of Korea) was a communist government, run by a single supreme leader, while the South Korean’s government (the Republic of South Korea) was anti-communist, with an aspiration to become unified with the North. Ever since then, North Korea has been ruled by the Kim dynasty. Kim Il-sung was the first leader of North Korea, and today, his grandson Kim Jong-un is the current leader of North Korea. North Korea is the most isolated country in the world, and even so, evidence and reports on the situation of human rights in North Korea are available and reflect horrendous violations of fundamental human rights. It is important to note that with every day, the situation has been deteriorating, and to this day, four million North Koreans have died of starvation. In addition, six
million people today are at risk of dying of starvation, especially children and pregnant women who are breastfeeding.¹

Kim Kwang-il, a survivor of the Jeongeori “Re-education Camp” in North Korea, revealed in his testimony some of the torture methods and the horrifying life conditions in those camps.² In one of his drawings, Kwang-il demonstrated the “Pigeon Torture.”

In the “Pigeon Torture,” the prisoner is handcuffed behind his back and held aloft in a position that does not allow him to stand or sit.³ In that position, prisoners were beaten on their chests until they vomited blood, often confessing crimes they did not commit.⁴ Kwang-il further explained:

[W]e are bound to stay in that position until the jailer feels that you have been tortured enough. So, the torture goes on until the time has come to the satisfaction of the jailer. This is the pigeon torture. This is a very strange word in Korea and to you. Your hands are bound back and if they tie you like this, your chest comes out forward and in this position you are tortured.⁵

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Another defector even went as far as to claim that “[the Pigeon Torture] was the most painful of all torture. . . . [It] was so painful that I felt it was better to die.” The Pigeon Torture is one heinous method of torture employed in North Korea’s prison camps. It demonstrates the cruelty and inhumanity of the regime.

On March 21, 2013, The U.N. Human Rights Council established a Commission of Inquiry on the Human Rights Violations in North Korea (“Commission”). The Commission’s report (“Report”) was published on February 7, 2014, and contains evidence on systematic, widespread and grave violations of human rights, including murder, torture, rape, forced abortions and more. The Report notes that “the gravity, scale and nature of these violations reveal a state that does not have any parallel in the contemporary world.” Days after the Report was released, the U.N. Secretary-General, Ban Ki-moon, stated that he was “deeply disturbed by the findings of the commission.”

The Report is the most comprehensive and authoritative research available on the humanitarian crisis in North Korea. This Report, issued by a commission established by the U.N. Human Rights Council, is among the most reliable and extensive reports available on human rights violations in North Korea, and therefore we can structure with certainty an argument to respond to the Report’s findings, namely, the argument that this paper will advance, in regard to the aftermath of the Report: that humanitarian intervention in North Korea is both legal and legitimate under international law.


6 Brown, supra note 3.


8 Id.

9 Id. at 15.

The methodology of this article in advancing the argument is to analyze the findings of the Report in Part II.\textsuperscript{11} This will serve to lay the background of the current human rights violations in North Korea, their intensity, the degree of state involvement, the amount of people affected and others. Following the discussion on the Report’s findings, Part III of this article will analyze the current legal framework justifying and prohibiting humanitarian intervention and apply those to the concrete situation in North Korea.\textsuperscript{12} There is an ongoing debate among scholars toward the question of the legality of the humanitarian intervention.\textsuperscript{13} In support of the argument, this article focuses on the doctrine of the Responsibility to Protect (“R2P”), as well as the case study of NATO humanitarian intervention in Kosovo and Libya, and how those precedents are similar and different both legally and geopolitically from the situation in North Korea. This article also includes a discussion of the international law regulating the resort to force (\textit{jus ad bellum}), which contains the specific provisions on the permitted types of use of armed force. All of those substantial discussions are included in Part III. In Part IV, the conclusion of this article, is composed of two parts: firstly, from the legal aspect, given the broad acceptance and development of the concept of humanitarian intervention, there is an emerging international norm that humanitarian intervention is legal, and therefore intervening in North Korea would be legal and legitimate; and secondly, with some specific considerations taken into account, humanitarian intervention in North Korea is practically possible.

II. THE REPORT: MANDATE, METHODOLOGY, AND FINDINGS

In order to fully understand the findings of the Report, it is important to understand the mandate, which was given to the Commission by U.N. Human Rights Council resolution 22/13. Moreover, in order to make determinations on human rights violations in North Korea, it is also helpful to analyze the relationship between the Commission and the government of North

\textsuperscript{11} See infra notes 14–41 and accompanying text
\textsuperscript{12} See infra notes 42–91 and accompanying text
Korea, and what methodology the Commission employed. Finally, the substantial part of the Report is discussed, namely, the specific and detailed human rights violations that are taking place in North Korea as of today. We move forward to discuss the Commission’s mandate.

A. THE MANDATE

On March 21, 2013, the U.N. Human Rights Council adopted Resolution 22/13 (“Resolution”) titled “Situation of Human Rights in the Democratic People’s Republic of Korea.” The Resolution established a commission of inquiry consisting of three members, and its mandate was to:

investigate the systematic, widespread and grave violations of human rights in the Democratic People’s Republic of Korea . . . including the violation of the right to food, the violations associated with prison camps, torture and inhuman treatment, arbitrary detention, discrimination, violations of freedom of expression, violations of the right to life, violations of freedom of movement, and enforced disappearances, including in the form of abductions of nationals of other States, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity.

The list of human rights violations that the U.N. Human Rights Council mentioned is not exhaustive. The objective of the Commission was to investigate and document the human rights violations, to collect and document victims and perpetrators accounts, and to ensure accountability. Additionally, the Resolution called upon the government of North Korea to fully cooperate with the commission and to ensure access to humanitarian assistance. An important point to note is that the

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15 Id. ¶ 5.
17 H.R.C. Res. 22/13, supra note 14, ¶ 5.
18 Id. ¶ 6.
19 Id. ¶ 7.
temporal scope of the investigation was not limited, meaning that the Commission examined not only recent human rights violations, but also the ones that occurred in the past. The Commission interpreted its mandate to include extraterritorial human rights violations, such as abductions of people from other countries. We move to examine the background in which the Commission has operated.

B. BACKGROUND AND METHODOLOGY

Although the Resolution asked the government of North Korea to “permit the Commission’s members unrestricted access to visit the country and to provide them with all information necessary to enable them to fulfill their mandate,” North Korea did not cooperate and rejected the mandate of the Commission. As a result, the commission members were not able to investigate human rights in North Korea. Instead, they had to rely on first-hand testimonies.

More than eighty witnesses provided testimony, during the course of the Commission’s investigation. Those testimonies were of high detail and the witnesses testified in public hearings at the end of 2013. Moreover, the Commission asked China to allow its members to visit the China-North Korea border, however, China refused to allow the visit.

The international legal written instruments used by the Commission to assess the human rights violations were the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Rights of the Child (“CRC”) and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”). In addition, international customary law, with regard to the refugee law (non-refoulement) and international criminal law was considered. Surprisingly, North Korea has signed and ratified all of the above

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21 Id. ¶ 8.
22 Id. ¶ 9.
23 Id. ¶ 17.
24 Id. ¶ 17.
25 Id.
treaties.  

However, on August 23, 1997, North Korea requested withdrawal from the ICCPR.  

The Secretary-General who received the notification of withdrawal remarked that such withdrawal was not possible. since the ICCPR does not have a withdrawal provision and in such case, Article 54(b) of the Vienna Convention on the Law of Treaties applies, which requires the consent of all state parties to the covenant. Therefore, it is established that North Korea is a party to all of the above treaties, as well as customary international law, which generally binds all states.

In the light of the international human rights sources, we move to examine the findings of the commission.

C. FINDINGS ON HUMAN RIGHTS VIOLATIONS

The Commission’s Report found that the “widespread and gross human rights violations” took place in North Korea and were

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27 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, n. 8, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no =IV-4&chapter=4&lang=en#8 (“On 25 August 1997, the Secretary-General received from the Government of the Democratic People's Republic of Korea a notification of withdrawal from the Covenant, dated 23 August 1997. As the Covenant does not contain a withdrawal provision, the Secretariat of the United Nations forwarded on 23 September 1997 an aide-mémoire to the Government of the Democratic People's Republic of Korea explaining the legal position arising from the above notification. As elaborated in this aide-mémoire, the Secretary-General is of the opinion that a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal.”)

28 Sarah E. Kirsch, North Korea as a Signatory to the International Covenant on Civil and Political Rights, ACADEMIA.EDU, http://www.academia.edu/1203872/North_Korea_as_a_Signatory_to_the_International_Covenant_on_Civil_and_Political_Rights (last visited on Feb. 12, 2015).


30 H.R.C. Rep. 25/63, supra note 7, ¶ 26–73.
carried out by the organs of the Worker’s Party of Korea, which is currently the effective government in North Korea.\textsuperscript{31}

The Report provided that there were violations of freedom of religion and thought, the right to movement and residence, the right to food and water, freedom from torture and executions and prison camps.\textsuperscript{32} For example, people who are suspected of holding different political views than those ones of the Worker’s Party are imprisoned without trial, starved and treated inhumanely, and some of them even disappear indefinitely.\textsuperscript{33}

All those human rights violations are severe and widespread, however, for the purpose of this paper, the most gross and intense human rights violations are considered. Such violations are the ones that reach the degree of crimes against humanity. The report concludes that “[t]hese crimes against humanity entail extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation.”\textsuperscript{34}

One example the Report gives is of enslavement. The individuals who are imprisoned in prison camps are forced to work under inhumane conditions, they are not provided with adequate food or water, and they are regarded as “ploughing animals.”\textsuperscript{35} The malnourishment of those people sometimes makes them work to their deaths.\textsuperscript{36} Failure to work can result in execution, torture and ration cuts, which exacerbate the starvation.\textsuperscript{37} Moreover, an attempt to escape typically results in immediate execution.\textsuperscript{38} It is

\textsuperscript{31} Id. ¶ 24.
\textsuperscript{32} Id. ¶ 26–73.
\textsuperscript{33} Id. ¶ 58, 59.
\textsuperscript{34} Id. ¶ 76.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
the Commission’s view that this qualifies to be a crime against humanity.\textsuperscript{39}

The Report concludes by making recommendations to North Korea, China, the states in friendly relations with North Korea, business enterprises, and the international community.\textsuperscript{40} The Report does not expressly recommend using armed force for humanitarian reasons (also “humanitarian intervention”). Instead, the main recommendations for the international community include a referral from the U.N. Security Council to the International Court of Justice, continuation of monitoring of the human rights situation in North Korea, support the people of North Korea and sanction the leadership involved in the violations.\textsuperscript{41} However, there might be an implied recommendation to use armed force to overthrow the North Korean regime and to change the dire situation in North Korea, with the Report stating that: “[W]here so much suffering has occurred, and is still occurring, \textit{action} is the shared \textit{responsibility} of the \textit{entire international community.”}\textsuperscript{42} The words “action,” “responsibility” and the “entire international community” are key words in the Report’s recommendation to the international community. The view of the author is that such wording, in fact, \textit{implies recommends} humanitarian intervention to resolve the humanitarian crisis in North Korea. We proceed to examine the international law that deals with different aspects of humanitarian intervention.

\section*{III. INTERNATIONAL LAW AND HUMANITARIAN INTERVENTION: LEX FERENDA & LEX LATA}

What is the law regulating the use of force, and how does it interact with the idea of humanitarian intervention? This question initiated many debates, and is a matter of great controversy among scholars. More importantly, the answer to this question has to take into account many considerations, which complicates the matter even more, since international law itself does not seem to have an explicit answer to the question. First, the \textit{jus ad bellum} must be explored, namely, the international law regulating the use of force by states. Second, the rising doctrines, such as the Responsibility to Protect (“R2P”) and its specific components must be considered, as well as the current legal weight of the R2P doctrine. Third, the

\begin{itemize}
\item \textsuperscript{39} \textit{Id.} \textsection 1211.
\item \textsuperscript{40} H.R.C Rep. 25/63, \textit{supra} note 7, \textsection 90–94.
\item \textsuperscript{41} H.R.C Rep. 25/CRP.1, \textit{supra} note 35, \textsection 1225.
\item \textsuperscript{42} H.R.C Rep. 25/63, \textit{supra} note 7, \textsection 94(f) (emphasis added).
\end{itemize}
opinions of scholars, with regard to humanitarian intervention will be analyzed and those can reflect the controversy and the variety of legal arguments, which can be reduced to the question of *jus ad bellum*, which generally prohibits the use of force, unless narrow exceptions are met, versus the R2P doctrine, which advocates for an exception to the use of force prohibition on humanitarian grounds. Fourth, state practice can serve as an important factor in formalizing the answer. Although state practice of humanitarian intervention is somewhat limited, it still has legal value because it shows the response from the international community, which can often reflect the current international law. Finally, the theoretical legal substance will be applied on the humanitarian crisis in North Korea.

A. THE INTERNATIONAL LAW GOVERNING THE USE OF FORCE BY STATES—*JUS AD BELLUM*

The use of force by states is governed today by the Charter of the United Nations and the customary international law applicable to it. Generally, the use of force or the threat to use the force in inter-state relations is prohibited by Article 2(4) of the U.N. Charter that posits: “[A]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Generally, states are permitted to use force within their territories, as part of their sovereign rights. Moreover, states are permitted to allow other states to use force, within their territories.

The U.N. Charter contains two exceptions to the prohibition on the use of force. First, Article 51 recognizes the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” Second, articles:

43 U.N. Charter art. 2, para. 4.


45 Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 20 reads: “Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”

46 U.N. Charter art. 59.
the U.N. Security Council is authorized by Chapter 7 of the Charter to take “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

The U.N. Charter does not include an explicit authorization to use the force for a humanitarian cause and intention. However, the international community, as discussed infra, gave some effort to legally, morally and doctrinally justify humanitarian intervention.

In addition to the prohibition on the use of force and its exceptions, states are generally prohibited from intervening in the internal affairs of another state. The principle of non-intervention is a long-standing principle in customary international law and it is derived from the Westphalian understanding of state sovereignty. The International Court of Justice in the case of Military and Paramilitary Activities in and Against Nicaragua explained that intervention is prohibited when it is:

[b]earing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a

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47 U.N. Charter art. 42.
49 G.A. Res. 25/2625 (XXV), at 123, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”). See also UN Charter art. 2, para. 1, 4, 7.
political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.\footnote{Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 205 (June 27)}

Moreover, Article 2(7) strengthens the idea that states have the prerogative to freely decide on their internal affairs by positing that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”\footnote{U.N. Charter art. 2, para. 7.} Therefore, formally speaking, humanitarian intervention has to overcome two main challenges to be considered lawful. First, it must be a permissible use of force according to international law, and it must be an exception to the principle of non-intervention. However, as will be discussed further, those barriers are only imaginary, and humanitarian intervention is legal, even without specifically responding to them. In order to examine how humanitarian intervention is in fact legal, we move forward to examine the doctrine of the Responsibility to Protect.

B. HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT

The doctrine of the Responsibility to Protect was mainly a response to the failure of the U.N., as well as the international community, to protect lives during the ethnic cleansings in Srebrenica and Rwanda.\footnote{Young Sok Kim, Responsibility to Protect, Humanitarian Intervention in North Korea, 5 J. INT’L B. & L. 74, 88 (2006).} In his millennium report, former Secretary-General of the United Nations, Kofi Annan, challenged the international community by stating:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we
respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity? . . . surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community.\footnote{54}

Annan’s statement reflects precisely the difficulty with humanitarian intervention. On one hand, states are sovereign and have the right to decide on their domestic political, economic, social and cultural affairs. However, on the other hand, there is a tendency to limit the scope of the principle of sovereignty – states are not permitted to justify grave violations of fundamental human rights on the grounds of sovereignty. To respond to the challenge reflected in Annan’s statement, in 2000 the Canadian government established the International Commission on Intervention and State Sovereignty ("ICISS") in order to develop a doctrine to regulate and set the framework for humanitarian intervention.\footnote{55} In December 2001, the ICISS published a comprehensive report titled “The Responsibility to Protect,” also referred to as R2P.\footnote{56}

In order to understand the concept of R2P, first we must precisely examine what humanitarian intervention means for the purpose of this paper. According to Holzgrefe, humanitarian intervention is:

the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without permission of the state within whose territory force is applied.\footnote{57}

\footnotesize{\begin{itemize}
\item \footnote{54} U.N. Secretary-General, \textit{We the Peoples: The Role of the United Nations in the 21st Century, Rep. of the Secretary-General}, 48 (2000), \textit{available at} \url{www.un.org/millennium/sg/report}.
\item \footnote{55} CRISTINA GABRIELA BADESCU, \textit{HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS} 3 (2011).
\item \footnote{56} See ICISS, supra note 50.
\item \footnote{57} J. L. HOLZGREFE, \textit{HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS} 18 (2003).
\end{itemize}}
There are three main components in the definition. First, the means must be threat or use of force. “Force” in this definition refers specifically to armed force (as opposed to economic or political coercions).\textsuperscript{58} Second, the aim of the use of force must be the prevention or the termination of widespread and grave violations of fundamental human rights of other than its own citizens.\textsuperscript{59} According to this limited aim, sporadic, occasional violations of fundamental human rights, as well as non-fundamental human rights violations are outside the scope of humanitarian intervention.\textsuperscript{60} It must also be the human rights of citizens that are not nationals of the intervening state. Third, the intervention has to be without permission of the violating state.\textsuperscript{61} The reason for this, as mentioned in the previous part of this article, is the fact that states are allowed to call upon another state or group of states to use force within their territories, and once such use of force is authorized by a state, it is not a violation of the prohibition on the use of force.\textsuperscript{62}

The R2P report sets the conceptual and normative framework to address humanitarian intervention. Some even go as far as to claim that R2P is “the most dramatic normative development of our time.”\textsuperscript{63} The R2P report summarizes the idea behind it, by providing that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe . . . but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”\textsuperscript{64}

The determination of an R2P action (i.e., humanitarian intervention in accordance with R2P principles) consists of five substantial criteria.\textsuperscript{65} Just cause, which requires that the use of

\textsuperscript{58} \textit{Id.} at 18, n. 13.

\textsuperscript{59} \textit{Id.} at 18.


\textsuperscript{61} HOLZGREFE, supra note 57.


\textsuperscript{63} Ramesh Chandra Thakur & Thomas G. Weiss, \textit{R2P: From Idea to Norm – and Action?}, 1 GLOBAL RESPONSIBILITY TO PROTECT 22, 22 (2009).

\textsuperscript{64} ICISS, supra note 50, at VIII.

