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International Focus at
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Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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COMBATING INCELS: ADDRESSING MISOGYNISTIC VIOLENCE AS AN EARLY WARNING INDICATOR OF ESCALATING VIOLENCE AND ARMED CONFLICT

Christie J. Edwards, JD, LLM*

Abstract

The spectrum of misogynistic violence between incels ("involuntary celibates"), non-State armed groups, and armed forces using extreme violence against women is based around the desire to restore "traditional" gender norms of male dominance, maintain systemic inequality between men and women, and often manifest in gender-based hate crimes before escalating into community violence and armed conflict. Governments and policy makers must dismantle structural inequalities and discrimination against women, as well as ensure effective criminal justice responses to gender-based hate crimes and all other forms of violence against women in order to address and prevent violence and armed conflict, as well as build sustainable peace.

Table of Contents

* Christie J. Edwards, JD, LLM, is a human rights lawyer, humanitarian implementer, and gender specialist who works globally on gender and conflict, sexual violence, human rights, and international humanitarian law.

I. Introduction

In May 2014, twenty-two-year-old Elliot Rodger went on a murderous spree near Santa Barbara, California, targeting women from a sorority "'to exact revenge on the society' that had 'denied' him sex and love.'"[1] The following month, among other crimes, the Islamic State group began their campaign and conquest of territory, demarcated by mass executions, kidnappings, sexual slavery, gender-based torture,[2] and rape, among other crimes.[3] The systematic enslavement and rape of Yazidi women and girls became a core practice and key theological tenet of the Islamic State group since it announced they were reinstituting the practice of slavery in 2014, and these practices were often highlighted in their recruitment efforts.[4]

At first glance, Rodger's attack on women at a California sorority, and the Islamic State group's recruitment campaign advertising the sex slaves given to caliphate recruits and fighters may not seem to be directly linked, but the spectrum of misogynistic violence between lone shooters and non-State armed groups using extreme violence or engaged in armed conflict has many troubling ideological commonalities based around gender inequalities and the desire to restore "traditional" gender norms of male dominance,[5] and often manifest in gender-based hate crimes before escalating into community violence and armed conflict.[6]

The correlation between misogyny and acts of violent extremism take place at the individual level, as many of the perpetrators of violent extremism have documented histories of committing domestic abuse and expressed misogyny, and at the larger community or collective level, where misogyny and control over women's bodies is part of the explicit ideology and tactics of the world's most prominent terrorist groups and non-State armed groups in conflict areas.[7] Numerous studies have shown significant support for a relationship between gender

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[1] *Elliot Rodger: How Misogynist Killer Became 'Incel Hero,'* BBC NEWS (Apr. 26, 2018), https://www.bbc.com/news/world-us-canada-43892189 [hereinafter *Elliot Rodger*].

[2] Christie J. Edwards, *Forced Contraception as a Means of Torture*, *in* GENDER PERSP. ON TORTURE: L. & PRAC. 139, 140 (Ctr. for Hum. Rts. & Humanitarian L., Am. Univ. Wash. Coll. L.).

[3] *See* U.N. Hum. Rts. Council Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic [UN COI], *They Came to Destroy: ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

[4] Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html; *The Revival of Slavery Before the Hour*, DABIQ: THE FAILED CRUSADE, 14-16 (2014).

[5] *Male Supremacy*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/male-supremacy (last visited Dec. 2, 2022).

[6] *See Gender-Based Hate Crimes*, OSCE OFF. FOR DEMOCRATIC INST. & HUM. RTS. (n.d.), https://www.osce.org/files/f/documents/f/1/480847.pdf [hereinafter *Gender-Based Hate Crimes*]; *see also No. 10/07, Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding*, OSCE MINISTERIAL COUNCIL (Nov. 30, 2007), https://www.osce.org/files/f/documents/b/7/29452.pdf; *see also Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*, OSCE OFF. FOR DEMOCRATIC INST. & HUM. RTS. 11 (2009), https://www.osce.org/files/f/documents/8/a/39821.pdf.