\textsuperscript{65} \textit{Id.} at XII.
military force will serve as an exceptional measure to stop grave human rights violations, and as so, the threshold should be either large-scale loss of life or a large-scale ethnic cleansing.\textsuperscript{66} The state in question should be either directly involved in those situations or unable to prevent them. Right intention provides that the purpose of the military intervention should be the prevention of grave and widespread human rights violations. Other motives are strictly prohibited.\textsuperscript{67} Last resort requires that military force only be used after all other non-forceful measures have been exhausted.\textsuperscript{68} Proportional means limits the intensity, severity and temporal scope of the military force, so only the minimum will be exercised.\textsuperscript{69} And lastly, reasonable prospects which requires predicting whether there is reasonable chance of success and whether inaction will yield worse consequences than action.\textsuperscript{70}

There is an additional criterion, which some refer to as the “Sixth Criterion,” which requires legitimate authority.\textsuperscript{71} This criterion provides that the Security Council is the most appropriate authority to engage in a R2P operation, however, it also recognizes that sometimes the Security Council, due to its nature as a political body, is unable to act, and therefore, states should consider acting on their own, whether individually or collectively with other states.

The R2P was reaffirmed on many occasions. Firstly, in December 2004, the High-level Panel on Threats, Challenges and Change, consisting of 16 member states, affirmed the “emerging norm that there is a collective responsibility to protect.”\textsuperscript{72} Moreover, in September 2005, heads of state and government adopted R2P at the World Summit High-level Plenary Meeting of the 60th Session of the United Nations General Assembly.\textsuperscript{73} Even

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} See id.
\textsuperscript{70} Id.
\textsuperscript{73} U.N. Secretary-General, In Larger Freedom: Towards Development, Security and Human Right for All, Report of the Secretary-General ¶ 135 U.N. Doc. A/59/2005 (Mar. 21, 2005). The statement is as
the Security Council itself reaffirmed the conclusion that R2P is an emerging norm in international law. 74 We move forward to examine the relations between R2P and the UN Charter *jus ad bellum* paradigm.

### C. RESPONSIBILITY TO PROTECT AND THE UN CHARTER USE OF FORCE PARADIGM

As discussed above, the U.N. Charter prohibits threat or the use of force. However, interpreting the prohibition should be in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"). 75 Article 31(1) of the VCLT provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” 76 The prohibition on the use of force, which according to some scholars thwarts the legality of humanitarian intervention, should be read along with the purposes of the U.N. Charter. The relevant purposes of the United Nations as provided by Article 1 to the U.N. Charter are “[t]o maintain international peace and security”77 and “[t]o achieve international co-operation in solving international problems . . . of humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.” 78 Moreover, the interpretation of the prohibition on the use of force must be read in context. When the Charter was promulgated, its view was to prevent inter-state tensions and uses of force. However, as a matter of fact, between 2001 and 2010, out of 29 armed conflicts in total, 27 were intra-

follows: “I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d’être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.”

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76 Id., art. 31(1).
77 U.N. Charter art. 1, para. 1.
78 U.N. Charter art. 1, para. 3.
state conflicts, meaning that only 2 conflicts were between states.\textsuperscript{79} The rise of armed conflicts and humanitarian crises inside a state serves to demonstrate that the vision of the U.N. Charter drafters was that states cannot use force against other states for merely inter-state disputes. For instance, State A cannot use force against State B to make B pay the debt owed to State A. Such a paradigm did not consider the possibility of intra-state conflicts—i.e., an oppressive regime that tortures and kills its own citizens, while the international community is unable to effectively react. The state practice shows that states are using force to intervene in situations of massive intra-state killings or genocides, as the paradigm of the inter-state use of force is inadequate to address intra-state atrocities and human rights violations. The prohibition is therefore irrelevant in addressing intra-state conflicts, since it was not intended to situations requiring humanitarian intervention, such as the current humanitarian crisis in North Korea.

Not only is the current \textit{jus ad bellum} paradigm incompatible with today’s reality, but it also fails in the same places where previous instruments that regulated the use of force have failed. Before the U.N. Charter came to life, there were different instruments, such as the Covenant of the League of Nations of 1919, which referred the parties to a dispute to arbitration, judicial decision or report of inquiry of the League’s Council, and parties were prohibited from using force until three months after the award.\textsuperscript{80} In addition, in the General Treaty for Renunciation of War as an Instrument of National Policy, also known as Kellogg-Briand Pact, the main substantial article posited that the parties “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”\textsuperscript{81} Such absolutist paradigms failed because they were unable to address the limits of the legality of war and they lacked the flexibility required in order to address new challenges.\textsuperscript{82}


\textsuperscript{80} League of Nations Covenant art. 12.

\textsuperscript{81} General Treaty for Renunciation of War as an Instrument of National Policy, art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

\textsuperscript{82} \textsc{Yoram Dinstein}, \textit{War, Aggression and Self-Defence} 85 (5th ed. 2011).
The R2P developed because there is a normative gap within the U.N. Charter. The state practice of humanitarian intervention out of legal and moral obligation toward the suffering peoples, along with the reaffirmation in the U.N. Security Council and other international forums demonstrate that humanitarian intervention is legal under current international law. This conclusion is based on the interpretation of Article 2(4) in accordance with the VCLT, taking into consideration the context, purpose, intention of the U.N. Charter drafters and the travaux préparatoires, given that the pure textual meaning is inconsistent with the purpose of the U.N. Charter and it leads to a manifestly absurd and unreasonable result.83 We move forward to examine the specific application on North Korea.

D. R2P IN NORTH KOREA

In order to establish the admissibility of the R2P in North Korea, the five substantial criteria should be fulfilled:

Firstly, and as mentioned in the beginning of this paper, four million North Koreans have died of starvation and six million are at immediate risk to die of starvation, with torture and public executions used occasionally by the government organs.84 The Reports make it clear that crimes against humanity that involve extermination, murder and enslavement have been carried out by the government of North Korea. Judging from the available evidence, it appears that there is a just cause to intervene militarily in North Korea.

Secondly, the intervening state should have the right intentions in doing so. North Korea is not particularly rich in natural resources, but there is a risk that intervention in North Korea, if carried out by the United States, will be considered a reprisal for the North Korean nuclear weapons program, as well as the humiliating statements of Kim Jong-il and Kim Jong-un against the United States. In order to overcome this difficulty, the intervention must reach a wider consensus and be carried out by a collective of states.

83 See VCLT supra note 75, art. 32(b) (providing that if the textual interpretation of a treaty leads to a manifestly absurd or unreasonable result, the interpreter must resort to supplementary means of interpretation, including the travaux préparatoires and circumstances of the conclusion of the treaty).

84 See supra notes 1–5 and accompanying text.
Thirdly, intervention should be the last resort. So far, North Korea is the most isolated country in the world.\footnote{\textit{Obama warns it may be time for more North Korea sanctions}, \textit{N.Y. DAILY NEWS} (Apr. 25, 2014), http://www.nydailynews.com/news/politics/obama-korea-article-1.1768713.} There are strict limitations on trade, banking and travel, with more sanctions being considered daily.\footnote{\textit{Id.}} The current U.N. Security Council sanctions against North Korea include embargo on arms and related material, a ban on certain export of goods, travel bans and assets freeze and more.\footnote{\textit{Id.}} Many of such sanctions were also imposed by states, such as the United States, the European Union, and Canada.\footnote{\textit{Id.}} However, those sanctions are mainly in response to violations for proliferation of chemical, biological and nuclear weapons.\footnote{\textit{Id.}} It appears that not all sanctions were considered, but due to the North Korea’s close ties with Russia and China, it is questionable whether such sanctions by other states can harm or coerce North Korea to comply with international human rights law. However, it appears that those ties are shaky, due to the unpredictable foreign policy of North Korea.\footnote{\textit{See S.C. Res. 2087, U.N. Doc. S/RES/2087 (Jan. 22, 2013).}}

Finally, the reasonable prospects and proportional means are interconnected in the case of North Korea. First, there is a high chance that the oppressive regime in North Korea will most likely react, using military force against both South Korea and Japan.\footnote{\textit{North Korea irks allies Russia and China with 3rd nuclear test}, \textit{CBS NEWS} (Feb. 12, 2013), http://www.cbsnews.com/news/north-korea-irks-allies-russia-and-china-with-3rd-nuclear-test/.} As noted above, North Korea possesses nuclear capabilities, i.e. weapons of mass destruction, and therefore, the harm likely to be caused by the humanitarian intervention could be severe. There is also a possibility that China or Russia will use some kind of reprisal to deter intervention in North Korea. Second, the proportional means is the minimal military means necessary to achieve a successful result. However, in this context, “minimal”
also indicates that it must be the minimal to cause the least collateral damage, caused by the North Korea regime. This balancing test will ensure that the military means used against North Korea is proportional, and not more than necessary, as well as prevent a potentially harmful response from North Korea.

Previous lessons of humanitarian intervention can also serve to develop a comprehensive and effective plan to intervene in North Korea. In the case of the humanitarian intervention in Kosovo by NATO, the intervention was carried out with non-U.N. Security Council authorization. 92 The implications, formally speaking, were that NATO violated Article 2(4) of the U.N. Charter prohibiting the use of force between member states. However, the U.N. Security Council resolution that intended to condemn NATO for an “illegal operation” was defeated 12-3. 93 Moreover, the fact that the humanitarian intervention was carried out by a collective of states, rather than a single one, strengthens the component of a just cause and right intentions. While an individual state may act opportunistically and possibly with lack of pure motives, a collective of states is more likely to act for the right motives and with a just cause.

The humanitarian intervention in Libya also serves to show that gradually, the UN Security Council and the international community are readier than ever to authorize R2P actions. In the case of Libya, the intervention was authorized by the UN Security Council resolution—unlike the situation in Kosovo. 94 The reluctance to authorize the R2P states, China and Russia, abstained in this case, due to lack of interest or special relations with Libya. 95 Unfortunately, it is very likely that China and Russia will veto similar resolutions on intervention in North Korea. The case of Libya demonstrates that the UN Security Council is still a political body, making decisions that are based not on norms and principles, but also on the identity of the state in question.

92 See Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT’L L. 1 (1999).
93 Ian Williams, The UN’s Surprising Support, INST. FOR WAR & PEACE REPORTING (Apr. 18, 1999), http://iwpr.net/report-news/uns-surprising-support.
Moreover, even if the humanitarian intervention will succeed in overturning the North Korean regime, there are other political powers that will prevent a change in the character of the successor regime in North Korea. It is believed that China will not let North Korea have a different kind of regime after the collapse of the current regime, and the former will act diplomatically following the intervention to shape the successor regime, which obviously will not be the democratic human rights abiding regime that the people of North Korea deserve. 96 The potential floodgate of refugees fleeing from North Korea toward China will also increase China’s involvement in the internal politics of North Korea.97

It appears that in order to successfully intervene in North Korea, a careful and thoroughly considered operation plan is required. In addition, cooperation between the intervening forces, as well as China and Russia could lower the risk of adverse results caused either by China or Russia, and might even convince North Korea to refrain from responding.

IV. CONCLUSION

Humanitarian intervention, according to the R2P doctrine, is legal. This conclusion is based on the discussion and realization that pure textual interpretation of Article 2(4) and its exceptions is inconsistent with the context and intention of the U.N. Charter drafters, and therefore it cannot be assumed that humanitarian intervention in the case of intra-state humanitarian crisis is illegal. There is an ongoing process of growing acceptance of the idea that sovereignty is not only a right, but also a duty to protect a state’s nationals. Given that North Korea is directly involved in committing crimes against humanity against its own people, the world cannot sit back, without taking appropriate action. According to the current situation in North Korea and the non-


forceful measures already implemented on North Korea, humanitarian intervention would be legitimate and legal under international law.

The practical interpretation is in fact that the intervening forces (the United States or NATO) should take into account the very specific geopolitical characteristics of the region. North Korea is in possession of weapons of mass destruction, and has close and strong ties with China and Russia. In order for an operation to be successful, those characteristics should be taken into account, in order to fulfill the five substantive requirements of the R2P. Unfortunately, those difficulties could also prevent intervention, since it is more difficult to have a sterile operation, like the operations in Libya and Kosovo, which did not cause action, due to the controversy of other states, and despite the controversy, it did not amount to any actual action.

Article 2(4) of the U.N. Charter concludes with stating that the use of force is prohibited, if it is “in any other manner inconsistent with the Purposes of the United Nations.” As discussed in this article, it would be consistent with the purposes of the United Nations to intervene in North Korea, due to the grave, severe and widespread violations of the most fundamental human rights, which amount to crimes against humanity. Successful intervention supported by the U.N. will only enhance the reputation of the U.N. as a promoter of human rights and freedoms.

The recommendation for the future of the R2P is to limit it so to limit the possibility that strong states will exploit it for their own gain. Such limitation can be either toward the subject of application—only severe situations, such as genocides, war crimes, ethnic cleansings, and crimes against humanity—or it can be toward the means, i.e., what is allowed and what is prohibited in humanitarian intervention. The narrower the scope of R2P, the more acceptance it will gain, since it will guarantee that strong states will have to justify their actions and motives.

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98 U.N. Charter art. 2, para. 4.
NOTES FROM A NEW UNDERGROUND: THE INTERSECTION OF RUSSIAN ORTHODOXY, RELIGIOUS LIBERTY, LGBT RIGHTS, AND STATE AUTHORITY

JOHN S. EHRETT*

I. INTRODUCTION

Liberal democratic societies exist in a state of ideological tension, in which foundational notions of public order must coexist with freedom of dissent. Preserving a middle ground demands constant vigilance and births civic controversies: out of such tension emerged the modern concept of pluralism. In a pluralistic regime, the public square serves as the crucible in which ideas are shaped, refined, and tempered.

In the United States, questions surrounding the extent of pluralism have been the fuel of countless jurisprudential battles. One principle, however, has generally emerged from such challenges. Though limited restrictions may be placed on certain types of expressive activity, the government will almost never intervene to suppress public discourse. No matter how esoteric

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1 See, e.g., Van Orden v. Perry, 545 U.S. 677, 730 (2005) (Stevens, J., dissenting) (describing "continuing expansion of religious pluralism and tolerance" in the U.S.); Brown v. Hartlage, 456 U.S. 45, 56 (1982) ("[O]ur tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.").


one’s religion, or how eclectic one’s political ideology, the state will generally refrain from outright interference.\textsuperscript{4}

This principle, however, is not universally upheld, even among states professing adherence to pluralism. Over two decades after the formal disestablishment of the Soviet Union, the Russian Federation has recently taken two internationally unpopular stances evoking historic patterns of regulation of dissent.\textsuperscript{5} Most recently, the Russian Federation has been targeting religious critics \textsuperscript{6} and those expressing public support for lifestyles encompassed by lesbian, gay, bisexual, and transgender (“LGBT” \textsuperscript{7}) persons.\textsuperscript{8} Relatively unique among emerging democracies, modern Russia is a nation whose notions of civic order are contextually grounded in both a strict sense of public

\begin{footnotesize}
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\item See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).
\item See, e.g., Jason M. Breslow, What Is the State of Dissent in Vladimir Putin’s Russia? PBS FRONTLINE, Jan. 13, 2015, http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/putins-way/what-is-the-state-of-dissent-in-vladimir-putins-russia/ (“Russia has never been the friendliest environment for political dissent, and . . . the situation has only grown more challenging. Since that time, Russia has raised fines for taking part in unauthorized protests, tightened state control over the media and non-governmental organizations and cracked down on opposition websites.”).
\item “LGBT” is hereinafter used as the acronym encompassing individuals identifying as lesbian, gay, bisexual, and transgender. Due to the ongoing evolution of this acronym in light of developments in the study of sexual orientation/gender identity, the term is to be understood expansively.
\item See License to Harm: Violence and Harassment Against LGBT People and Activists in Russia, HUMAN RIGHTS WATCH, 12-13 (2014), http://www.hrw.org/sites/default/files/reports/russia1214_FoUpload.pdf.
\end{enumerate}
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morality and a history of centralized political control. Accordingly, a broad historical-cultural approach must be employed when assessing ideological trends.

This Note will argue that a number of recent political measures taken by the Russian government exemplify parallel tendencies towards both restrictions on minority-group civil rights and politically centralized control of social discourse. These measures, restricting both religious freedom of minority groups and the expressive rights of those within the Russian LGBT community, are accelerated by Russia’s historical pattern of church-state integration. The nexus of confluence between religious rights and LGBT rights is of particular theoretical importance, due to historic antagonism between the advocates of each principle. Moreover, the Russian government has justified its anti-LGBT stance by drawing on distinctly Russian socio-religious enthymemes. It will be demonstrated, however, that, contrary to the Russian state narrative, defenders of both religious freedom and LGBT rights in Russia may share a common cause: promoting the free dissemination of ideas that address essential aspects of human nature. Contrary to media reports that suggest inevitable mutual hostility, both factions now have a unique opportunity to collaborate toward the advancement of this shared ideal.

In formulating the argument that a common cause exists between these two groups, in light of prevailing trends toward both increasing caesaropapism and political authoritarianism, several

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9 See discussion infra Part III; see generally WILLIAM ZIMMERMAN, RULING RUSSIA: AUTHORITARIANISM FROM THE REVOLUTION TO PUTIN (2014), at 1-13 (giving a broad overview of sub-trends within general Russian authoritarian tendencies).

10 See infra Part III.


12 See infra Part III.

13 See infra Part III.

considerations are essential: (1) the specific actions taken by the contemporary Russian regime which have given rise to controversy, and their implications; (2) the precedential framework for Russian administrative co-optation of religious discourse in the service of a political end; (3) the ongoing clash between religious organizations and LGBT groups over the legal issues in question, which may in fact obscure areas of shared paradigmatic commitment; (4) the implications of this ongoing debate for international obligatory regimes and treaty standards; and (5) the suggestion of a suitable domestic policy framework with which the issues in question may be addressed.\textsuperscript{15} It may be that advocates of both religious freedom and fully realized expressive freedoms for the LGBT community can unite around a holistic approach to civic pluralism and fundamental human rights in the Russian Federation.

Careful evaluation of Laws 136-FZ and 135-FZ, which restrict speech deemed offensive to religious feelings and speech deemed “propagandistic” regarding LGBT lifestyles, respectively, requires analysis of both current and past aspects of the Russian sociopolitical experience. Specifically, this Note advances three interrelated conclusions:

1. \textit{Historical.} The recent increased tendency towards synthesis between church and state effected within Vladimir Putin’s Russia may have emerged from political considerations similar to those present during the \textit{rapprochement} of World War II, in which Joseph Stalin reversed patterns of antagonism toward the Russian Orthodox Church for the political purposes of the Soviet Union.

2. \textit{Legal.} Both religious- and sexual-minority groups within Russia—organizations traditionally opposed to one another within liberal-democratic civil societies—face similarly restrictive limitations on freedom of expression under Putin, restrictions both characterized by far-reaching implications and potentially derived from social/geopolitical considerations that echo those present during the \textit{rapprochement}.

3. \textit{Theoretical.} Both of these minority groups may conceivably derive substantial benefit from a

\textsuperscript{15} \textit{See} discussion \textit{infra} Part VI.
broader baseline vision of civic pluralism that transcends areas of ideological disagreement.

II. RECENT DEVELOPMENTS IN RUSSIAN LEGISLATION

Emergent controversies over expressive freedom in the Russian Federation stem from two pieces of legislation passed in late June 2013 by the Russian Duma: Federal Law No. 136-FZ16 and Federal Law No. 135-FZ.17 These laws are often colloquially termed “the blasphemy law” and “the anti-gay law” by Western media;18 as one might reasonably expect, both have garnered criticism—to some extent, however, grounded in surface-level misunderstandings—from outside observers.19 Accordingly, a systematic evaluation of the laws in question must undergird any discussion of their consequences. This part will seek to provide such an evaluation, correct a number of ongoing popular misconceptions, and offer an overview of the possible political rationale underlying both legislative acts.

A. LAW 136-FZ

International debate continues to rage regarding the possible implications of Russia’s Federal Law No. 136-FZ of June 29, 2013, on “Amending Article 148 of the Russian Criminal Code and Certain Legislative Acts of the Russian Federation in order to counter the actions offending religious beliefs and feelings of


citizens,” (“Law 136-FZ”).20 This law emerged in the wake of a controversial 2012 incident, in which Russian dissident musical group Pussy Riot performed an unauthorized “performance art” routine.21 Specifically, a profanity-laced “punk prayer” containing a call for the Virgin Mary to expel Vladimir Putin from office—in the Christ the Savior Cathedral, one of Moscow’s most revered sites.22 Law 136-FZ was the fruit of the ensuing public outcry.23

Law 136-FZ, following in the footsteps of a 2000 “anti-extremism” Russian law,24 levies financial sanctions against individuals found responsible for “disrespecting” the religious traditions of Russia’s historic faiths. Critically, implicit in this legislative proscription is both a certain subjective dimension and an identification of particular “historical” religions which are to be granted greater legal protection than others. As the Institute on Religion and Public Policy details, “The draft Blasphemy Law seeks to amend existing Russian codes of law, particularly the Criminal and Administrative codes, to include legal penalties against individuals found to have affronted the rites and ceremonies of groups whose religions are an integral part of the historical heritage of Russia.”25 Amnesty International goes on to explain the penalties for any violation:

The law criminalizing blasphemy which came into force today imposes fines of up to RUB 500,000 (over USD 15,000) and up to three years of imprisonment for public actions which disrespect or insult the religious beliefs of people in places of worship. If committed elsewhere, the offence carries up to a year of imprisonment and fine of up to RUB 300,000 (USD 9,000).26

20 See Law 136-FZ, supra note 16.
22 Id.
23 See Sineva, supra note 6.
24 Id.
25 Id.
The Institute goes on to express concern that “[t]he term ‘blasphemy’ has no definitional basis in the legal system of the Russian Federation, a country with a wide spectrum of ethnicities, confessions and beliefs.”27 This lack of definition, in turn, has the possibility of compounding upon the over-breadth of past restrictions on religious speech, as the International Religious Freedom Roundtable notes:

The [Russian] federal government continues to allow the use of an expansive definition of “extremist activity” to include religious writings that imply superiority of one’s religion to another, or that express opposition to moral and ethical shortcomings in society. Any local prosecutor can push for such religious works to be found “extremist.”28

Accordingly, these two laws together suggest a politicized understanding of “religious tolerance” in Russia: those faith communities with the greatest judicial clout are afforded substantial potential leeway in determining both what constitutes “extremist activity” and what constitutes “disrespect,” due to the imprecision of the statutes in question.29

Western nations—whose constitutions generally adopt a broader vision of freedom of speech and expression—have been loath to adopt blasphemy laws comparable to Russia’s.30 Benedict Rogers, Deputy Chair of the Conservative Party Human Rights Commission in the United Kingdom, explicates the theoretical principle undergirding such reticence:

In the course of thinking, questioning, exploring, it is legitimate—indeed essential—to ask probing

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27 Sineva, supra note 6.
29 See id.
questions of religions and beliefs, our own and others. . . . It cannot be the business of government to determine blasphemy and heresy, let alone to legislate against them. Religious teachers can teach and preach about them, but politicians should not outlaw them. An open society consists of open minds and, whether we like it or not, open mouths too.31

Thus, in Rogers’ framework, the very act of establishing a legal definition of “blasphemy” is an act against the principles of democratic pluralism, which cannot meaningfully coexist with state-enforced religious doctrines—or those doctrines whose relative value is determined by those in positions of power.32 He further proceeds to explain the practical basis for concern over laws similar to Russia’s:

There are several problems with blasphemy laws. In most cases the “crime” is very poorly defined. . . . As a result, many blasphemy charges turn out to be completely false. The law is used to settle personal or commercial scores that have nothing to do with religion. The accused never even said or did anything offensive—the blasphemy law is simply used as a convenient tool for a vindictive adversary. There is typically no proof of intent.33

Thus on a pragmatic legal basis alone (particularly when coupled with the dearth of a statutory definition of “blasphemy”), Law 136-FZ lays the groundwork for judicial proceedings motivated more by ideological distaste than by concerns over public order.34 Avenues for prosecuting vandalism and disorderly conduct already exist.35 Accordingly, if merely “maintaining the peace” were the foremost concern, there would appear to be no pressing need to

32 See id.
33 Id.
34 See id.
Designate certain majority-favored faiths as “protected.” The law as it stands, however, would seem to suggest that certain belief systems are more highly favored than others, a contention not without supporting precedent in the Russian historical experience, as subsequent parts will observe, but a tendency which contravenes the international normative structure to which Russia has acceded via past treaties.

### B. LAW 135-FZ


Contrary to the majority of popular perceptions, however, the uniquely controversial aspects of this legislation are not found in its direct effects upon LGBT persons, but rather in its convergence with other limitations of expressive freedom: specifically, Law 135-FZ targets the following category of expressive activity for legislative censure:

[**P**]romotion of non-traditional sexual relationships among minors expressed in the dissemination of information aimed at forming of non-traditional sexual orientation, attractiveness of non-traditional sexual relationships, distorted interpretation of social equivalency of traditional and non-traditional sexual relationships or touting of information on

36 See id.
37 See infra Part II; Parts IV-V.
39 Id.
non-traditional sexual relationships that attracts interest to such relationships in minors.\textsuperscript{40}

Amnesty International’s analysis summarizes the penalties for unauthorized conduct under the statute: “[The law] includes penalties of up to RUB 5,000 (USD 150) for individuals, up to 10 times that for officials, and up to RUB 1,000,000 (over USD 30,000) as well as possible three-month suspension of activities for organizations.”\textsuperscript{41}

The law is not without popular support, given that mainstream Russian culture is characterized by widespread antagonism towards LGBT persons and activities: official poll data released by the All-Russian Public Opinion Center (“VTSIOM”) indicates that “88 per cent of Russians supported the amendments to the law. Only 7 per cent said they are against. Some 54 per cent said homosexuality should be banned and face criminal liability.”\textsuperscript{42}

In light of falling birthrates in Russia\textsuperscript{43} and other expressions of social malaise, Putin and other legislators may point to trends in popular opinion as a supposedly compelling justification for Law 135-FZ. It is, in turn, easy for organs of the government establishment to portray LGBT Russians as participatory in ongoing civic ills, whether or not this portrayal is grounded in fact:

In July, the Moscow department of the FSB, Russia’s secret police, placed homosexuality within a perceived foreign conspiracy to overthrow the Russian government. The FSB report read: “The spread of the idea of homosexuality…is all the more widespread. According to our operational data, groups of people counting themselves among sexual minorities . . . actively employ the special services and organizations (including NGOs) of foreign governments, to realize projects with destructive

\textsuperscript{40} See Law 135-FZ, supra note 17.

\textsuperscript{41} Russia: New Laws an Affront to Basic Human Rights, supra note 26.


goals. In particular, it was recently noted that the active participation of said people in the staging of protests (including the May 6, 2012 protest on Bolotnaya square in Moscow) that sought to harm the Russian Federation.\footnote{44}{Sean Guillory, *Repression and Gay Rights in Russia*, THE NATION (Sept. 26, 2013), http://www.thenation.com/article/176368/repression-and-gay-rights-russia#.}

International critics have, at times, obviated important nuances surrounding Law 135-FZ. Same-sex sexual activity was decriminalized in Russia in 1993 following the collapse of the Soviet Union;\footnote{45}{Jamie Manson, *The Orthodox Church’s Role in Russia’s Anti-Gay Laws*, NAT’L CATHOLIC REP. (Aug. 14, 2013), http://ncronline.org/blogs/grace-margins/orthodox-church-s-role-russian-anti-gay-laws.} the law in question deals exclusively with the provision of a certain category of information to minors. This seemingly narrow speech restriction—although a restriction fraught with far-reaching implications—has been incorrectly conflated with outright state-sponsored persecution. In the words of American talk-show host Jay Leno: “Suddenly, homosexuality is against the law. I mean, this seems like Germany: Let’s round up the Jews. Let’s round up the gays. Let’s round up the blacks. I mean, it starts with that.”\footnote{46}{Herszenhorn, supra note 19.}

Sean Guillory, writing in *The Nation*, corrects this misunderstanding and offers a clarifying perspective:

Given the international outcry against the law, including hyperbolic comparisons to Nazi Germany, it’s somewhat surprising how sparingly it’s been used. No organization has been prosecuted yet. So far there have been only a handful of cases involving individuals. And most of these concern gay activists who’ve purposely violated the law to challenge it in court. In 2009, two activists, Nikolai Baev and Irina (Fet) Fedotova, were convicted of violating Ryazan’s gay propaganda law for holding a sign reading “Homosexuality Is Normal” and “I Am Proud of My Homosexuality” outside a school.\footnote{47}{Guillory, supra note 44.}
Complaints over journalistic imprecision aside, however, Law 135-FZ unquestionably sets forth a legislative precedent that, alongside Law 136-FZ, suggests a trend towards greater restrictions on civil and political rights.48 Attorneys for Alliance Defending Freedom, Roger Kiska, Daniel Lipsic, and Paul Coleman point out that the “over-breadth of the law in general, meaning all of its provisions (among them the prohibition of propaganda regarding non-traditional sexual relationships with an aim to corrupting minors), does raise concerns from a free speech perspective.”49

In many liberal democracies, including the United States, community norms, if not de jure legal strictures, limit the accessibility of certain forms of content to minors (i.e. pornography, depiction of extreme violence, etc.).50 Accordingly, it is insufficient to indict the Russian LGBT legislation in question without further establishing the nature and problematic extent of its over-breadth.51 This over-breadth concern emerges on two fronts: over-breadth of content and over-breadth of communication.

Specifically, this over-breadth emerges from the lack of legal definition of the terms employed—as in the case of Law 136-FZ. As Human Rights First, an organization critical of Law 135-FZ, succinctly explains: “If you ask twenty judges to explain what it means to disseminate ‘information on nontraditional sexual relations,’ you’ll likely get twenty different responses…Without a legal definition of ‘propaganda,’ ‘distributing information,’ or ‘nontraditional sexual relations,’ the article’s interpretation is left to the police and the courts.”52 In practice, Russian authorities have apparently elected not to interpret Law 135-FZ with particularly great latitude.53

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48 Kiska et al., supra note 38.
49 Id.
50 Cf. American Library Ass’n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (upholding the constitutionality of regulations placed on producers of pornography where the interests of minors are implicated).
51 A meaningful comparison of pluralistic norms demands that circumstantial factors be considered across different legal regimes: in what way, for instance, is Russia’s ban different than a U.S. ban on certain forms of pornography?
53 See Guillory, supra note 44.
Speaking to the issue of content-based regulation, the *Boston Globe* reports that, “[i]n a . . . sinister reflection of Russian reality, four gay rights activists were arrested in St. Petersburg after they unfurled a banner that quoted the ban against discrimination in the Olympic Charter.”\(^54\) Even more disturbingly, when Russian government officials have actually hinted at some semblance of an administrative definition of these crucial terms, a clear potential has emerged for far-reaching limitations on free expression:

In April 2012, the foreign ministers of the G8 (minus Russia) countries “reaffirmed that human rights and fundamental freedoms are the birthright of all individuals, male and female, including lesbian, gay, bisexual or transgender individuals.” The ministers of the United States, Canada, France, Germany, Italy, Japan, and the United Kingdom said, “These individuals often face death, violence, harassment and discrimination because of their sexual orientation in many countries around the world.” The Russian delegation disassociated itself from the language, citing a footnote and explaining that the foresaid [sic] acknowledgement constitutes “aggressive propaganda.” Indeed, under the federal “propaganda” law, a Russian official could now be fined for endorsing statements like the G8 proclamation. If acknowledging violence based on sexual orientation is “aggressive propaganda,” what isn’t?\(^55\)

The mere recognition that LGBT persons often experience human rights violations is far from a moral or sociological endorsement of particular lifestyles, yet even this acknowledgement of brute fact is deemed to be in violation of Law 135-FZ—a counterintuitive result, and one that appears to stem directly from the intrinsic vagueness of the law against “propaganda.”\(^56\) If this precedent

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\(^55\) *Convenient Targets: The Anti-“Propaganda” Law & the Threat to LGBT Rights in Russia*, supra note 52, at 8.

\(^56\) Whether or not an acknowledgement of the presence of a particular phenomenon is a legitimation of that phenomenon, for
continues, even seemingly anodyne sociopolitical statements—such as “LGBT persons have historically experienced violence, and such acts of violence are condemnable”—may fall within administrative reinterpretations of such an ill-defined “propaganda” proscription, and be deemed corruptive to minors.\(^{57}\)

Yet concerns over the vast regulatory potential of Law 135-FZ are not limited to possible regulations on the content of expression. Indeed, given the law’s lack of definition of what precisely constitutes “dissemination of information,”\(^ {58}\) broad proscriptions on certain modes of civic expression are within the realm of possibility. The Council for Global Equality explains this risk, a concern that will be further discussed in later Parts:

Moreover, while the law suggests that only information directed at children should expose an individual or an organization to liability, prosecutions under similar laws in the regions have not dwelled on this nexus to children and the federal law’s heightened focus on the internet, where minors have an opportunity to view such information, suggest that the law could be applied broadly and with little regard to any notion of child protection.\(^ {59}\)

Leaving aside any questions of the nature of such information, and whether or not the Russian government may legitimately seek to regulate it, the vagueness inherent in the legislation risks compromising the ability of individuals to freely make information available online, irrespective of any actual “propagandistic” intention directed at minors.\(^ {60}\) Based on the pattern of court decisions that has emerged thus far, a Russian individual engaged in pro-LGBT civic or political activism online could theoretically, instance, is a question that cannot be answered—even by inference—in light of Law 135-FZ.

\(^ {57}\) Convenient Targets: The Anti-“Propaganda” Law & the Threat to LGBT Rights in Russia, \textit{supra} note 52, at 8.

\(^ {58}\) Law 135-FZ, \textit{supra} note 17.


\(^ {60}\) \textit{Id.}
under an expansive interpretation of the federal law, be punished for promulgating impermissible information to minors.\footnote{See id.}

Such definitional ambiguity, which naturally results in a ceding of administrative discretion to the Russian judicial establishment, offers the opportunity for political leaders to affirmatively promote a certain vision of “Russia as it ought to be”—particularly in contraposition to external rivals.\footnote{See Gabriela Baczynska, Russian Orthodox Church Sings from Putin Hymn Sheet on Ukraine, REUTERS (Mar. 7, 2014), http://www.reuters.com/article/2014/03/07/us-ukraine-crisis-russia-church-idUSBREA260Q520140307.} From the perspective of Russian administrators, non-traditional religious and sexual practices conceivably risk creating cleavages in an otherwise stable and homogeneous national ideal: hence, engaging in targeted restriction of minority group activities offers a means of both shoring up political credibility and limiting the proliferation of dissident viewpoints.\footnote{See Stephen Blank, Russia’s Lurch Toward Fascism, HUFFINGTON POST (Apr. 18, 2014), http://www.huffingtonpost.com/stephen-blank/russias-lurch-toward-fasc_b_5169230.html.}

In order to bolster and propagate this ideal, however, the halls of secular and ecclesiastical power must find common ground. This necessity is born from years of tradition reinforcing Russian cultural identification with Orthodoxy: to truly win the hearts of the populace, a leader cannot overlook the uniquely spiritual quantum of the Russian experience.\footnote{See infra Part III.} It is to the subject of such an intersection—a resurgent synthesis of interests that eerily echoes one of decades past—that is the issue the subsequent Part turns to address.

III. HISTORICAL ROOTS OF CHURCH-STATE SYNTHESIS IN RUSSIA

Since the days of the tsars, the Russian Orthodox Church has displayed a tendency towards integration into the state political apparatus.\footnote{Nicholas Myers, Russian Orthodoxy’s Unreconciled Dualism, FIRST THINGS, (May, 24 2012), http://www.firstthings.com/web-exclusives/2012/05/russian-orthodoxys-unreconciled-dualism.} At times, this complex and almost codependent relationship has verged on the antagonistic—witness, for instance,
the persecution of religious believers during particular stages of the Soviet era—
but on the whole, the Orthodox Church has persistently linked its own fate to that of the regime writ large. Lacking institutional buffers comparable to the American “wall of separation” between church and state, the Orthodox Church has historically gravitated toward whoever holds the reins of power. In so doing, the Church has evidenced a trend towards allowing its theology to develop according to the needs of state policy—an ideological co-optation by the ruling faction that draws on the Church's historically broad appeal as a means of solidifying political support. History suggests that the Putin administration’s recent legislative move away from protection of free expression, in matters of both religion and sexuality, is a resurgent manifestation of this tradition.

While a certain level of integration between church and state has historically been characteristic of the Russian social experience, not all episodes of this integration are equivalent with respect to both their initial rationale and emergent implications. This variance may be attributed to the external circumstances surrounding particular episodes of uniquely close church-state cooperation. For the purposes of this discussion, analysis will center on those episodes in which such cooperation was accompanied by a demonstrated aim of establishing a particular regime’s political legitimacy in contraposition to outside forces.

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66 See generally Paul Gabel, And God Created Lenin: Marxism VS Religion in Russia 1917–1929 (2005) (discussing the clash between Marxists and persons of faith in the early days of the Soviet Union).


68 Cf. Stephen Blank, Russia’s Lurch Toward Fascism, HUFFINGTON POST (Apr. 18, 2014), http://www.huffingtonpost.com/stephen-blank/russias-lurch-toward-fasc_b_5169230.html. (“In Russian history, the invocation of the trinity of church, state, and Russian nationalism has historically occurred at precisely those intervals where the state essentially admits that it has nothing to offer anyone and will not reform.”)