[7] Pablo Castillo Díaz & Nahla Valji, *Symbiosis of Misogyny and Violent Extremism: New Understandings and Policy Implications*, 72 J. INT'L AFF. 37, 38 (2019).

inequality, misogynistic violence, and armed conflict, concluding that "countries which have higher levels of gender inequality are more likely" to become involved in armed conflict, the levels of violence are more extreme, and peace agreements are more difficult to achieve and maintain than countries where women are treated with more equality.[8] Misogyny is therefore a "gateway," motivator, and early warning signal that acts of individual violence towards women can escalate into broader community violence.

This article examines the ideological similarities and spectrum of discrimination, misogyny, violence, and escalation to armed conflict from individuals engaging in acts of violence towards women, to extremist groups and non-State armed groups. It also examines structural inequalities and gender disparities leading to inter-community conflict. The article concludes with proposed legal and political solutions for accountability, social cohesion, peacebuilding, and structural gender equality.

II. Historical and Current Trends in Violence Against Women

A. Misogyny, Domestic Violence, and Intersectional Gender-Based Hate Crimes

Man Haron Monis, who murdered two people during a siege at a café in Australia in 2014, had recently been charged with 22 counts of aggravated sexual assault, 14 counts of aggravated indecent assault, and 40 additional related offenses, as well as being an accessory to the brutal murder of his ex-wife immediately prior to the attack.[9] He also claimed allegiance to the Islamic State group, among his other radical viewpoints.[10] In 2016, Cedric Ford shot seventeen people at his workplace in Kansas, killing three, immediately after being served with a restraining order barring him from contact with his ex-girlfriend, who said that he had repeatedly abused her.[11] A few months later, following gunman Omar Mateen's mass shooting at the Pulse nightclub during Pride month celebrations, investigators uncovered Mateen's long history of domestic violence towards his ex-wife, as well as his antipathy towards members of the LGBTQIA+ community, and claim to be a follower of the Islamic State group.[12] In 2020, a seven-

[8] Erika Forsberg & Louise Olsson, *Gender Inequality and Internal Conflict*, OXFORD RSCH. ENCYCLOPEDIA POL. (Mar. 23, 2022), https://doi.org/10.1093/acrefore/9780190228637.013.34.

[9] Michael Safi & Ben Quinn, *Man Haron Monis: Fringe Figure Whose Crime Record and Erratic Behavior Made Him Notorious*, THE GUARDIAN (Dec. 15, 2014), https://www.theguardian.com/australia-news/2014/dec/15/man-haron-monis-sydney-siege-suspect; Amanda Taub, *Control and Fear: What Mass Killings and Domestic Violence Have in Common*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/2016/06/16/world/americas/control-and-fear-what-mass-killings-and-domestic-violence-have-in-common.html.

[10] Safi & Quinn, *supra* note 9.

[11] Christopher Haxel & Mark Berman, *Kansas Gunman Served with Restraining Order Just Before Shooting Spree, Police Say*, THE WASH. POST (Feb. 26, 2016, 6:38 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/02/26/kansas-gunman-served-protection-from-abuse-order-shortly-before-shootings-sheriff-says/; Taub, *supra* note 9.

[12] Adam Goldman, Joby Warrick & Max Bearak, *'He Was Not A Stable Person': Orlando Shooter Showed Signs of Emotional Trouble*, THE WASH. POST (June 12, 2016), https://

teen-year-old young man became the first Canadian ever indicted for committing an "incel-inspired terror attack" after fatally stabbing one woman and injuring two others with a machete at an erotic massage parlor in Toronto, Canada.[13]

Analysis of F.B.I. data on mass shootings from 2009-2015 indicated that "57 percent of cases included a spouse, former spouse, or other family member among the victims, and that 16 percent of the attackers were previously charged with domestic violence."[14] Another study found that since 2011, in twenty-two mass shootings, 86 percent of the shooters had a strong history of domestic violence, 50 percent had specifically targeted women, and 32 percent had stalked and harassed women.[15] Several of these perpetrators had been influenced by the incel movement, short for "involuntarily celibate," a violent political belief system based on aggressive prejudice towards women and white supremacy.[16]

Perpetrators of domestic violence or intimate partner violence (usually men) follow a pattern of behavior seeking control over every aspect their partner's (usually women) lives by physical force, resulting from feelings of low personal control by the abuser and a desire to enforce "traditional" gender roles where men have control over women's bodies.[17] Some experts even refer to this behavior as "intimate terrorism."[18] Outside of the home or the private sphere of a specific relationship, this behavior may escalate into a gender-based hate crime, or even a mass shooting or terror attack.[19]

Rodger is one of the more well-known idols of the incel movement, cited by a number of perpetrators who carry out attacks on women and other mass shootings or terror attacks.[20] The rapidly growing online incel community is primarily composed of young men who are angry and extremely frustrated by their inability to find sexual partners, and who see themselves as victims of oppressive feminism.[21] The incel ideology advocates violence and bloodshed primarily against

www.washingtonpost.com/world/national-security/ex-wife-of-suspected-orlando-shooter-he-beat-me/2016/06/12/8a1963b4-30b8-11e6-8ff7-7b6c1998b7a0_story.html; Taub, *supra* note 9.

[13] Justin Ling, *Incels Are Radicalized and Dangerous. But Are They Terrorists?*, FOREIGN POL'Y (June 2, 2020, 3:08 PM), https://foreignpolicy.com/2020/06/02/incels-toronto-attack-terrorism-ideological-violence/; *Teenage Boy Charged in Canada's First 'Incel' Terror Case*, BBC NEWS (May 20, 2020), https://www.bbc.com/news/world-us-canada-52733060.

[14] Taub, *supra* note 9; *Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND: REP., https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/ (last updated Jan. 26, 2022) [hereinafter *Guns and Violence Against Women*].

[15] Mark Follman, *Armed and Misogynist: How Toxic Masculinity Fuels Mass Shootings*, MOTHER JONES, https://www.motherjones.com/crime-justice/2019/06/domestic-violence-misogyny-incels-mass-shootings/ (last visited Dec. 2, 2022); *Guns and Violence Against Women*, *supra* note 14.

[16] Shannon Zimmerman, et al., *Recognizing the Violent Extremist Ideology of 'Incels'*, WOMEN IN INT'L SEC.: POL'Y BRIEF (2018), https://www.wiisglobal.org/wp-content/uploads/2018/09/Policybrief-Violent-Extremists-Incels.pdf.

[17] Taub, *supra* note 9; Debra Umberson et al., *Domestic Violence, Personal Control, and Gender*, 60 J. MARRIAGE & FAM. 442, 442 (1998).

[18] Taub, *supra* note 9.

[19] *Id.*; Zimmerman, *supra* note 16.

[20] Zimmerman, *supra* note 16.

[21] *Id.*

women as a way to intimidate the broader society generally and women in particular.[22]

Violent misogynist attacks and gender-based hate crimes are motivated by common beliefs about male supremacy, sexuality, and the desire to violently restore a "traditional" and mythologized system of heterosexual gender norms where all men have access to and control of a female sexual partner.[23] While incel attacks and misogynistic attitudes and antipathy may not always focus on women from a specific religious or ethnic group, many women face intersectional discrimination and attacks due to their multiple and intersecting identities, which lead to stereotypes about how certain women are supposed to behave or look.[24]

The Organization for Security and Co-operation in Europe ("OSCE") Office for Democratic Institutions and Human Rights describes gender-based hate crimes as

> criminal offences motivated by bias against a person's gender [which] often seek to intimidate and suppress ways of life or expressions of identity that are perceived as not complying with traditional gender norms. . .The victims of such crimes are often targeted due to their perceived deviation from gender norms including on the basis of their sexual orientation and gender identity.[25]

The OSCE notes that "hate crimes are message crimes," which communicate to both individuals and entire communities that they are unwanted and unwelcomed, and that "threats and violence will never be far away."[26] Left unchecked, the escalation of community violence can trigger larger conflict across communities, intensify civil unrest, and in the worst cases, result in mass atrocities.[27]

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[22] Zimmerman, *supra* note 16.

[23] *Id.*

[24] *See, e.g.*, Emily Baumgaertner, *Atlanta-Area Spa Shootings Highlight Knotted Intersection of Sexism and Racism, Scholars Say*, L.A. TIMES (Mar. 19, 2021, 6:04 PM), https://www.latimes.com/world-nation/story/2021-03-19/atlanta-area-spa-shootings-highlight-knotted-extremist-ideas-scholars-say; *see, e.g., Eight Dead in Atlanta Spa Shootings, With Fears of Anti-Asian Bias*, N.Y TIMES, https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth (last updated Mar. 26, 2021) [hereinafter *Eight Dead in Atlanta*].