69 See discussion infra Part III.

70 Id.

71 See William Zimmerman, Ruling Russia: Authoritarianism from the Revolution to Putin (2014) for a multifaceted survey of this tradition.
During World War II, this occurred through Joseph Stalin’s attitudinal about-face with respect to the Russian Orthodox Church—a rapprochement necessitated by incursions of Nazi military forces into Russian territory, specifically incursions in which invading Germans sought to wrest moral legitimacy away from the Soviet regime by removing barriers to religious practice. Similarly, today the Russian regime seeks to define itself in opposition to a Western society it has cast as decadent and unappealing to Russians who favor traditional moral norms.  

In short, when political objectives are accompanied by a particularly pronounced need to claim the socio-moral high ground, there has been a tendency in some Russian regimes toward an ever-closer fusion of church and state. This fusion carries with it a number of consequences that will be further explored in subsequent parts.

For centuries prior to the Russian Revolution, Russian society was characterized by a tight linkage between civil government and religion—specifically, the Russian Orthodox Church. The early writings of Vladimir Ilyich Lenin, father of the Russian Revolution, demonstrate (in line with prevailing Marxist sentiment) an unwavering contempt towards this state-synthesized religion. In a 1905 article, Lenin wrote, “We demand complete disestablishment of the Church . . . [W]e founded our association, the Russian Social-Democratic Labour Party, precisely for such a struggle against every religious labour movement, not in the workers.” Notably, however, Lenin suggested that the appropriate counter-religious strategy was marginalization, not outright opposition: “The revolutionary proletariat will succeed in making religion a really private affair, so far as the state is concerned.” For Lenin, religion was simply a vestigial psychological practice that would die off as communism ascended to supplant it. A sharp division, however, was required between church and state in order to facilitate this transition: this division would go on to be supported

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75 Id.
or compromised, as circumstances required, by Lenin’s successors.76

In contrast to Lenin, some Marxist thinkers discussed this existing church/state hybridization without resorting to harsh invective. Friedrich Engels, crucially, “made a distinction between early Christianity (the first three hundred years) and Christianity after it became the state religion under Constantine in the early fourth century. He drew parallels between the suffering of early Christians and those of the modern working class.”77 The existence of these parallels would later push Stalin’s administration to syncretize socialist political thought with Orthodox civil-religious practices.78

Upon acceding to power, however, the Bolsheviks adopted a hardline stance towards religious practitioners. At least twenty-eight Orthodox bishops, and thousands of other clergy and believers, were killed during 1918 and 1919.79 And, as Wassilij Alexeev points out, this situation only grew more precarious for the Church: “The number of open (i.e. functioning) churches decreased considerably, and by 1939 the situation was catastrophic . . . In view of these facts one can assume that the number of open churches in the USSR at the beginning of 1939 was only approximately 2,700, i.e., no more than six percent of the pre-revolutionary figure.”80

The newly-forged Bolshevik state, however, would soon face a terrifying challenge from the west: specifically, the rise of a rival totalitarian power that was unafraid to embrace and propagate (albeit in a bastardized form) Christian religious iconography.81

76 See Dzurnal Moskovskoi Patriarhkii (Journal of Moscow Patriarchate), No. 1 (Sept. 12, 1943), 5, 6, 11, 16 reprinted in A DOCUMENTARY HISTORY OF COMMUNISM IN RUSSIA: FROM LENIN TO GORBACHEV 28 (Robert V. Daniels ed., 1993).

77 GABEL, supra note 66, at 85.

78 Jordan Hupka, The Russian Orthodox Church as a Soviet Political Tool, 2 CONSTELLATIONS 31, 39 (2011).

79 GABEL, supra note 66, at 116.

80 Alexeev, supra note 67, at 29–30.

Jordan Hupka succinctly summarizes the implications of the Nazi onslaught for the Russian church/state relationship:

It was the Nazi invasion of 1941, however, that brought new life to the church. As the German army swept eastward, churches were re-opened to incise the local population to accept their new rulers. This was a great threat to the Soviets, as people in Soviet-held territory long yearned for that freedom. Thus, Stalin was forced to end his attack on religion.82

The Nazis strategically sought to exploit a critical ideological variance between the Soviet populace and its leadership. By affirming the religious heritage that many Russians still embraced, the invaders attempted to fracture any sense of national consensus or solidarity before it could materialize. The Nazis themselves were no strangers to co-opting elements of the Christian faith into their political and military battlefront.83

Noted Russian writer Maxim Gorky, in a letter to Stalin, warned against explicit antagonism toward religion on the parts of the Soviet authorities. “You won't achieve much with the weapons of Marx and materialism, as we have seen,” Gorky advised.84 “Materialism and religion are two different planes and they don't coincide. If a fool speaks from the heavens and the sage from a factory—they won't understand one another. The sage needs to hit the fool with his stick, with his weapon.”85 In other words: to attain the ultimate Marxist end, religious ideology had to be controlled and redirected. With the longed-for segue from totalitarianism to pure communism still incomplete, Stalin—more interested in preserving his power than preserving pure Marxist doctrine86—pragmatically realized that a broad Soviet attack on religion had

82 Hupka, supra note 78, at 39.
83 See generally ERIC METAXAS, BONHOEFFER: PASTOR, MARTYR, PROPHET, SPY (2011) (discussing the conflicts within the German church at the dawn of the Nazi period).
85 Id.
been premature, and ended the systematic oppression of the Orthodox Church in 1943. \textsuperscript{87}

This policy shift, however, did not stop at mere cessation of persecution; it was an outright imprimatur of approval for certain religious institutions, as Hupka subsequently notes: “When the Soviets forced the Germans out, the re-opened churches were absorbed into the Russian Orthodoxy. While the persecution of the Russian Church ended, all other churches were eliminated. As a result, the sole legitimate religious institution was firmly in the grasp of the Soviet government.” \textsuperscript{88} Paradoxically, Stalin’s subsumption of the church into the state bore similarities to the similar synthesis produced by the Roman emperor Constantine centuries before—precisely the phenomenon Engels had condemned.

Stalin’s embrace of Marxist-tinged civil religion \textsuperscript{89} was, all things considered, a calculated decision to shore up the foundations of communism. \textsuperscript{90} In the face of sweeping Nazi attacks, continued religious persecution would not inspire collective national solidarity; a more subtle touch was needed. The great irony of this policy change is clear: for the very purpose of safeguarding the communist Weltanschauung (and an arguably post-religious way of life), a new synthesis of church and state was required. The Russian populace, accustomed to a close relationship between the Orthodox Church and various tsarist regimes, was certainly not unfamiliar with such a fusion; the character of this particular fusion, however would be fundamentally unique, given the newness of the Soviet project. \textsuperscript{91}

A melding of Marxist-style socialism and Christianity was not without intellectual precedent. Strains of what would later be termed “liberation theology” already existed within the Orthodox

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\textsuperscript{87} A DOCUMENTARY HISTORY OF COMMUNISM IN RUSSIA, supra note 76, at 228. \\
\textsuperscript{88} Hupka, supra note 78, at 39. \\
\textsuperscript{91} See Hupka, supra note 78, at 39.
\end{flushleft}
Church, as Alexander Negrov, rector of the St. Petersburg Christian University, argues:

It is possible to trace the influence of certain Marxist socio-analytical insights within Russian Christianity at the beginning of the twentieth century. . . . For some Orthodox thinkers a Christian [could] be a socialist. . . . he or she ought to desire the socialization of the economy, which would (1) guarantee that every human has the right to work; (2) secure for every human being the possibility of realizing the fullness of life; (3) regulate the community by promoting communication between people on the issue of justice. However, they believed that it is only the Church that is able of itself to create a new man or a brotherly community of people, to create community, communion between people, and the brotherhood of people.  

Negrov goes on to explain that, “Through religious praxis and faith teachings, these Orthodox exegetes and theologians also attempted to connect the suffering of Christ on earth with that of the oppressed and poor in Old Tsarist Russia, using particular references in the gospel.”

This bears a close parallel to Engels’ own analysis of the church-state relationship. By relying on Christian tropes to justify aspects of the socialist worldview, communism could be reinforced without the negative consequences of overtly attacking religious practice.  

Thoroughgoing Marxists and Russian Orthodox believers alike could, at least in theory, unite around a common social vision, albeit for different reasons. Historian Hiroaki Kuromiya has even speculated that in the postwar era, Stalin might have employed Orthodox parishes as actual vehicles of Soviet ideological expansion.  

This religio-political synthesis is exemplified in a 1947 declaration by Archpriest N. A. Khariuzov: “Moscow is the centre of the social life of humanity, the centre which unites all progressive and democratic elements, and in

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93 Id. at 342.
94 Cf. Gorky, supra note 84.
religious life Moscow is not the centre of aristocratically despotic Catholicism or of anarchic Protestantism. Moscow is the centre of true Orthodoxy, rejecting this or that extreme.96

The aforementioned actions led to a win-win scenario for the Soviet regime. With the Orthodox Church in thrall to the Politburo, “obedience to God” could be directly connected with “obedience to government.” This correlation is evidenced by Stalin’s persecution of Catholics, which continued even after the Orthodox rapprochement; Catholics, who by definition owed allegiance to an extraterritorial “spiritual sovereign” in the Vatican, were seen as a threat to Stalin’s aims and subjected to oppression.97 By fusing the Soviet regime with the Orthodox Church, any element of internal conflict on the part of the individual—any sense of conflicting loyalties between church and state—could theoretically be rationalized away. Thus, Stalin’s relaxation of controls on the Church was, fundamentally, a strategic decision.

Assuredly, such an abrupt reversion to tsarist-era policy (particularly when subsequent to a period of intensive persecution) was fraught with implications. This becomes still more pronounced when the impact of communist-themed liberation theology on the church/state relationship is considered. Contrary to what one might expect, Stalin’s integration (or official toleration) of the Russian Orthodox Church within the Soviet system resulted in a long-term weakening of ecclesiastical influence.98 Though the Orthodox Church never again lost its stamp of official approval, factors beyond governmental control led to a progressive decline. Alexeev highlights the root cause of this downward spiral:

For all the concessions which the Russian Orthodox Church received during and after the Second World War, the Moscow Patriarchate was obliged to pay the price of complete subordination to the atheistic government of the USSR and to participate in its foreign policy. In this way the Soviet government . . . did everything possible to contain it within the

96 DUNCAN, supra note 73, at 59.
98 KUROMIYA, supra note 95, at 39 (“The Orthodox Church’s concordat with the Soviet government appeared to many sectarians as a betrayal—in ‘service of the Antichrist.’”).
tightly-controlled body of the Moscow Patriarchate, which ha[d] become a tool of the Soviet government in the attainment of its political goals.  

Absent the external pressures of World War II, Nikita Khrushchev and his successors did not share Stalin’s vision for a robust and pragmatic synthesis of church and state. Philip Walters explains the church/state tension that persisted into the postwar era: “The Soviet government . . . saw fit to enlist the support of the Church for its political aims, but it never became reconciled to the existence within the Soviet Union of religion as a worldview.” It may be accordingly inferred that the existence of Christianity was tolerated in an exclusively adjectival capacity: “Christian communist,” might be permissible and even praiseworthy, but “communist Christian” would suggest a hierarchy of belief in which communism was considered subsidiary to one’s religious faith. This, presumably, had the net effect of further reducing religious doctrine to a matter of antiquated tradition—a veneer of orthopraxy serving as a substitute for true orthodoxy.

With the legitimacy of the church linked on some level to that of the state, progressive fragmentation of the Soviet system engendered turmoil in the attached Church and a backlash on the parts of individual Russian believers. Religious scholar Andrew Evans pinpoints the lasting sociopolitical consequences stemming from decades of such integration:

The church-state relationship works both ways. Various political parties use the ROC [Russian Orthodox Church] in order to exploit its solid base of symbolism and to tap into a potentially valuable constituency. In return the ROC, seeking to guard its links with the state in one form or another, finds support all along the political spectrum. Rather than endorse a particular set of values, the ROC itself

99 Alexeev, supra note 67, at 34.
100 Philip Walters, The Russian Orthodox Church 1945–1959, 8 RELIGION, STATE AND SOCIETY: THE KESTON JOURNAL 218, 222 (1980).
101 Id.
102 KUROMIVA, supra note 95, at 39.
wants to be a value in Russian society.\textsuperscript{103} [Emphasis in original]

This tacit societal compartmentalization of the Orthodox Church stems from its historical interdependence with the state; if the doctrine and character of the Church are impacted by ideological fluctuations within civil government, the Church in turn is led to abrogate its traditional role as an arbiter of absolute moral truth. The Stalin-era reconceptualization of traditional religious themes (suffering, redemption, etc.) in purely humanistic terms resulted in a compromise of the distinctive Orthodox doctrinal character; the mythos found in symbolism itself, rather than the metaphysical concepts encapsulated by such symbols in the first place, became the sociological centerpiece of religious dialogue.\textsuperscript{104} For Putin and other emerging political leaders, the precise character and teachings of the Orthodox faith may or may not be relevant in any socially meaningful way: such religious institutions have historically served a utilitarian purpose in Russian society, and can correspondingly serve as a sort of “national glue” reinforcing cultural solidarity.\textsuperscript{105}

The fundamental lesson that may be derived from observation of this synthesis is relatively straightforward: contemporary Russian history has displayed an ongoing pattern of integration between political and ecclesiastical loci of authority.\textsuperscript{106} In such a symbiosis, particularly as epitomized by the Marxist-Orthodox intellectual convergence Negrov identifies,\textsuperscript{107} authority figures may posit a basis for laws that apparently derive from the enthymematic foundation of the Russian cultural experience.\textsuperscript{108}

Put another way, a Russian leader seeking to advance his political ambition may draw upon the socio-religious elements that

\textsuperscript{103} Andrew Evans, \textit{Forced Miracles: The Russian Orthodox Church and Postsoviet International Relations}, 30 RELIGION, STATE AND SOCIETY: THE KESTON JOURNAL 33, 35 (2002).

\textsuperscript{104} See generally id. (explaining the gradual breakdown of traditional ecclesiastical norms).


\textsuperscript{106} See Alexeev, supra note 67.

\textsuperscript{107} See Negrov, supra note 92.

\textsuperscript{108} See DUNCAN, supra note 73, at 59
pervade modern Russian history; this mutually influential relationship works both ways, given the Orthodox Church’s past willingness to adapt to state norms rather than seeking to shape them.\footnote{Cf. George Weigel, *Kowtowing to Moscow = Bad Ecumenism*, FIRST THINGS (Dec. 10, 2014) [hereinafter Weigel, *Kowtowing to Moscow*], http://www.firstthings.com/web-exclusives/2014/12/kowtowing-to-moscow-bad-ecumenism (“[The] obstacles to a Church ‘breathing again with both its lungs’ are not going to be resolved by kowtowing to the patriarchate of Moscow and tacitly accepting its dubious ‘narrative’ about the history of Christianity among the eastern Slavs . . . .”).} This differs from the “civil religion” often espoused by politicians in states lacking historical establishments of religion in that caesaropapist authority structures, such as those in Russia, are not merely convergent, but codependent.\footnote{Just as the state benefits from the legitimation of its political authority by way of the church, the church reaps material benefits from its affiliation with the state; see infra Parts IV-V.} Both evolve in order to ensure the persistence of the extant political authority—whether that be a tsarist regime, a Communist state, or a “democracy” in transition.\footnote{Cf. Jason M. Breslow, *What Is the State of Dissent in Vladimir Putin’s Russia?* PBS FRONTLINE, Jan. 13, 2015, http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/putins-way/what-is-the-state-of-dissent-in-vladimir-puts-russia/ (noting the instability of the contemporary Russian “democratic” order).} In such an arrangement, neither church nor state serves to “check” the other.

The following Part will consider how both of Russia’s controversial recent measures—Law 136-FZ and Law 135-FZ—fall within this tradition of intellectual co-optation. Furthermore, it will examine how the Putin administration, in the tradition of its predecessors, has successfully capitalized on persistent fissures in the Russian ideological consciousness. In so doing, the administration has constructed an idealized and politically winsome vision that integrates society and state.

IV. RELIGION, LGBT RIGHTS, AND FREE EXPRESSION

In the course of evaluating patterns of social upheaval in Russia, and before further consideration of how historical patterns of church-state cooperation have lent sociocultural impetus to emerging political dynamics, a brief detailing of the specific philosophical issues under consideration is warranted. To wit: this
Part offers a brief theoretical overview of the shared political interest in pluralism held by members of both religious minority groups and representatives of the LGBT community, before exploring how these interests intersect in the context of the developing Russian tendency towards cultural, religious, and social homogeneity—a tendency accelerated, if not actually inspired, by the political establishment.

Few recent clashes over principle have been as contentious as those between members of traditional faiths and advocates for expanded LGBT rights. Drawing upon centuries of moral proscriptions against same-sex sexual behavior,\(^{112}\) conservative individuals and institutions have raised a number of challenges to the increasing movement of LGBT persons and practices into the societal mainstream. These arguments range from the religious (same-sex conduct is inherently immoral, by virtue of the fact that it violates divine command\(^ {113}\)) to the pragmatic (the optimal arrangement for rearing children is a family headed by a married mother and father\(^ {114}\)). In response, LGBT allies have cited universalizing principles of human rights (the right to privacy in intimate affairs,\(^ {115}\) the right to enter into contractually-recognized relationships\(^ {116}\)) and asserted that any significant social impact will be positive (the claim that LGBT individuals frequently make excellent parents, etc.\(^ {117}\)).

Similarly, a conflict narrative has emerged between established religious institutions and newer modes of expressing

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113 E.g., Leviticus 18:22.


belief (or nonbelief, as the case may be).\textsuperscript{118} Much has been written about the purported fragmentation and/or decline of Western Christianity, stemming from an emerging lack of overarching worldview consensus.\textsuperscript{119} Accordingly, institutions are likely to be acutely aware of any hostility (real or perceived) directed toward their core tenets or composition. These forms of tension are frequently conceptualized as a conflict between socially conservative and socially progressive values.\textsuperscript{120} And indeed, those most likely to oppose LGBT political goals (the normalization of same-sex marriage and parenting, among other objectives) typically identify as “conservative”; conversely, those of a pro-LGBT disposition often consider themselves “liberals” or “progressives.”\textsuperscript{121}

To treat (as many on both sides have often done) the narratives of “human rights” and “public moral standards” as fundamentally oppositional is to overlook important commonalities. Both sides rely on similar rhetoric, emphasizing lofty themes of right and wrong that transcend cultural practices. This betrays a real area of shared intellectual ground: both conservatives’ and progressives’ operant framework for dialogue rests on several shared baseline presuppositions.\textsuperscript{122} These presuppositions are commonly termed “negative rights”: qualities

\textsuperscript{118} Adam Epstein, In America, Christianity Is Declining As “Non-Religion” Takes Hold, QUARTZ, May 12, 2015, http://qz.com/403261/in-america-christianity-is-declining-as-non-religion-takes-hold/ (“As some Christian denominations become increasingly political (almost always toward the right), they have alienated some members of the religion.”).