[25] *Gender-Based Hate Crimes, supra* note 6.

[26] *Lack of Comprehensive Approach to Hate Crimes Leaves Them Invisible and Unaddressed, OSCE Human Rights Head Says*, OSCE OFF. FOR DEMOCRATIC INST. & HUM. RTS. (Nov. 15, 2021), https://www.osce.org/odihr/504244; *see generally* Barbara Perry & Shahid Alvi, *'We Are All Vulnerable': The* In Terrorem *Effects of Hate Crimes*, 18 INT'L REV. VICTIMOLOGY 57 (2011).

[27] OSCE, *Countering Hate Crime: An Overview of ODIHR's Work*, YOUTUBE (Mar. 21, 2017), https://www.youtube.com/watch?v=PFP9z92FSvc.

B. The Incel Movement's Links to White Supremacy and Violent Far-Right Extremists

> *Expressed misogyny and domestic violence [are] precursors to mass violence, public shootings, and acts of terror.*[28]

According to the Anti-Defamation League ("ADL"), "[w]hile not all misogynists are racists, and not every white supremacist is a misogynist, a deep-seated loathing of women acts as a connective tissue between many white supremacists, especially those in the alt right, and their lesser-known brothers in hate like incels."[29] For example, Rodger's online manifesto and posts in many online incel forums shortly before his shooting spree were not only extremely misogynistic, they were also tremendously racist[30] – in one instance complaining that "an inferior, ugly black boy [was] able to get a white girl and not me."[31] The 2019 fatal attack on a Jewish synagogue in Halle, Germany was carried out by a perpetrator who blamed Germany's liberal immigration policies for his failure to be in a relationship, telling the investigating judge for the attack that he was a "dissatisfied white man" who had never been in a relationship with a woman.[32] He told the judge that men like him "don't get women" because foreigners take women from them.[33]

Many individual mass shooters do not belong to specific terrorist groups and are often categorized by law enforcement as "lone wolf" shooters who commit random acts of violence.[34] However, these individuals often engage in online extremist forums where they find "a community, an ideology, tactics, and targets."[35] Since Rodger's attack and publication of his manifesto, the incel movement has been joined by many far-right extremists who find close links between "men's rights activism" and white supremacy, particularly in their viewpoints and propensities towards intolerance, hatred, and violent hate crimes.[36]

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[28] Díaz & Valji, *supra* note 7, at 41.

[29] *When Women Are the Enemy: The Intersection of Misogyny and White Supremacy*, ANTI-DEFAMATION LEAGUE (July 20, 2018), https://www.adl.org/resources/report/when-women-are-enemy-intersection-misogyny-and-white-supremacy [hereinafter *When Women Are the Enemy*].

[30] Bruce Hoffman & Jacob Ware, *Incels: America's Newest Domestic Terrorism Threat*, LAWFARE (Jan. 12, 2020, 10:00 AM), https://www.lawfareblog.com/incels-americas-newest-domestic-terrorism-threat [hereinafter Hoffman & Ware, *Incels*]; Josh Glasstetter, *Elliot Rodger, Isla Vista Shooting Suspect, Posted Racist Message on Misogynistic Website*, S. POVERTY L. CTR. (May 24, 2014), https://www.splcenter.org/hatewatch/2014/05/23/elliot-rodger-isla-vista-shooting-suspect-posted-racist-messages-misogynistic-website.

[31] Bruce Hoffman & Jacob Ware, *Are We Entering a New Era of Far-Right Terrorism?*, WAR ON THE ROCKS (Nov. 27, 2019), https://warontherocks.com/2019/11/are-we-entering-a-new-era-of-far-right-terrorism/ [hereinafter Hoffman & Ware, *Are We Entering*].

[32] *Id.*; *Halle-Attentäter glaubt an jüdische Weltverschwörung* [Halle Assassin Believes in Jewish World Conspiracy], SPIEGEL PANORAMA (Oct. 25, 2019, 2:10 PM), https://www.spiegel.de/panorama/justiz/halle-attentaeter-stephan-balliet-glaubt-an-juedische-weltverschwoerung-a-1293330.html [hereinafter Halle Assassin].

[33] Hoffman & Ware, *Are We Entering*, *supra* note 31; Halle Assassin, *supra* note 32.

[34] Díaz & Valji, *supra* note 7, at 46.

[35] *Id.*

[36] Hoffman & Ware, *Incels*, *supra* note 30.

Another study of young men and violent extremism, based on interviews about social and economic pressures with American neo-Nazis and white supremacists, European anti-immigration skinheads, as well as jihadists and Islamists, finds gender at the center of a filtering process that allows some men to cope with these stressors, while others turn to rage and violence.[37] Online spaces such as 8chan,[38] Reddit's Red Pill forum, Proud Boys, Pick Up Artists, and many other men's rights activist forums illustrate the interconnected relationship between the politicized misogyny of the incel movement and the extreme views on race and immigration of far-right political groups.[39]

An investigation into the tweets surrounding the 2022 "Freedom Convoy," which claimed to fight against State control and COVID-19 vaccination mandates, indicated links between several disparate right-wing extremist movements and some parallel common myths.

> One is the myth of a "Golden Age." This concept harks to ideas of a mythical past that is regarded as perfect. The fantasy includes the way traditional forms of authority were venerated and racial and religious superiority was uncontested. Another myth, or old logic, is that of an "us" versus "them," pitting immigrants and racialized others against a unified, imagined "us." And finally, the posts display a desire to restore an idealized masculinity that advances and reinforces nationalist and masculine projects.[40]

At the root of these myths is a significant fear of losing perceived power, as well as "culture, religion, values, and beliefs."[41] Members of the convoy advocated for traditional forms of "masculinity and toughness" to ensure the security of the State, indicating how dominant, toxic masculinity is used by far-right extremists to provide credibility for "hierarchical gender relations between men and women, femininity and masculinity, and pure and 'corrupt' masculinities (*i.e.*, racialized, minority and queer masculinities)."[42]

ADL notes, "it's not a huge leap from 'women's quest for equal rights threatens my stature as a man' to 'minorities and women's quests for equal rights

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[37] *See generally* MICHAEL KIMMEL, HEALING FROM HATE: HOW YOUNG MEN GET INTO–AND OUT OF–VIOLENT EXTREMISM (Univ. of Cal. Press 2018).

[38] 8chan was removed after the 2019 El Paso, Texas mass shooting but later re-launched as 8kun. Hoffman & Ware, *Are We Entering*, *supra* note 31; Oscar Gonzalez, *8chan, 8kun, 4chan, Endchan: What You Need to Know*, CNET (Nov. 7, 2019), https://www.cnet.com/news/politics/8chan-8kun-4chan-endchan-what-you-need-to-know-internet-forums/; Vanessa Roma, *El Paso Walmart Shooting Suspect Pleads Not Guilty,* NPR (Oct. 10, 2019), https://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty.

[39] Hoffman & Ware, *Are We Entering*, *supra* note 31.

[40] Zeinab Farokhi, David Anderson & Yasmin Jiwani, *A Twitter Investigation Reveals What the 'Freedom Convoy,' Islamophobes, Incels and Hindu Supremacists Have in Common*, THE CONVERSATION (Feb. 15, 2022, 10:12 AM), https://theconversation.com/a-twitter-investigation-reveals-what-the-freedom-convoy-islamophobes-incels-and-hindu-supremacists-have-in-common-177026.

[41] *Id.*

[42] *Id.*

threaten my stature as a white man.'"[43] Misogyny is often therefore considered a "gateway drug" into a broader hatred, discrimination, or acts of violence towards others, such as ethnic or sexual minorities.[44] "Once individuals from the dominant group internalize this notion of victimization where feminism and women are to blame, it is easier for them to apply that ideological framing to other categories of "others," and it is also why sexism, racism, homophobia, and other forms of bigotry and intolerance frequently go together."[45] Additional studies also show a correlation between sexist and racist attitudes, and scholars suggest that "societies with a very high level of male dominance in politics tend to be dominated by hypermasculine political cultures. This norm also prescribes violence as a means to resolve conflict on the highest decision-making levels."[46]