\textsuperscript{120} See, e.g., MAN YEE KAREN LEE, EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES 98–99 (2010).


\textsuperscript{122} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).
which individuals possess solely by virtue of their being human, which other individuals, and society at large, are morally obligated to respect and affirm.\textsuperscript{123} The right to not have one’s property seized without cause, for instance, is a negative right: it depends on establishing what other entities cannot do. The affirmation of such baseline principles is common to both conservatives and progressives for the simple reason that both groups’ moral imperatives—to defend public morality, or to celebrate diversity in lifestyles—are contingent upon recognition of said principles. If individuals are invested with certain intrinsic qualities that trigger responsibilities, meeting those responsibilities is a moral duty. Questions over the precise character of negative rights (which obligations to one’s fellow man should be recognized, and how should they be promoted?) are frequent and often controversial.\textsuperscript{124} That being said, epistemological disagreement regarding the extent, identification, and character of human rights need not automatically translate into ontological disagreement regarding the very existence of such rights.\textsuperscript{125}

One of these negative rights affirmed by both groups may be termed freedom of expression. Both religious practitioners and members of the LGBT community are defined by a characteristic or set of characteristics with which they identify at a fundamental level. Crucially, expressing one’s identification or affiliation (an issue which implicates negative-right concerns) need not automatically translate into a demand for the state’s imprimatur of approval (an issue of positive rights). That said, the freedom to publicly identify with and celebrate a particular set of religious

\textsuperscript{123} See generally Understanding the Difference Between Positive and Negative Rights, ALA. POL’Y INST., last visited April 16, 2015, http://www.alabamapolicy.org/wp-content/uploads/GTI-Brief-Positive-Negative-Rights-1.pdf (“A ‘negative right’ restrains other persons or governments by limiting their actions toward or against the right holder. In other words, it enables the right holder to be left alone in certain areas.”).

\textsuperscript{124} See generally ALASDAIR MACINTYRE, AFTER VIRTUE (1981) (arguing against the use of “rights” language as a means of expressing moral obligations between persons).

\textsuperscript{125} See John Ehrett, After “After Virtue”: MacIntyre’s Critique of Human Rights, THE SENTINEL 4 (Jan. 19, 2015), http://issuu.com/phcsentinel/docs/the_sentinel_1-1__pdf_ (“[R]ights language is . . . properly viewed as a proxy for concepts whose ultimate meaning in se may be non-articulable . . . . a Wittgensteinian shorthand of sorts, one that possesses utility alongside undeniably imperfect determinacy.”).
practices or way of conducting one’s private life is integral to civic pluralism, insofar as such expression is not in se intrinsically harmful (e.g. creation of child pornography). 126 In many Western democracies, abuses of this expressive freedom may be addressed via alternative legal channels—anti-vandalism statutes, for instance. Essentially, certain “bad fruits” which emerge in a free society may be pruned without uprooting or poisoning the entire tree; in American law, this practice is described as “narrow tailoring.” 127

Some observers in Russia and elsewhere have supported the recent measures taken by the Putin regime. 128 Their objectives are frequently laudable—among them, promoting respect for traditional values and protecting the welfare of minority religious groups. 129 Laws 136-FZ and 135-FZ, however, constitute far-reaching limitations on expressive liberty that, in the end, may serve to both undermine these observers’ goals and compromise a broader vision of a democratic marketplace of ideas. It is to this paradox that the discussion now turns.

In response to concerns regarding changing norms of public morality in their home countries, and further fueled by imprecise media reporting on Law 135-FZ, some cultural commentators in the West have voiced support for the Putin regime’s new policies. 130 While understandable on some level, such support risks merely propping up the sophisticated sociological narrative the regime appears to be cultivating. 131 U.S. conservative commentator

129 Id.
130 Id. But see George Weigel, Ukraine: Disinformation and Confusion, FIRST THINGS (Feb. 18, 2015) [hereinafter Weigel, Ukraine], http://www.firstthings.com/web-exclusives/2015/02/ukraine-disinformation-and-confusion (“The notion that Putin’s Russia can be a genuine partner in international pro-life and pro-family work is a snare and a delusion, given the murderous character of Putin’s regime. There can be no serious ecumenical dialogue with clerical agents of Russian state power.”).
131 See Weigel, Ukraine, supra note 130.
Pat Buchanan argues, “Putin is trying to re-establish the Orthodox Church as the moral compass of the nation it had been for 1,000 years before Russia fell captive to the atheistic and pagan ideology of Marxism.” 132 This conclusion suggests that the Russian government’s goal with Laws 136-FZ and 135-FZ is, predominantly, a restoration of cultural morality. This may indeed be the case, but it is far less clear whether the “morality” in question is actually in line with the domestic social policies Buchanan personally favors—and on account of which he defends the actions of Putin's government.133 Indeed, the actual practice of the Russian church-state establishment sharply diverges from the goals sought by American-style social conservatism.134

Put simply, the justifications invoked in defense of restricting LGBT “propagandizing” may swiftly rebound against evangelical Protestant Christians or others with disfavored views (and Law 136-FZ opens the door for such an unintended effect).135 Likewise, LGBT groups critical of the established church may soon find themselves running afoul of anti-blasphemy legislation. Domestic and international observers alike must recognize that morally-inspired support for the legislation in question risks overlooking the fact that these issues are, counterintuitively, interwoven at a deep level. If history is to serve as any guide, the Putin regime may well not effect a restoration of cultural morality (as American observers understand it), but rather only a further consolidation of political power. Scholar Andrew Rosenthal observes, in commenting on American support for Law 135-FZ, that “[t]he Soviets tolerated a Russian Orthodox Church, as long as it toed the Kremlin line, but they persecuted pretty much every other religion, including evangelical Christianity. The Kremlin

132 Buchanan, supra note 128.

133 See Peter Pomerantsev, What Does the Russian Elite Really Believe In? ASPEN INST. (Feb. 2014) (“The Kremlin regime’s salient feature is a liquid, shape-shifting approach to power . . . .”) [hereinafter Pomerantsev, Russian Elite].

134 Cf. Id. (“The same Russian elites who now profess themselves religious conservatives were committed democrats just a few years ago, and avowed young Communists in their youth. They might now shout about Holy Russia fighting the fallen west but . . . have their children and funds in the same west they so decry.”).

allows religious observance, but regulates it, and Christianity is simply irrelevant to Kremlin policy.” Moreover, this state “regulation” is more than more bureaucratic rigmarole. The Slavic Centre for Law and Justice, a conservative policy analysis group, has extensively investigated such religious regulation—regulation that may, in some instances, cross the line into hostility toward non-sanctioned groups:

The specific character of the violations of the freedom of religion lie not only in individual cases of outrage, such as murders of priests in relation to their religious activity, but also in the ubiquity of these types of violations which are perpetrated regularly all over Russia. . . . The licensing of educational activities is only required with respect to professional training, whereas the teaching of religion does not fall into this category. Such restrictions are not necessary in a democratic society. Nevertheless, there are cases when law enforcement agencies try to dissolve non-Russian Orthodox religious organizations for the fact that they are engaged in teaching religion.137

The Putin regime’s social narrative is not without a level of sophistication—and, to some Western observers, a modicum of surface appeal.138 The vision of a restored sense of public morality is often invoked by pro-Kremlin voices—a vision in which the human rights violations endemic to the Soviet Union are conspicuously absent. Stanislav Mishin, writing in leading Russian news outlet Pravda, argues that in the Soviet period, “[f]amily was of great importance, so perversions, like homosexuality was [sic] not tolerated and treated as a mental illness to be treated by psychologists not entertained by society or put upon a pedestal.”139 This retro-utopian portrayal of traditional Russian cultural morality

136 Id.
138 Buchanan, supra note 128.
may seem to suggest a level of surface ideological commonality with Western conservatives.

It is unlikely, however, that actual consensus exists between the views Mishin advances and those espoused by Western conservatives. Since the U.S. lacks the tradition of a state religious establishment, accordingly American observers naturally risk viewing the Russian Orthodox Church as discrete from the Kremlin. The norms of “civil society” taken for granted by the West, in which groups of various persuasions vie to see their views manifested politically, cannot be presumed to be present in Russian culture.140 If it were so, the Church might conceivably serve as a partner in advancing global social conservatism, for purposes beyond mere suppression of dissent: this assumption, however, may not be grounded in fact. Boston Globe correspondent Cathy Young highlights critical ways the Orthodox Church’s actual practices diverge from the aims of American conservatives:

Orthodox Christianity has taken Communism’s place as the new official ideology, with church membership an official badge of patriotism and loyalty. Russia’s political and religious leaders speak glowingly of church-state cooperation; in practice, the Russian Orthodox Church serves as a handmaiden of the regime, which grants it special privileges. Its head, Patriarch Kirill, has obsequiously praised the “miracle” of Putin’s rule and disparaged political protests. (The patriarch almost certainly has past ties to the Soviet-era KGB). Neither Kirill nor other senior clerics have criticized the government in areas where the church disagrees with official policy, such as abortion, which remains not only legal but free at public clinics; their statements on the subject have been low-key and deferential.141

140 Cf. Pomerantsev, Russian Elite, supra note 133 (noting the emergence of “faux civil society organizations to drive the national debate the way the Kremlin wants.”).

141 Cathy Young, Vladimir Putin is No Ally for the Right, BOSTON GLOBE (Aug. 21, 2013), http://www.bostonglobe.com/opinion/2013/08/21/putin-friend-gays-finally-for-right/i02pH9skFergvPtAW0GOVK/story.html (emphasis added).
The concept of a Russian Orthodox Church committed to the defense of traditional conservative views—whose countercultural stance might render it an ideological ally on par with the Catholic Church—may be a sophisticated political smokescreen. In the view of Buchanan and others, it is the responsibility of religious establishments to stand for timeless moral principles, even if such a stance may not be politically expedient. The leadership of the Orthodox Church, however, faces institutional barriers that restrict the possibility of its taking such countercultural positions. Accordingly, those in the West who favor Russian social norms cannot be confident that either the Church or state actually shares their moral sympathies; powerful incentives exist for the Church not to compromise its privileged relationship with the Kremlin.

The question has heretofore been left open as to whether or not the “social conservatism” used to target minority groups actually does stem from orthodox (small-“o”) Christian doctrinal convictions, as some Russian commentators have suggested. A correlation between church and state domains of authority, which has been previously established, must not be automatically construed to undermine the veracity of any claims to cultural consensus. If the claims suggested by Evans and Alexeev (that aspects of the Orthodox Church’s doctrine have been hijacked for nationalistic purposes) are to be legitimated, a cultural movement away from the tenets of Christianity, conventionally understood, should conceivably have occurred on some level. Indications of such a tendency in Russian society towards a divergent understanding of traditional moral norms do indeed exist. It has been previously noted that the Orthodox Church has displayed a

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142 See Pomerantsev, Russian Elite, supra note 133.
143 See, e.g., Victoria Hudson, The Russian Orthodox Church under Patriarch Kirill, Open Democracy (Mar. 31, 2015), https://www.opendemocracy.net/od-russia/victoria-hudson/russian-orthodox-church-under-patriarch-kirill (“The Russian Ministry for Economic Development and Trade has submitted a draft bill on the restitution of property confiscated by the Bolsheviks; and now held by the state. The bill would turn the ROC into one of the largest... landowners in the country...”).
144 See Weigel, Ukraine, supra note 130.
145 See Hudson, supra note 143.
146 Mishin, supra note 139.
147 See Young, supra note 141; see also Pomerantsev, Russian Elite, supra note 133.
reticence to challenge the political establishment;\textsuperscript{148} if anything, this may be a significant understatement.

Just as Stalin’s co-optation of the Church resulted in an increasing emphasis on extant liberation-theology tendencies within Orthodox Christianity, Russia, under Putin, has undergone a sociocultural evolution in which traditional Christian principles have, at least in some spheres of Russian culture, been understood in political rather than spiritual terms.\textsuperscript{149} If the potential for conflict exists between historic religious doctrine and contemporary political expedience, Russian society is apparently willing to compromise on the former. Journalist Peter Pomerantsev explains how the popular façade of collective Orthodox unity is not definitionally synonymous with “shared religious convictions”:

Today, 90 percent of ethnic Russians now identify themselves as Orthodox, according to statistics from the Levada Center, an independent research organization, and the sociology institute VCIOM [sic]. There are some caveats: fewer than 10 percent of Orthodox respondents say they attend church regularly, and 30 percent of them admit they don’t believe in God. (The phrase “Orthodox atheist” has become common.) . . . For its part, the state has gone from persecuting the church to co-opting its ancient tropes.\textsuperscript{150}

The supposed cultural consensus invoked to justify restrictions on expressive freedom—of both religious and sexual-identity minority groups—may actually be attributable to the political integration of church and state, rather than to a Russian moral renaissance: it follows that the Church, echoing historical tendencies towards the conflation of church/state authority, risks

\textsuperscript{148} See Andrew Evans, Forced Miracles: The Russian Orthodox Church and Postsoviet International Relations, 30 RELIGION, STATE AND SOCIETY: THE KESTON JOURNAL 33, 35 (2002).

\textsuperscript{149} Cf. Weigel, Kowtowing to Moscow, supra note 109 (“Moscow, which has long imagined itself the ‘Third Rome,’ seems less interested in unity within the family of Orthodoxy, and between East and West, than with asserting itself over-against the ‘Second Rome,’ Constantinople, and with supporting Russian foreign policy.”).

undermining its role as a timeless moral fixture in favor of increasing politicization. In light of such radical reinventions of traditional Christian thought, and the simple fact that many “Orthodox” affiliate with the Church for purely cultural reasons, it is reasonable to speculate whether Laws 136-FZ and 135-FZ, irrespective of whether or not they reflect the deeply held religious beliefs of the citizenry, may actually be a product of traditional socio-cultural norms brought within the Kremlin’s fold and subsequently invoked for moral credibility.

The idea of “Holy Russia” as a construct that must be defended is not new. The ways in which social policy (Laws 136-FZ and 135-FZ) has been employed to bolster such a construct, however, lend support to the idea that church-state integration may have engendered a cultural way of thinking in which pluralism is seen as fundamentally subversive: in the Putin-era civil religion of Russia, minority viewpoints may be seen as threatening. Furthermore, external factors—circumstances bearing a resemblance to those that incentivized Stalin to pursue a church-state rapprochement—exist which may have catalyzed this recent trend, as the next section will consider.

Due to the persistence of centripetal cultural forces opposed to pluralism, both historic tendencies and current religious trends result in a politically advantageous scenario for the Kremlin administrative establishment. For those holding to traditional Orthodox beliefs, the Putin-era Orthodox Church has been puzzlingly quiet on social questions such as abortion; moreover, the Church has remained largely silent while nationalists within Russia have invoked traditional doctrines—including those historically invoked to justify charity, such as “turning the other

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151 Cf. Evans, supra note 103, at 35.
152 Pomerantsev, Putin’s God Squad, supra note 150.
153 See Weigel, Kowtowing to Moscow, supra note 109 (“[T]he leaders of Russian Orthodoxy aspire to hegemony within Orthodoxy, [and] claim to be the sole legitimate heirs of the baptism of Rus’ in 988 . . . ”).
154 See, e.g., Dennis Prager, Is There a Russian Conscience? NAT’L REV. (July 22, 2014), http://www.nationalreview.com/article/383344/there-russian-conscience-dennis-prager (“Vladimir Putin suppresses, sometimes violently, virtually all dissent in Russia, and most Russians seem to be entirely comfortable with it. Not just comfortable—supportive.”).
155 See Young, supra note 141.
cheek”—as talismanic mandates lending moral force to the marginalization of minority groups.\(^{156}\) For the nonbeliever witnessing such trends, the Putin-era Orthodox Church may appear to be a patriotic relic of a bygone age, a longtime handmaiden to the nationalistic cultural engine that powered the Soviet Union through its heyday (including contra Nazi Germany).\(^{157}\)

As of 2015, the Orthodox Church under Putin has continued to manifest these increased tendencies towards political integration—more specifically, integration in the service of a national ideal which is promulgated in contraposition to the regime’s opponents.\(^{158}\) Moscow correspondent Gabriela Baczynska explores the role played by the Church in the ongoing Ukrainian political crisis:

Russia has used the alleged threat to the worshippers of the Moscow-backed church in arguing it had the right to send in troops to Ukraine to protect its nationals and Russian speakers. Moscow and [Orthodox Patriarch] Kirill have both repeatedly described Ukraine as Russia’s “brotherly” nation, such rhetoric standing in sharp contrast to the pro-Western aspirations voiced by many protesters in Kiev. "We are now all deeply worried with what is happening in Ukraine. It's the same as if it was happening in our country or in the family of each one of us," Kirill said on February 26.\(^{159}\)

By making such statements as a representative of the officially sanctioned Church, the Patriarch effectively accedes to

\(^{156}\) Pomerantsev, Putin’s God Squad, supra note 150 (“When Alexander Bosykh, a religious-nationalist aide to the deputy [Prime Minister], was photographed punching a female Pussy Riot protester, he responded: ‘You only turn the other cheek to people you know. I don’t know her so I hit her.’”).

\(^{157}\) Jordan Hupka, The Russian Orthodox Church as a Soviet Political Tool, 2 Constellations 31, 39 (2011).

\(^{158}\) See Weigel, Ukraine, supra note 130 (“[T]he Russian Orthodox Church leadership has been, sadly, a participant in Moscow’s disinformation campaigns.”).

the unfolding Russian rhetorical narrative regarding Ukraine—a narrative in which recent military incursions are simply a restoration of historically Russian territory (a reunification of the “Russian family”). This homogeneity of viewpoint between Church and Kremlin suggests, yet again, the tendency of the Church to conform to administrative norms: as Russian political scholar Dmitry Oreshkin observes, “On Ukraine, as elsewhere, the Russian Orthodox Church these days unfortunately cannot have any stance different from the state’s one because it is becoming more and more an instrument of state policy.”

As during World War II, the Russian government is engaged in patterns of political behavior that place it at ideological odds with other powerful members of the international community. Promoting unity of domestic culture is important in attaining the Kremlin’s political ends, particularly given the state’s lack of a trajectory toward pluralism. Accordingly, cultivating ever-closer ties with the official Orthodox Church—and legislatively marginalizing minority groups whose activity might undermine a cultural ideal—is, for the Kremlin, an integral aspect of this process. Laws 136-FZ and 135-FZ may well be the resulting manifestations. Historian Mara Kozelsky, a scholar of the Russian empire and of the Crimean region more particularly, concurs:

The prosecution of Pussy Riot for performing in an Orthodox church as well as dismaying anti-homosexual legislation reflects a new stage in the evolution of Russia’s deeply conservative Orthodox identity. Religion is one of the intangible

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160 See Id.
161 Id.
162 Stephen Sestanovich, Russian Democracy in Eclipse: Force, Money, and Pluralism, 15 JOURNAL OF DEMOCRACY 32, 32 (2004) (“Most analysts seem to agree that the disorderly pluralism of the Yeltsin era is at an end, and that the victorious siloviki—officials who began their careers in the old Soviet coercive apparatus—are restoring the dominance of Russian state institutions.”).
163 See also Marlene Laruelle, Conservatism as the Kremlin’s New Toolkit: An Ideology at the Lowest Cost, 138 RUSS. ANALYTICAL DIGEST 2 (2013), http://www.css.ethz.ch/publications/pdfs/RAD-138-2-4.pdf (“Putin’s third term in office confirms two trends. Firstly, over the years the Kremlin has gradually developed an ideological meta-narrative while still refusing to elaborate details about it and to systematize its contents. Secondly, this meta-narrative crystallizes values identified as conservative.”).
elements driving Russia expansion southward, and one of the reasons why Russian citizens, and particularly the Orthodox devout, may not protest their own government’s actions in this particular conflict.\textsuperscript{164}

This “religion,” of which Kozelsky speaks, however, is more properly understood as a resurgence of civil religion \textit{par excellence}, rather than as a mass revival of doctrinally robust Orthodoxy.

In light of the ongoing movement away from the conventional understanding of civic pluralism, minority groups may indeed find a level of ideological common ground born of a baseline shared purpose: the desire to articulate and promote diverse viewpoints, absent pressure from a state seeking to marginalize non-majoritarian positions. The precise nature and manifestation of such a shared purpose—and the broader implications from a more holistic international standpoint—will be considered in subsequent Parts.

V. INTERNATIONAL DIMENSIONS OF RUSSIAN SPEECH RESTRICTIONS

It has heretofore been argued that today’s increasingly close ties between the Russian church and state have occurred by means of a pattern somewhat similar to that epitomized by Stalin’s \textit{rapprochement} during World War II, and that (as under Stalin, and the tsars before him), the Church’s role in society has evolved to fit the Kremlin’s purposes. Moreover, while the rhetoric of social conservatism and a shared religious heritage is today employed by the Putin regime to justify overbroad regulations, evidence suggests that the rationales behind Laws 136-FZ and 135-FZ are, on a core level, grounded in fundamentally political considerations.

Analysis must now turn to the question of broader-scale implications, particularly from an international perspective. Core issues here center on the international systems to which Russia is a party, and the “human rights” commitments made therein.

A. INTERNATIONAL INSTITUTIONS AND TREATY OBLIGATIONS

The United Nations formally advocates a pluralistic social ethic throughout its governing documents: the 1948 *Universal Declaration of Human Rights* (UDHR), in the course of laying out a broad tapestry of both negative and positive rights, proclaims in Article 19 that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” 165 Benedict Rogers, in indicting the larger concept of “blasphemy laws,” drives this point home:

A fundamental human right is the freedom of thought, conscience, religion or belief. Another is freedom of expression. Without either of these, what other freedom matters? Yet so-called blasphemy laws are complete violations of these two rights, established respectively in Articles 18 and 19 of the Universal Declaration of Human Rights. If we do not have the freedom to think, to choose what to believe, to change our beliefs, to question the beliefs of others, to share our beliefs with others without coercion, or to decide not to believe, we have no freedom.166

The Russian administration’s apparent lack of concern for its obligations under the UDHR is matched by its reticence to uphold the standards required by its membership in regional cooperative organizations, as the Institute on Religion and Public Policy points out:

Russia is a member of the Council of Europe and is bound by certain obligations in regards to maintaining international standards of human rights in its jurisdiction. . . . Article 10 of the ECHR [European Convention on Human Rights] establishes the right to freedom of expression, which includes the freedom to “receive and impart


information and ideas without interference by public authority.”167

Among the “information and ideas” presumably encapsulated by the ECHR’s declaration are critiques of state-sanctioned religious establishments and political statements made in support of LGBT rights and individuals—both of which would be restricted under Laws 136-FZ and 135-FZ. Significantly, Russia’s ongoing violations of such obligations have not gone unnoticed by the relevant supranational actors, as Paul Johnson, writing in the Jurist legal journal, notes:

What is astonishing about the recent ratcheting up of these regional anti-gay provisions in Russia is that they are in direct defiance of the European Court of Human Rights (ECHR), which has explicitly admonished Russian public authorities for prohibiting public association and assembly on the grounds of sexual orientation.168

Potential Russian rebuttals to external criticism may conceivably invoke article 13, clause 5 of the Russian constitution, which stipulates that “[t]he creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited.”169 Facially, this appears to foreclose criticism based on liberal or pluralistic conceptions of expressive freedom; the expansive protections guaranteed by the American First Amendment, for instance, do not seem to exist here.

Yet such an analysis is incomplete: the Russian constitution itself imposes obligations to conform to the standards of international norms, and when these norms are deemed to be in

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169 KONSTITUTSIIA ROSSIISKOI FEDERATSI [KONST. RF] [CONSTITUTION] art. 13 (Russ.).
conflict with existing Russian laws, the international standards are to be treated as controlling. In the document’s own words, “[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.” This expansive incorporation of international standards into Russian law renders the state subject to criticism on the basis of obligations it has failed to uphold. Among these obligations, as previously noted, are those conferred through Russian membership in various global and regional organizations, which codify the right to free expression. Some Russian and international jurists appear to agree with this more robust conception of pluralistic society, as journalist Joe Morgan observes:

Arrested, charged and fined 1,500 rubles ($46, €34), [Irina] Fet was found guilty of informing minors about homosexuality. While her group Moscow Pride appealed the charge, they lost at a local court. After that, the case was sent to the UN Human Rights Committee to challenge the arrest. On 31 October 2012, the UN committee ruled in their favor, describing the law as ‘discriminatory’ and ‘arbitrary’. They agreed the law went against the International Covenant on Civil and Political Rights, by violating Fet’s right to freedom of expression and protection from discrimination. Ryazan regional court today (2 October) has now agreed with the international ruling, and cancelled all prior charges and verdicts.

The particular rationale behind the UN committee’s decision warrants a brief discussion. Notably, the committee recognized that while Russian authorities do have a legitimate interest in protecting children from inappropriate information, the particular conduct in question did not fall outside the norms of

170 Id. at art. 15.
propriety for which the government had argued; thus, prosecuting Fet on the basis of a vaguely-defined statute would be an impermissible violation of her expressive liberties under the Covenant:

While the Committee recognizes the role of the State party’s authorities in protecting the welfare of minors, it observes that the State party failed to demonstrate why on the facts of the present communication it was necessary, for one of the legitimate purposes of article 19, paragraph 3, of the [International Covenant on Civil and Political Rights] to restrict the author’s right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality. . . . Furthermore, the Committee is of the view that, by displaying posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building, the author has not made any public actions aimed at involving minors in any particular sexual activity or at advocating for any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it.173

The crux of the opinion’s logic rests on the premise that Fet’s conduct was not aimed at drawing children into a particular lifestyle or communicating objectionable information (she did not encourage her observers to engage in homosexual behavior or identify as homosexual themselves, nor did her expressive activity provide inappropriate details of sexual practices). Rather, her sign was an opinion statement grounded in her perception of personal identity: that she believed that identifying as homosexual was normal, and that she saw an element of her personal identity as something of which she was proud. Alternative perspectives offering a narrative different from Fet’s could have been provided in a variety of contexts—by teachers or by students’ parents, for instance—without the need to treat her conduct as expressly

criminal. Observers in Western democracies, culturally accustomed to a plethora of diverse voices in the public square, would likely not have found her behavior troublesome; Russian society, however, lacks this expressive tradition. A legitimate basis for restrictions on certain types of expressive conduct—obscene public displays endeavoring to communicate a message similar to Fet’s, for example—might well exist, and this possibility is not foreclosed by the UN committee’s ruling. Prosecution of statements of expression unaccompanied by otherwise objectionable activity, however, is considered a violation of the Covenant.175

International organizations, voluntarily joined, lack broad enforcement or police powers;176 the utility of transnational legal norms exists only insofar as such norms are incorporated by national and subnational court systems. The Ryazan regional court, in accordance with the requirements of the Russian constitution, did indeed effect such incorporation.177 Yet while this decision does constitute a move towards greater expressive liberty in the public square, two major concerns persist: first, the Ryazan ruling only addressed a regional law, leaving the federal regulation in place;178 and second, the Ryazan decision should not be seen as jurisprudentially influential, in any meaningful sense, upon subsequent challenges to the broader restriction. As Morgan explains, “Russian courts do not rule using precedents.”179

In perhaps the most damning indictment of all, the Kremlin itself rejected Law 135-FZ as legally impermissible on four separate occasions, before finally capitulating in order to capitalize on the groundswell of popular support.

174 See Miller v. California, 413 U.S. 15 (1973) for ways in which a pluralistic social tradition has sought to address the question of obscenity.
177 Morgan, supra note 172.
178 Id.
179 Id.
In its public messaging against the law, the U.S. government should highlight the previous positions of the Russian government, which articulately opposed earlier versions of the anti-“propaganda” law four times. The Prime Minister’s office exposed the law’s illogic and illegality, explaining how the “propaganda” bans violated the Russian constitution, the country’s criminal code, and Russia’s international obligations. By using the Russian government’s own words, the U.S. would make a strong case against it and expose the cynicism of its about-face on this issue.\textsuperscript{180}

Time alone will tell whether the Kremlin establishment eventually will display due deference to the international structures it is legally mandated to affirm; however, in light of the matters at stake, the sociopolitical credibility of both Putin’s regime and the Orthodox Church, at present, this would appear to be an unlikely outcome.\textsuperscript{181}

In light of such a fluctuating portrait of expressive liberty within Russia, additional avenues of suitable responses, as available to those entities with the capacity to take meaningful action against these worrisome trends in Russian political culture, will be explored in the following and final Part.

\section*{VI. TOWARD COMMON PURPOSE}

The broad theoretical argument supporting the “negative right” of expressive freedom—an argument that underpins the stances of both religious liberty advocates and LGBT supporters—has been discussed at length above. It is conceivable that social progressives and conservatives alike can recognize that the issue of expressive freedom in Russia may be addressed, and that advocacy may be pursued toward such an ideal, without rendering judgment on the specific merits of the viewpoints in question. The intersection of political interests between advocates of religious


freedom and those within the LGBT community is currently in a state of legal flux; in many Western liberal democracies, these spheres of interests are at odds, and long-term outcomes remain uncertain. As it were, the very existence of such an open controversy in liberal democracies is an indicator that expressive freedom is, as yet, still alive and well. In Russia, however, the debate between groups with potentially opposing objectives has not yet reached this conflict stage.

The immediate question is not which group’s goals, if any, will emerge triumphant; the question is whether or not either will be free to make an argument. Education and persuasion are necessary elements of such an argument, yet religious and sexual minority groups’ ability to engage in such activities is restricted in Russia under Laws 136-FZ and 135-FZ. Broad support for such expressive freedom need not immediately translate into marginalization of one side or the other. With this understanding in mind, it remains to be considered the specific, actionable steps that may be taken by liberal-democratic policymakers, in the United States and elsewhere, to further the ideal of expressive freedom in the Russian Federation.

Leading Western policymakers are well situated, by virtue of their international prominence, to speak out against international violations of human rights. Such a stance falls in line with the recommendations of the International Religious Freedom Roundtable, which has condemned the expansiveness of Law 136-FZ’s “anti-blasphemy” restrictions:

President Obama and Secretary of State Kerry should publicly and specifically condemn the recent wave of repressive laws and their enforcement. These public statements should focus public attention on government actions that violate the Russian constitution and Russia’s international commitments.

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183 The debate in Russia hinges not on state sanction of LGBT relationships, but rather state suppression of LGBT activism.
184 See supra Part II.
185 Letter from Russia, Int’l Religious Freedom Roundtable, to U.S. Gov’t (Sept. 4, 2013) (on file with author),
As an aside, it is perhaps ironic that certain religious publications protesting “moral and ethical shortcomings in society”\textsuperscript{186} may run afoul of Russian governmental sensibilities, given the government’s stated rationale for limiting LGBT expressive freedom, restoring public morality. This apparent inconsistency serves, however, to bolster prior evidence suggesting that such legislation likely emerges from the need to establish a unified Russian culture as a winsome alternative to the West, rather than from a theologically coherent commitment to civic morality.\textsuperscript{187}

Non-governmental actors may also play a role in pushing back against these trends. The restrictive understandings of liberty advanced by Putin and others gain moral credibility via their contraposition against a purportedly decadent West.\textsuperscript{188} Implicit in this idea of decadence is a complaint against popular apathy on the parts of individual citizens: pro-Kremlin academic Andranik Migranyan has spoken out against critics of Russian governmental authoritarianism, claiming that Putin’s Russia is no worse than Western governments in the area of civil liberties:

\begin{quote}
[I]n Russia, the liberal-human-rights sphere has remained mum about the rights to privacy of Americans and other citizens. Why? What has rendered these self-appointed defenders of liberty, so quick to lash out at Putin, mute when it comes to America?\textsuperscript{189}
\end{quote}

Migranyan’s point may or may not be valid; its introduction, however, obviates the immediate concerns at hand. Concerns over civil liberties in liberal democracies, while an important topic of inquiry and debate, have no bearing on the particular matters of concern that have developed in the Russian Federation. Furthermore, the civil liberties issues in question are distinct from

\textsuperscript{186} Id.
\textsuperscript{187} See supra Part IV.
\textsuperscript{188} See Peter Pomerantsev, What Does the Russian Elite Really Believe In? ASPEN INST. (Feb. 2014) (“[R]eligious conservative rhetoric has become a staple in Russian propaganda, with attacks on decadent gay-Europa contrasted with invocations of Holy Russia . . . ”).
the constraints on expressive freedom that have attracted special scrutiny. But although Migranyan’s specific argument serves to veil, rather than address, the real issue in question, his contention does highlight important ideas: individual citizens’ commitment to democratic principles should not be restricted to matters that dominate the international press scene, and domestic political involvement is likely critical in impacting Russian political trends.

Migranyan’s indictment bears consideration, however, with respect to another realm of Western culture. Given the increasing gravitation towards LGBT civil equality in Western states, maintaining the expressive liberties of those holding more traditional or religiously motivated views is an important consideration—and one often overlooked in instances of media outrage over anti-LGBT statements. This is of particular significance in light of the disproportionate media coverage of Law 135-FZ (restricting LGBT expressive freedoms) relative to Law 136-FZ (implicating religious freedom).190 Kiska, Lipsic, and Coleman observe:

As many groups are calling for a boycott of the Winter Olympics, it should be noted that the host of the 2012 Summer Olympics, the United Kingdom, has also seen dozens of cases arise where freedom has been restricted due to religious and traditional beliefs on homosexual behaviour and same-sex relationships. For example, preachers have been arrested and convicted for speaking against homosexual behavior. . . .191

In order to maintain the moral coherence of their stance against Russian regulations on expressive freedom, Western LGBT political groups must be willing to affirm the importance of protecting pluralism of expression in the public square—a principle that holds even when groups or organizations seek to express socially disfavored viewpoints.192 Activists on the left and

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191 Id.
192 See, e.g., Conor Friedersdorf, Should Mom-and-Pops That Forgo Gay Weddings Be Destroyed?, THE ATLANTIC (Apr. 3, 2015), http://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be-destroyed/389489/ (arguing that a “religious impulse to shy away from even the most tangential interaction
the right may hold to radically disparate visions of “the good society,” but an effective defense of baseline liberties recognizes the necessity of open dialogue. Individual efforts towards argumentative consistency—and, as previously observed, greater responsibility on the media’s part where the nuances and implications of international policy are concerned—might go far toward offering an alternative to the cultural narrative that the Putin regime has countenanced.

A still more powerful cultural presence remains unmentioned. For the last several decades, the Orthodox Church has largely served as an organ of the dominant political power. But a broad Western characterization of the Church as an institutional collective, however apt, risks perpetuating the Church’s own veneer of ideological homogeneity. Such homogeneity may or may not actually exist—a potentially intriguing divergence, and one reflected in Pomerantsev’s inquiry into Russia’s thorny relationship between church and state:

“The tragedy of the church is that it has always grown too close to the state, and then it pays for it. Now the church is trying to prove to the Kremlin it is a serious and useful player,” says Archpriest Alexei Uminsky, a Moscow clergyman whose ministry includes members of the protest movement . . . . “We are at a crossroads: either the church starts to stand up for conscience or it will get blamed for all the Kremlin’s faults. But for that we need to abandon our old illusions: the ‘Third Rome,’ dreams of an Orthodox superpower,” Uminsky says.

True-believing members of the state Orthodox Church—an entity which has done little to question a regime hostile to the expressive freedom of minority groups—face a grim yet

with gay weddings can be met with extremely powerful and persuasive counterarguments . . . [when] operating in the realm of reason rather than coercion . . . [and] more interested in persuading than shaming or claiming scalps.”

193 See supra Parts III-IV.
194 See, e.g., the characterization offered by Blank, supra note 50.
unavoidable choice: allow the favorable status quo to persist, but witness the slow degradation of doctrine and historic identity; or to stand against the system that both nurtures and funds them, and in so doing finally enjoy independence and freedom of conviction. In the end, a great deal of responsibility may lie with individual persons of faith—whether those abroad, or those within Russia—to stand for expressive freedom.

Insofar as the issues in question are matters of domestic policy, the ability of the international community to take direct action is restricted. Soft-power avenues of response, however, may be realistically envisioned: government leaders may offer constructive advocacy of liberal norms; citizens may model effective democracy by treating complex issues with both appropriate nuance and consistent moral standards; individual Orthodox priests and persons of sincere faith may speak out against state power centralization. Opportunities for strategic engagement on these subjects do exist; it is the prerogative and responsibility of those with the opportunity to seek them to do so.