At the core of both the incel ideology and alt-right white supremacist groups is deep-seated sexism where men believe they have a "responsibility to bring girls back to their proper place [and] to lead them into their natural roles as wives and mothers."[47] One online commenter evoked the Nazi imagery of an ideal Aryan family, suggesting that the ideal woman should be "breeding six warriors while being a happy hausfrau," while others complained "that 'women's liberation' has actively hurt (white) men's ability to procreate, because when white women have choices, they are less likely to get married, have children, and perpetuate the white race."[48]

The Norwegian mass shooter Anders Breivik, whose manifesto expressed a fear of white ethnic replacement by migrants from the Middle East and North Africa,[49] inspired the Christchurch shooter, whose manifesto entitled "The Great Replacement" began with: "It's the birthrates. It's the birthrates. It's the birthrates."[50] Scholars have since explained that misogynistic ideas of women's roles as solely reproductive are central for all of these violent extremists, as well as the bridge that leads to further radicalization for many of them.[51] "The birthrate conversation – and the question that goes with it, of women's continued freedom – has become a key recruitment tool for white supremacists. It is often the first

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[43] *When Women Are the Enemy*, *supra* note 29.

[44] *When Women Are the Enemy*, *supra* note 29.

[45] Díaz & Valji, *supra* note 7, at 43-44.

[46] Forsberg & Olsson, *supra* note 8.

[47] *When Women Are the Enemy*, *supra* note 29.

[48] *Id.*

[49] Will Englund, *In Diary, Norwegian 'Crusader' Details Months of Preparation for Attack*, THE WASH. POST (July 24, 2011), https://www.washingtonpost.com/world/europe/in-diary-norwegian-crusader-details-months-of-preparation-for-attacks/2011/07/24/gIQACYnUXI_story.html?itid=LK_inline_manual_21.

[50] Rosa Schwartzburg, *The 'White Replacement Theory' Motivates Alt-Right Killers the World Over*, THE GUARDIAN (Aug. 5, 2019), https://www.theguardian.com/commentisfree/2019/aug/05/great-replacement-theory-alt-right-killers-el-paso.

[51] Nellie Bowles, *'Replacement Theory', a Racist, Sexist Doctrine, Spreads in Far-Right Circles*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/technology/replacement-theory.html.

political point of agreement a white supremacist recruiter online will find with a target, especially with young people."[52]

These misogynistic ideas of "traditional" gender roles seek to preserve the dominance of heterosexual men and idealize a time before the sexual revolution.[53] Members of the incel movement believe that despite a woman's lack of interest or protests, men have a right to have sex with them anytime they please.[54] They believe that before the 1960s, every man was able to have access to a female partner, but with the rise of women's empowerment, women now choose to sleep with only the most physically attractive men, and consequently, fewer and fewer men have access to women's bodies.[55] Since "society" has failed to give them access to women's bodies, to which they feel entitled, they feel their only option is to conduct violent attacks on the prevailing system, particularly against women whom they feel have "wronged" them, or members of the LGBTQIA+ community who are seen as a threat to their sexuality.[56]

Scholars note that there are quite striking parallels between intimate partner violence and mass terror attacks perpetrated by individual attackers, as both are attempts to provoke fear and assert control.[57] Incels and white supremacists often use similar arguments for the need for an armed and violent insurrection in order to overthrow the prevalent system.[58] This act conforms to the United Nations Security Council Resolution 1566 definition of terrorism as "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury. . . with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population."[59]

The frustration by incels with the increasing gender equality, which they feel denies them the patriarchal roles to which they are entitled by virtue of their gender, in addition to their adherence to an ideology that endorses violent responses, exacerbates the danger of incels engaging in acts of violence, as well as increases the likelihood that they will be receptive to recruitment by broader far-right or extremist groups.[60] The rapid growth, notoriety, and membership of the incel movement is also heavily due to the same social media tools and messages

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[52] Bowles, *supra* note 51.

[53] Zimmerman, *supra* note 16.

[54] *When Women Are the Enemy*, *supra* note 29; Taub, *supra* note 9.

[55] Zimmerman, *supra* note 16.