VII. CONCLUSION

As countless social critics and scholars have observed, religious freedom considerations and emerging conceptions of LGBT rights are, at present, frequently found in conflict within Western democracies. These are issues that deserve intense consideration and engagement, as well as further research and scholarship. Yet both groups oftentimes take for granted the principle of expressive freedom which is integral to their very existence: in liberal democracies, ideological systems stand on a level playing field, on which they must stand or fall according to their intrinsic merits. In contemporary Russia, this fundamental

196 Id.
197 See George Weigel, *Ukraine: Disinformation and Confusion*, FIRST THINGS (Feb. 18, 2015) [hereinafter Weigel, *Ukraine*], http://www.firstthings.com/web-exclusives/2015/02/ukraine-disinformation-and-confusion (“It’s entirely possible to honor the noble and living tradition of Russian Orthodox spirituality and recognize that Russian Orthodoxy’s leadership today functions as a Kremlin mouthpiece in matters Ukrainian, even as it lies . . . and betrays its ecumenical commitments in doing so.”).
198 See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al., eds., 2008) (discussing the possible implications for religious freedom of expanded same-sex marriage rights).
baseline cannot be presumed to exist: as John Dalhuisen, Europe and Central Asia Director at Amnesty International, has written, “[T]his is the reality of Russia today . . . the disregard the authorities there have for their international and national obligations in promoting the human rights of all people under their jurisdiction.” 199 Among these obligations is the principle of allowing social perspectives to exist that may diverge from those most advantageous to the state.

This analysis has explored how spheres of moral discourse, particularly the Russian Orthodox Church, have been co-opted by a state political establishment seeking to limit the expressive freedom of minority groups and dissident communities—whether those groups take the form of Protestant Christian congregations or LGBT support organizations. 200 This emergent process of co-optation, potentially effected for purposes of internal power consolidation, may have developed from considerations similar to those which incentivized Stalin’s similar move during World War II 201 —namely, the necessity of contraposition against a West viewed as antithetical to Russian interests. Such moves capitalize on the Orthodox Church’s historic capacity for theological reinvention. Subsequent limitations on liberty, in light of Russia’s external treaty commitments and the expectations codified in the Russian constitution—exemplify a disregard for the international norms to which the state has officially committed itself; 202 opportunities for action do exist, but the responsibility for systemic reform will ultimately rest with the Russian people.

Achieving a robust conception of civic pluralism and balancing the interests of rival groups—particularly where issues of religion and public morality are concerned—is a dilemma that confronts any liberal society. Controversies over the operation of traditional moral codes as justifications for state action are not new, and are likely to continue for decades to come. Seeking to re-characterize or subsume traditional moral doctrines in the service of political ends, however, both undermines conceptions of “transcendent” truth and results in widespread marginalization of


200 See supra Part IV.

201 See supra Part III.

202 See supra Part V.
those deemed outsiders. A broad understanding of transcultural human rights—including the right to expressive freedom, even of views deemed unorthodox—must inform any social construct that seeks to truly flourish.
TARGETING OBJECTS OF ECONOMIC INTEREST IN CONTEMPORARY WARFARE

ERICK R. BOHM*

I. INTRODUCTION

September 2014: American warplanes strafe oil refineries in the eastern provinces of Syria attempting to curtail the supply of funding for the Islamic State terrorist organization commonly referred to as ISIS.¹ United States Central Command recently went on record and said oil sales on the black market produce up to two million dollars per day for ISIS operations.² Coalition forces combating ISIS have learned this is a valuable economic resource. So, the question is, what are the legal options for targeting sources of revenue through military operations?

This Note posits an analysis in three sections. First, the Background examines the history behind targeting principles as they pertain to military operations, both under United States military operating procedure and International Law.³ This Note then makes the argument that the United States applies a broader interpretation to what military objects are, when compared to their international counterparts.⁴ Finally, this Note acknowledges the likelihood that objects, such as oil depots, may be lawful targets of military attack when applying the United States approach, but may not be under international law.⁵

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² Id.
³ See infra notes 6–30 and accompanying text.
⁴ See infra notes 33–72 and accompanying text.
⁵ See infra notes 73–78 and accompanying text.
II. BACKGROUND

The St. Petersburg Declaration of 1868 espoused the rule that only military objects are the lawful target of attacks. The drafters of the St. Petersburg Declaration deemed it unnecessary to attack economic objects of the enemy since every enemy can be defeated by dismantling its military forces. It was argued that even the most economically strong military force could no longer resist once its military forces have been dismembered. This principle has remained partially intact since 1868, but modern international law has stretched the legality of attacks to include civilian objects used for a military purpose, such as economic objects.

Distinguishing between combatants and noncombatants (civilians) is the most important and basic rule under customary international law. The “Basic rule,” Article 48 of the 1977 Protocol I Additional to the 1949 Geneva Conventions for the Protection of War Victims (“API”), states: “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Although the term “military objectives” was coined in the 1923 Rules of Air Warfare, a binding definition for this term was not crafted until 1977 in Article 52(2) of API. The binding definition of Article 52(2) provides:


Dinstein, supra note 10, at 140.
Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.\(^{13}\)

As discussed by legal scholars, the definition of 52(2) is not controversial; the controversy is in interpretation and application.\(^{14}\) Critics of 52(2) believe the language is abstract and generic.\(^{15}\) As a result of the ambiguity, “the definition is so sweeping that it can cover practically anything.”\(^{16}\) One possible solution: provide a list of specific military objectives “if only on an illustrative, non-exhaustive basis.”\(^{17}\) Despite critics advocating for a more sound definition, the inherent plasticity permits decision makers to adapt their military operations in accordance with unanticipated events.\(^{18}\)

The United States has agreed to the definition of Article 52(2) with one sweeping difference.\(^{19}\) The United States application of Article 52(2) replaces the use of “military action” with “war fighting or war sustaining capability.”\(^{20}\) As a result of this not so subtle difference, military commanders, per The Commanders Handbook on the Law of Naval Operations (“Handbook”), are provided more latitude in analyzing whether or not an object may be a lawful target.\(^{21}\) The Handbook states,

\begin{itemize}
  \item \(^{13}\) API, *supra* note 11, at 27.
  \item \(^{15}\) Dinstein, *supra* note 10, at 141.
  \item \(^{16}\) *Id.*
  \item \(^{17}\) *Id.*
  \item \(^{19}\) Dinstein, *supra* note 10, at 141.
  \item \(^{20}\) *Targeting Military Objectives, supra* note 14, at 4.
\end{itemize}
“[e]conomic objects of the enemy that indirectly or effectively support and sustain the enemy’s war-fighting capability may also be attacked.” 22 A report on U.S. practices revealed that the common practice of the United States is to give a broad reading to the definition of article 52(2). 23 The United States’s reading would include war-sustaining economic facilities as military objectives. 24 The foundation for this logic may have its roots in the American Civil War. 25 During the Civil War, targeting and destroying the Confederacy’s raw cotton supply was commonplace. 26 Cotton fields were considered a legitimate target for attack because they provided economic support to the Confederacy. 27

Beyond the Handbook, the President of the United States has also approved the use of “war-sustaining” capability “in the Military Commission Instructions.” 28 Over the last several decades, the term “war-sustaining capability” has been used more frequently in official documents. 29 The year 1990 marked the introduction of this concept through the Handbook. 30 By 2010, official documents including the term “war-sustaining capability” had reached seven, and the term was no longer limited to naval operations. 31 It is unclear whether the United States’ official position is that of “war-sustaining capability.” 32

22 Id. § 8.2.5.
24 Id.
26 Id.
27 Id.
28 Targeting Military Objectives, supra note 14, at 5.
29 JACHEC-NEALE, supra note 18, at 104.
30 Id.
31 Id.
32 Targeting Military Objectives, supra note 14, at 5.
III. ARGUMENT

As a result of history, most notably WWII, drafters of 1977 Protocol I Additional to the 1949 Geneva Conventions for the Protection of War Victims ("API") were looking to make drastic changes to targeting principles. 33 Targeting practices during WWII had few limitations; as long as an object made a contribution to the war effort, it could be attacked. 34 Because of this loose approach to targeting, drafters of API attempted to use language that would limit the purview of targeting. 35

Under Article 52(2) of API, economic targets that gain their value through export may not be legal targets because their contribution to the military action is too remote. 36 However, experts have agreed that under both Article 52(2) and the slippery definition of war-sustaining effort, oil facilities would be deemed lawful targets if the armed forces were directly using them (i.e., using the production to fuel their vehicles). 37 According to the Department of Defense’s 1993 report to Congress, direct use can be determined when the object is used for a military purpose. 38 The denotation of purpose is important in this context; purpose refers to the intended use. 39 Accordingly, an argument could be made that ISIS is using oil depots for a military purpose. 40

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34 Id. at 5.

35 Id.

36 Id. at 6.

37 Id.


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purpose, or intended use, is to get money to fund its armed activity, which is achieved from the oil production.\(^{41}\) Therefore, targeting ISIS controlled oil fields, and potentially other economic sources, would be legal in order to curtail its supply of funding.\(^{42}\)

The problem becomes whether export commodities, such as crude oil, make an effective contribution to war-sustaining efforts “in a world of economic privatization and global financial interconnectedness.”\(^{43}\) This is a problem because the benefit received from oil production is indirect.\(^ {44} \) However, the connection between a lawful target of attack and a nation’s war-sustaining effort may be indirect, direct, or discrete.\(^ {45} \) This connection may change over time and the object’s overt connection or use is not determinative on the lawfulness of the targeting.\(^ {46} \) Exports are considered potential objects to be targeted because their connection to a war-sustaining effort may progress from indirect to direct.\(^ {47} \)

The legitimacy of attacks depend on the intelligence gathered; which draws the connection between economic objects and an armed group’s stream of revenue.\(^ {48} \) Few states recognize the idea that economic objects indirectly contributing to military action constitute a legitimate target.\(^ {49} \) However, Ecuador has


\(^{41} \) See supra notes 36–40 and accompanying text.

\(^{42} \) See supra notes 36–41 and accompanying text.

\(^{43} \) Targeting Military Objectives, supra note 33.

\(^{44} \) See id.

\(^{45} \) Id. at 4 (citing the OPERATIONAL LAW HANDBOOK).

\(^{46} \) Id.

\(^{47} \) Id.

\(^{48} \) Id. at 5–12.

adopted, verbatim, the U.S. definition of military object.\textsuperscript{50} Official documents from Australia, New Zealand, and Sweden have also adopted the idea that economic targets indirectly contributing to military operations are legitimate military objectives, so long as their total or partial destruction would offer a definite military advantage.\textsuperscript{51}

Targeting under Article 52(2) is more restrictive than the U.S. approach, which permits targeting on the basis of an indirect relation.\textsuperscript{52} By way of example, under Article 52(2), an attack on an organization’s taxation system (i.e., the Internal Revenue Service) would be unlawful, whereas under the U.S. approach it may not be.\textsuperscript{53} The taxation system of an organization can loosely be seen as a necessary economic function in order to finance the war-sustaining efforts of an armed group.\textsuperscript{54} Though indirect, under the U.S. definition, if the partial or total destruction of the taxation system would offer a definite military advantage, the taxation system may be a lawful target.\textsuperscript{55}

The U.S. approach to defining military objects reflects the idea that an object may have an indirect, direct, or discrete connection to war-sustaining efforts.\textsuperscript{56} Article 52(2) addresses the differing levels of connection between military action and the object under review; however, Article 52(2) requires a more direct connection in order to be a legitimate target.\textsuperscript{57} Although some experts may view the term war-sustaining as a slippery slope, this approach provides competent decision makers more latitude when assessing whether or not an object is a lawful target of attack.\textsuperscript{58} The drafters may have envisioned the need for this latitude because

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Targeting Military Objectives, supra note 33, at 4–6.
\textsuperscript{53} Id. at 6–7.
\textsuperscript{54} See id. at 5–6.
\textsuperscript{55} See id.
\textsuperscript{57} Id. at 135.
\textsuperscript{58} See JACHEC-NEALE, supra note 49; Targeting Military Objectives, supra note 33, at 6.
they understood the elasticity needed in assessing a battlefield environment.\footnote{See JACHEC-NEALE, supra note 49; Targeting Military Objectives, supra note 33, at 6.}

The U.S. concept of war-sustaining capability did not emerge until U.S. involvement in the Iraq-Iran war, during which ships carrying oil in the Persian Gulf were often under attack by both Iraqi and Iranian forces.\footnote{JACHEC-NEALE, supra note 49, at 99.} However, this did not become commonplace until Iraq attacked Iranian tankers and the Kharg Island oil production terminal, which supplied both Iranian civilians and military.\footnote{Id.} As a result, Iran intensified its targeting of Iraqi oil tankers, threatened to do the same to any Persian Gulf State supporting Iraq, and Iraq announced that it would attack any ship going to or from Iran’s ports.\footnote{Id. at 100.} In 1987, the U.S. Navy became involved in the “tanker war” by reflagging and escorting Kuwaiti ships and shortly thereafter the United States launched attacks against oil platforms in Iran.\footnote{Id.} Ironically, in the same year referenced in the Handbook, economic targets were now seen as contributing to the war-sustaining capability of the enemy.\footnote{Id. at 105.}

Since 1987, the war-sustaining formula has also found its way into other U.S. doctrinal and operational law resources.\footnote{Id. at 100–104.} Albeit inconsistent, the references can be found in resources published by all four branches of the U.S. military and the Department of Defense.\footnote{Id.} However, the discussion does not stop with U.S. policy as the war-sustaining formula has become more popular in the international arena as well.\footnote{Id. at 105.}

The Kosovo air campaign underwent a never before seen review of targeting.\footnote{James A. Burger, International humanitarian law and the Kosovo crisis: Lessons learned or to be learned, INT’L REV. OF THE RED CROSS, No. 837 (Mar. 31, 2000) https://www.icrc.org/eng/resources/documents/misc/57jqcs.htm.} The targeting review process took place at
NATO headquarters and involved both member states and individual non-member states participating in the campaign.\textsuperscript{69} Insofar as targeting was concerned, the parties understood military and political objectives were better served by limiting civilian damage.\textsuperscript{70} In furtherance of this understanding, the parties were in agreement that civilian facilities used for a military purpose cannot be protected from attack simply because the civilian factor is present.\textsuperscript{71} The decision to target dual-use facilities was a difficult task during the air campaign, but it was reasoned that when a civilian object was put to military use, the object becomes a dual-use object and loses its protected status under the law.\textsuperscript{72}

During Operation Allied Forces, war planners understood targeting Yugoslav oil refineries created an economic setback for Yugoslavia.\textsuperscript{73} However, it was decided that the capabilities of the Yugoslav military within Kosovo were not affected by doing so.\textsuperscript{74} Serbs within Kosovo simply drew on local oil supplies.\textsuperscript{75} Because of the economic setback to the Yugoslav infrastructure, eliminating oil refineries had a direct impact on the economic state of Yugoslavia.\textsuperscript{76} However, since Yugoslavia had other means of revenue, dismantling their oil supply was not as crippling as it may potentially be on an organization such as the Islamic State terrorist group (“ISIS”).\textsuperscript{77} When sales from oil production constitute one of the main revenue sources for an armed group, curtailing this supply may offer a definite military advantage.\textsuperscript{78}

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} See id.
\textsuperscript{78} Tilford, supra note 73.
More recently, President Obama has authorized targeted airstrikes within Iraq and Syria as part of a comprehensive strategy to defeat ISIS.\(^\text{79}\) The United Nations Security Council has also passed a resolution authorizing the targeting of ISIS revenue sources, to include ISIS controlled oil fields.\(^\text{80}\) Even though decision makers are giving authorization to conduct such attacks, what is the legal justification? The simple answer may be that the destruction of these sites is justified because their purpose is to provide oil to ISIS.\(^\text{81}\) The legitimacy of these attacks depends on the accuracy of the intelligence gathered, which draws the connection between ISIS controlled oil and their stream of revenue.\(^\text{82}\)

### IV. CONCLUSION

Recent targeting application has diverged from the strict letter of the law found in international law and international practice, which may be attributed to precision strike capabilities.\(^\text{83}\) With the advent of more accurate and strategic targeting abilities, military forces are less likely to run afoul with collateral damage.\(^\text{84}\)

The U.S. war-sustaining approach appears to be gaining traction when it comes to targeting economic objects, specifically, the targeting of oil production facilities.\(^\text{85}\) Part of the reason this has remained an uncontested issues is because there is often little concern for collateral damage when targeting oil production facilities.\(^\text{86}\) Depending on which approach is taken, the legal


\(^{82}\) Id. at 512.


\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.
assessment may change. However, the underlying requirement does not change; the partial or total destruction of the target must offer a definite military advantage. Objects fall within the purview of a lawful target much easier under the U.S. definition of military object.

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88 Id.
I. INTRODUCTION

Imagine a husband kidnapping his wife, accusing her of an affair—an affair he imagined—raping her, and then choking her to death.¹ Next imagine a reporter saying this was a story where a husband and wife made love before the husband was overcome by a jealous passion and strangled his wife.² Society’s view of rape is framed by how media depicts rape.³ The above story is a true story, reported by a USA Today Reporter, a husband really did rape and choke his wife; the media even called his rape making love to his wife.⁴ Then consider Norway, where most rapes are relationship rape, so a significant other (usually male) has raped his partner.⁵ Unfortunately, relationship rape is fairly common worldwide, with 127 countries not recognizing marital rape.⁶ Rape occurs worldwide and is viewed differently throughout the world.⁷

Throughout the world, there are different definitions and rules for what constitutes rape.⁸ To address these differences this Note proceeds in three sections: first is the background section which covers world statistics of rape, cultural relativism, definitions of rape, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for Yugoslavia, the United States, and Denmark.⁹ The Note then proceeds to the

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¹ Susan Caringella, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 43 (Columbia University Press, 2009).
² Id.
³ See Id.
⁴ Id.
⁶ Id.
⁷ See infra notes 13–95 and accompanying text.
⁸ See infra notes 13–95 and accompanying text.
⁹ See infra notes 13–95 and accompanying text.
argument section, which discusses the best way to define rape based on defining consent and penetration, and the gender of the victim and perpetrator. \(^{10}\) Finally, the Note proceeds to a brief summary of the argument. \(^{11}\) This Note only deals with the issue of a lack of definition for rape; it does not discuss issues such as the lack of reporting of rape, rape shield laws, marital rape, or the possibility of an attorney for a rape victim. \(^{12}\)

II. BACKGROUND

A. Rape Statistics Around the World

Rape, like many crimes, transcends the decades, culture, gender, and race. \(^{13}\) It is estimated that over 150,000,000 girls and 73,000,000 boys experience some form of sexual violence each year. \(^{14}\) However, this is only an estimate, as problems exist with reporting rape and rape statistics on a global level. \(^{15}\) Many countries only recognize that males can rape females, - the countries do not recognize men as rape victims or women as rapists. \(^{16}\) In 2013, there was a Joint Official Statistics Bulletin on sexual violence compiled by “the Ministry of Justice (MOJ), Office for National Statistics (ONS), and Home Office.” \(^{17}\) The report found in England and Wales that approximately more than 400,000 women are sexually assaulted a year. \(^{18}\) In India in 2012,

\(^{10}\) See infra notes 96–140 and accompanying text.

\(^{11}\) See infra notes 141–46 and accompanying text.

\(^{12}\) See infra notes 13–140 and accompanying text.


\(^{14}\) Rights of the Child, supra note 13, para. 28.

\(^{15}\) Abegunde, supra note 13, 193 (2013).

\(^{16}\) Id. See also International Statistics on Crime and Justice, supra note 13, at 24.

\(^{17}\) Abegunde, supra note 13, at 193.

\(^{18}\) Id. at 193–94.
there were over 240,000 crimes against women reported.  
However, South Africa has one of the highest rates of sexual violence in the world. In 1998, 4,000 South African women were questioned about rape, and one-third of the women reported they were raped. The highest recorded rapes are in Southern Africa, Oceania, and North America while Asia has the lowest reported rapes.

B. CULTURAL RELATIVISM – WHO’S STANDARD

Cultural relativism is the idea that the rights and rules society follows are determined by each society’s individual culture. Relativists believe that the notions of right or wrong vary based on the culture that someone was brought up in and therefore we cannot have universal rules. A group cannot dictate its laws or rules onto another group of people because common ground between diverse groups of people does not always exist. When trying to dictate standards the question of ‘whose standards’ is raised because groups and societal norms differ.

C. DEFINE RAPE

Rape comes from the Latin word rapere, which means, “to seize or take by force.” Rape is defined in common law as “unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will.” The more modern definition of rape used by Black’s Law Dictionary is “unlawful sexual activity ([especially] intercourse) with a person ([usually] a female) without consent and [usually] by force or threat of injury.” While the Oxford Dictionary defines rape as a

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19 Id. at 194.
20 Id.
21 Id.
24 Id.
25 Id. at 532.
26 Id. at 535.
27 Abegunde, supra note 13, at 188.
29 Id.
crime most often committed by a man that forces another person to have sexual intercourse with the perpetrator against the victim’s will.  

D. RAPE AS DESCRIBED BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In 1994, genocide occurred in Rwanda, which had terrible effects on the female Rwanda population, “particularly the Tutsi and moderate Hutu women and girls.” This was due to the large amounts of rape and sexual violence, which were planned, and instigated by the “Rwanda senior military and government officials.” During a three-month period in 1994, over 800,000 people were killed in Rwanda. The number of women raped will never be known; however, estimates show that thousands of women were raped during the conflict. The mass killings led to the United Nations Security Council creating the International Criminal Tribunal for Rwanda (ICTR). The purpose of the ICTR is to prosecute the individuals that committed violations of international humanitarian law in Rwanda. However, in 2015 the tribunal is scheduled to close after the final appeal is completed.

In 1998, the ICTR concluded in Prosecutor v. Jean-Paul Akayesu that coercion was an element of rape; however, coercion can lack physical force because in circumstances like armed conflict the mere presence of a military may be threatening

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32 Id.

33 Id. at 139.


36 Id.

37 Id.

enough. 39 Jean-Paul Akayesu was tried for his crimes in Rwanda; he aided and abetted rape and sexual violence against women and girls near the commune of which he was the mayor. 40 Further, Akayesu made history by being the first person convicted of rape and sexual violence under the 1948 Genocide Convention in an international court. 41 Initially, Akayesu was not charged with rape or sexual violence. 42 However, when Akayesu’s trial began, the witnesses discussed being raped or being victims of other forms of sexual violence while at Akayesu’s communal. 43 Many of the women at Akayesu’s communal were Tutsi and were regularly taken by law enforcement and “subjected to sexual violence,” 44 As a result the charges against Akayesu were amended to include rape and sexual violence; stating Tutsi Women, who were at his communal, were subjected to repeated sexual violence that Akayesu knew of and encouraged. 45 The Akayesu Trial Chamber found that rape is a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” 46 Rape, in international law, is committed “as part of a widespread or systematic attack on a civilian population on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.” 47 The court found that because Akayesu was present while sexual violence was happening to these women, he influenced the sexual violence that happened to these women, and he did nothing to stop the sexual violence, therefore he encouraged these activities. 48

40 Obote-Odora, supra note 31, at 137.
41 Id.
42 Abegunde, supra note 13 at 191.
43 Id.
45 See generally Abegunde supra note 13.
47 Id.
48 Id. paras. 415, 452, 460.
In 2003, the *Prosecutor v. Laurent Semanza*\(^9\) Court held that rape has a mental element when the intention is to have prohibited sexual penetration with someone who is non-consenting.\(^\) The *Semenza* Trial Chamber also adopted the definition of rape as approved by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which is “the non-consensual penetration . . . of the vagina or anus of the victim by the penis of the perpetrator or by another object used by the perpetrator or of the mouth of the victim by the penis of the perpetrator.”\(^\) Under this definition of rape, consent must be voluntarily given and looking at the surrounding circumstances assesses whether consent was given.\(^\) In the *Semenza* case it was found that Semenza encouraged a crowd to rape Tutsi women, in the presence of commune and military authorities, which instigated the crowd to rape women.\(^\) In 2005, the *Prosecutor v. Mikaeli Muhimana*\(^\) decision found coercion is an element in international prosecutions, and when coercion is present consent usually does not exist.\(^\) Events, such as “genocide, crimes against humanity, or war crimes,” will usually be presumed to be coercive and therefore consent cannot be freely given.\(^\)

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\(^\) Prosecutor v. Laurent Semanza, Case No. ICTR–97–20–T, Judgment para. 346 (May 15, 2003), available at http://www.ictrcaselaw.org/docs/doc37512.pdf; MacKinnon, *supra* note 39 (discussing how the trial chamber held that “the mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.”) This basically takes rape from being a physical act performed on the body of the “victim to a psychic act committed in the mind of the perpetrator.” *Id.*

\(^\) *Semenza*, Case No. ICTR–97–20–T, Judgment, paras. 344, 345

\(^\) *Id.* para. 344.

\(^\) *Id.* paras. 476–78.


\(^\) MacKinnon, *supra* note 39.

E. **Rape as Described by the International Criminal Tribunal for the Former Yugoslavia**

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in 1993 by the United Nations Security Council to deal with war crimes that took place in the Former Yugoslavia since 1991.\(^{57}\) This was the first court created by the United Nations to deal with war crimes, and the first court created since the Nuremberg and Tokyo Tribunals.\(^{58}\) The United Nations Security Council created the ICTY in 1993 under Resolution 808 to prosecute those responsible for “serious violations of international humanitarian law.”\(^{59}\) The ICTY was created as a court specifically for the purpose of the war crimes in the Balkans.\(^{60}\) The Security Council approved the ICTY completion strategy; this plan allows for an ordered closure of the Court.\(^{61}\) The court was supposed to finish work in 2010; however, the winding down procedure has been halted because not all defendants have been apprehended.\(^{62}\) The ICTY is known for laying the foundation for “conflict resolution and post-conflict development across the globe.”\(^{63}\)

In 1998, the ICTY decided in *Prosecutor v. Anton Furund’ija*,\(^{64}\) that some form of penetration had to be shown either by the penis or another object used by the accused.\(^{65}\) *Furund’ija* was a pivotal point for the ICTY in regards to forming how rape

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\(^{58}\) *About the ICTY*, supra note 57.

\(^{59}\) SCHAACK & SLYLE, supra note 57, at 42.

\(^{60}\) *About the ICTY*, supra note 57.

\(^{61}\) *Id.*

\(^{62}\) SCHAACK & SLYLE, supra note 57, at 61.

\(^{63}\) *About the ICTY*, supra note 57.


cases would be handled in the ICTY. The Trial Chamber looked at “the ICTR definition of rape,” but ultimately decided a more narrow definition should be applied in the ICTY. The court found rape was defined as sexual penetration of the vagina or anus by the penis or another object used by the perpetrator or “the mouth of the victim by the penis of the perpetrator,” or by coercion or threat of force against the victim or another person. This definition fits better with the traditional definition in the common law of rape than did the definition developed by the ICTR in Akayesu. In the definition adopted by the ICTY, the perpetrator has to be male, unless a female uses another object.

In 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic was decided, and in 2002, it was appealed. In Kunarac, the Appeals Chamber looked at and adopted the 1998 Furund’ija test. This test requires that the victim did not consent to the sexual act, and the prosecution has the burden of proof. Non-consensual penetration includes penetration after a threat to retaliate “against the victim or any other person,” non-consent of the victim, or the victim is unable to consent based on the “context of the surrounding circumstances.” The court noted that a person’s sexual autonomy is violated if the person is subjected to an involuntary sexual act. The trial

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66 Obote-Odora, supra note 31, at 150.
67 Furund’ija, Case No. IT–95–17/1–T, Judgment, paras. 176, 185.
69 Weiner, supra note 68, at 1211.
70 See id.; Furund’ija, Case No. IT–95–17/1–T, Judgment, para. 185.
72 MacKinnon, supra note 39.
73 Obote-Odora, supra note 31 at 152.
74 Id.
chamber understood that under international law in order to be guilty of rape there has to be some level of sexual penetration of the vagina, anus, or mouth by the penis or another object used by the perpetrator without the victim’s consent. The court also noted that consent must be voluntarily given through the victim’s free will; which is determined on a case-by-case basis. However, the Appeals Chamber also presumed non-consent in situations like genocide.

F. RAPE IN THE UNITED STATES OF AMERICA

The FBI does collect statistics for the United States on rapes; this information is included in the Uniform Crime Reports. The FBI formerly defined rape as “the carnal knowledge of a female forcibly and against her will.” Carnal knowledge can be defined as sexual intercourse. When has carnal knowledge the person is said to have sexual intercourse with someone else. The problem with this particular definition was many other agencies were interpreting it to exclude many sexual offenses such as oral or anal penetration or rapes against men. The FBI changed the definition to “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI definition is the closest the United States has to having a


77 Id. para. 437
78 Id. para. 460.
79 MacKinnon, supra note 39.
83 Id.
84 Frequently Asked Questions, supra note 81, at 1.
85 Id.
uniform definition for rape. The FBI includes any time where the victim cannot give consent based on age, “or temporary or permanent mental or physical incapacity” in its definition of rape. The FBI defines sodomy as oral or sexual intercourse without consent; which is very similar to the definition of rape. When someone uses an object to penetrate the genital or anal opening of another person without consent this is considered sexual assault with an object.

G. DENMARK

Originally, Rape was defined in Denmark as violation of a man’s right to his property; however, in 1866 it was “seen as a violation of the woman.” Rape today is defined by §216 of the Penal Code as forcing an unwilling party to have sexual intercourse. This can be achieved through violence or threats of violence. If the victim is unable to consent because of something she herself has done, this is not considered rape according to §218 of the Denmark Penal Code.

III. ARGUMENT

Certain changes are necessary to prosecute rape worldwide. Currently none of the worldwide international

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86 See id.
87 Id. at 2.
88 Id. (“11B Sodomy Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”).
89 Id. (“11C Sexual Assault With An Object To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”).
91 Id. at 17.
92 Id.
93 Id. at 18.
94 See Prosecutor v. Anton Furund’ija, Case No. IT–95–17/1–T, Judgment para. 175 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10,
documents, such as the Geneva Convention or Declaration on the Elimination of Violence, have a definition for rape; the only international definitions are in courts of limited jurisdiction and duration. 95 Therefore, rape must be defined in international law in a more permanent manner. 96 The things to consider when defining rape are consent, penetration, and the gender of the perpetrator and victim. 97

Many international documents discuss rape; however, they do not define rape. 98 Nowhere does the Geneva Convention or The Declaration on the Elimination of Violence Against Women define


96 See generally supra notes 13–95 and accompanying text.


98 See generally Geneva Convention (IV), supra note 95; Declaration on the Elimination of Violence Against Women supra note 97 (neither of these sources defines rape).
rape. In its opinion in Prosecutor v. Anton Furund’ija the Court stated, “[n]o definition of rape can be found in international law.” Rape has been defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); however, these courts are courts of limited jurisdiction and duration. Therefore, in international law, and specifically international humanitarian law, no definition of rape exists; which in part results from different countries having different definitions of rape. Further rape is something that affects many people, such as an estimated 223,000,000 children worldwide; however, this number could be low because of the lack of a consistent definition of rape and therefore inconsistent reporting of rape crimes. All of this demonstrates that rape is an international problem that is at least mentioned in many international documents, but has no uniform definition. For international documents to have force after the international tribunals have closed, the international community must have a consistent definition of rape.

Part of any definition of rape should include an element of consent. Consent must be an element of rape because whether the victim said yes is crucial to understanding the situation.

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99 See Geneva Convention (IV), supra note 95; Declaration on the Elimination of Violence Against Women supra note 95.


101 Furund’ija, Case No. IT–95–17/1–T, Judgment para.175.


103 See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 531 (Oxford University Press, 2013); SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 21–22 (Columbia University Press, 2009).


105 See supra notes 98–104 and accompanying text.

106 See supra notes 98–105 and accompanying text.

107 See Kovac, Case No. IT–96–23/1–T, Judgment.
between these two people. Consent is something that must be freely given by the victim and must be determined using a case-by-case analysis. However, there are some surrounding circumstances where a victim is always unable to consent which includes: (1) when the victim is drugged, (2) when the victim is unconscious, (3) when the victim is led to believe the victim is having sex with the victim’s partner, (4) when there is a mental disorder or disability, or (5) when the victim is unable to consent because of the victim’s age. Other factors that may contribute to a victim’s inability to freely consent are when the accused uses force or threat of force toward a victim or third party.

In order to establish non-consent the victim should only need to show that they refused the advances of the accused. Non-consent is presumed by the International Tribunals during times of genocide, war, or violations of international humanitarian law. This is because during times of genocide, war, or violations of international humanitarian law, the International Tribunals presume coercion, and therefore non-consent.

Another important element in rape is penetration. The definition of penetration varies slightly from jurisdiction to jurisdiction. Under common law, penetration was strictly the

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110 See id. para. 451; Frequently Asked Questions, supra note 97, at 2.


112 See Caringella, supra note 103, 110–11.

113 Muhimana, Case No. ICTR 95–1B–T, Judgment and Sentence, para. 546.

114 See id.

115 See Frequently Asked Questions, supra note 97, at 1.

penetration of a vagina by a penis.\textsuperscript{117} Today the best definition of penetration is that by the Federal Bureau of Investigation (FBI) in the United States.\textsuperscript{118} The FBI defines penetration as any amount of penetration of the vagina or anus by a body part or object used by the perpetrator or oral penetration by a sexual organ of another person without the victim’s consent.\textsuperscript{119} This definition is best because it recognizes that both males and females can commit and be victims of rape.\textsuperscript{120} The FBI’s definition is similar to the ICTR definition found by the Semanza Court and the ICTY definition found by the Kunarac Court.\textsuperscript{121} The FBI’s definition also does not care how much penetration there was, as long as some amount of penetration occurred.\textsuperscript{122}

Another important thing to consider is who is the victim and who is the perpetrator.\textsuperscript{123} Under the common law the perpetrator is always male, and the victim is always female.\textsuperscript{124} However, this creates a problem because 22\% of men experience some level of sexual violence.\textsuperscript{125} Therefore, the ICTY, ICTR, and

\textsuperscript{117} See generally Weiner, supra note 116, at 1209–10 (discussing rape as only being committed by males to females, by deduction one gets to the idea of penal to vaginal intercourse).

\textsuperscript{118} See generally Frequently Asked Questions, supra note 97 (explaining the FBI’s definition of rape).

\textsuperscript{119} Id. at 1.

\textsuperscript{120} See generally id. (explaining the FBI’s definition of rape).


\textsuperscript{122} See Frequently Asked Questions, supra note 97, at 1.


\textsuperscript{124} See Weiner, supra note 111, at 1210.

\textsuperscript{125} See American Bar Association Commission on Domestic Violence, Domestic Violence Statistics, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/domestic_violence/resources/statisti
FBI have the better definitions because they recognize that rape can occur against men, and that women can commit rape.\textsuperscript{126} They recognize that men can be raped by allowing any amount of penetration of the anus by a sexual organ or object, and of the mouth by a sexual organ of another person.\textsuperscript{127} They also recognize that women can rape by allowing sexual penetration to include a foreign object.\textsuperscript{128} Therefore international law should recognize that a rapist can be either gender, and likewise, rape victims can be either gender.\textsuperscript{129}

Cultural relativists believe groups cannot dictate their laws or rules to another group.\textsuperscript{130} However, we have many laws or rules that are supported by most countries, such as the Geneva Convention or the Universal Declaration of Human Rights.\textsuperscript{131} Further, anthropologists have found that many countries want change, especially Third World countries; these countries are disadvantaged without change, and some values that can be applied to all countries.\textsuperscript{132} Therefore, while some critique the idea that universal rules can work, sometimes universal rules are necessary to help third world countries.\textsuperscript{133} However, many cultures around the world are very conservative and the issue of rape is sensitive.\textsuperscript{134}


\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} See supra notes 123–28 and accompanying text.


\textsuperscript{131} Hatch, supra note 130, at 532.

\textsuperscript{132} See id. at 535.

\textsuperscript{133} See generally id.

An example is how in Egypt, Lebanon and Jordan incest rapes occur on a daily basis but is not addressed because society would disgrace the family as a whole. These are the types of countries that are disadvantaged without change, but they would also resist change. The challenge would be determining how to present the earlier described definition of rape in such a way that culturally these countries would accept it. Therefore the best way to incorporate such a law into our international community would be an amendment to the Geneva Convention or other such resolution through the United Nations.

IV. Conclusion

The entire world has a different idea as to what constitutes rape. This first section of the Note was the Background Section, which covers world statistics regarding rape, statistics regarding male rape as compared to female rape, the Geneva Convention, the Declaration on the Elimination of Violence Against Women, the ICTY, the ICTR, the United States, and Denmark. The Background Section provided that there is not a consistent definition of rape in international law, and the definition that does exist is only temporary. The Note then proceeded to the argument section where it defined rape based on defining consent and penetration, determining who can be the perpetrator and the victim, as well as some criticisms to having anything universal in international law. This Note only dealt with the lack of a definition for rape, it does not discuss issues such as the lack of reporting of rape, rape shield laws, marital rape, or the possibility of an attorney for a rape victim.

The rape laws around the world need to be changed to provide the best prosecution against the accused. By following the recommendations in this Note, the laws and courts are ensuring the victim is protected and not on trial. The laws and courts are

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135 Id.
136 Id.; see Hatch, supra note 130, at 537.
137 See id.
138 See supra notes 94–137 and accompanying text.
139 See supra notes 11–93 and accompanying text.
140 See supra notes 11–93 and accompanying text.
141 See supra notes 11–93 and accompanying text.
142 See supra notes 94–137 and accompanying text.
143 See supra notes 11–137 and accompanying text.
ensuring the accused is on trial. As Angelina Jolie said at her summit on rape in 2014, “[i]t has nothing to do with sex, [but] everything to do with power. . . . We must send a message around the world that the shame is on the aggressor.”