[56] *Id.*; for example, the sorority members were attacked by Elliott Rodger. *Elliot Rodger*, *supra* note 1; there was an incel attack on women in a yoga studio in Florida. Steve Hendrix, *Yoga Shooting Incel Attack Fueled by Male Supremacy*, THE WASH. POST (June 7, 2019), https://www.washingtonpost.com/graphics/2019/local/yoga-shooting-incel-attack-fueled-by-male-supremacy/; an attack primarily on Asian women in spas in Georgia. *Eight Dead in Atlanta*, *supra* note 24; and an incel-inspired attack on a crowd in Toronto. *Toronto Van Attack: Minassian Guilty of Killing Ten People*, BBC NEWS (Mar. 3, 2021), https://www.bbc.com/news/uk-56269095; *see also* Taub, *supra* note 9.

[57] Taub, *supra* note 9.

[58] Zimmerman, *supra* note 16.

[59] S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

[60] Zimmerman, *supra* note 16.

which create community mobilization and likeminded behavior[61] used by the Islamic State group and other violent far-right extremists and terrorist groups.[62] The language of patriarchal masculinity provides the most basic foundation for far-right extremist viewpoints, where the "restoration of masculinity [and] retrieval of masculine entitlement" is the cornerstone for recruitment of men into these groups.[63]

The strict gender norms which control women (and their sexuality in particular) promoted by some non-State armed groups and certain terrorist groups can be a "pull" factor for possible new members who already have misogynistic attitudes or desires which "push" them towards groups with more radical ideologies.[64] One journalist notes:

> it is almost inevitable that these men would then be attracted to belief systems – whether it's Isis, evangelical Christianity, or the fundamentalist version of pretty much any major religion – that advocate wildly restrictive attitudes towards gender and endorse patriarchal systems which encourage men to punish women for their own failings.[65]

Additionally, the *United Nations Framework of Analysis for Atrocity Crimes: A Tool for Prevention* indicates that "[i]ncreased serious acts of violence against women and children, or creation of conditions that facilitate acts of sexual violence against those groups, including as a tool of terror" is one of the major risk factors which enables or prepares an environment conducive to the commission of atrocity crimes.[66] The ability for governments and communities to appropriately identify and address attitudes which support the subordination of women is therefore one of the best ways to prevent the escalation of violence.

C. Systemic Gender Discrimination and the Impact on Social Unrest

> *The surest way to curse one's nation is to subordinate its women.*[67]

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[61] *When Women Are the Enemy*, *supra* note 29; Abby Ohlheiser, *Inside the Online World of 'Incel,' the Dark Corner of the Internet Linked to the Toronto Suspect*, THE WASH. POST (Apr. 25, 2018, 7:50 PM), https://www.washingtonpost.com/news/the-intersect/wp/2018/04/25/inside-the-online-world-of-incels-the-dark-corner-of-the-internet-linked-to-the-toronto-suspect/.

[62] Antonia Ward, *ISIS's Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, THE RAND BLOG (Dec. 11, 2018), https://www.rand.org/blog/2018/12/isiss-use-of-social-media-still-poses-a-threat-to-stability.html.

[63] Farokhi et al., *supra* note 40.

[64] Taub, *supra* note 9; Zimmerman, *supra* note 16.

[65] Hadley Freeman, *What Do Many Lone Attackers Have in Common? Domestic Violence*, THE GUARDIAN (Mar. 28, 2017), https://www.theguardian.com/commentisfree/2017/mar/28/lone-attackers-domestic-violence-khalid-masood-westminster-attacks-terrorism.

[66] *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, U.N. 16 (2014), https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

[67] *Societies That Treat Women Badly Are Poorer and Less Stable*, THE ECONOMIST (Sept. 11, 2021), https://www.economist.com/international/2021/09/11/societies-that-treat-women-badly-are-poorer-and-less-stable [hereinafter *Societies That Treat Women*].

While the incel ideology may be a newer and more violent form of misogyny and social unrest stemming from the inability of men to find sexual partners, this phenomenon has similar roots in other countries and societies.[68] In order to better identify ways in which gender inequality can lead to the outbreak of internal armed conflicts or civil war, researchers have looked at a number of measurement metrics.[69] Academics have found "that the very best predictor of a [S]tate's peacefulness is not its level of wealth, the quality of its democracy, or its ethno-religious identity, but how well its women are treated."[70] The basic correlating factors which determine whether women are treated well are often issues relating to "access to power to decide (over everything from the more 'private' matters of one's own body to influencing the larger 'public' structures), and access to varying forms of material and immaterial resources (such as land, money, education, etc.)."[71] The social dimension of gender inequality relates to the value given to individuals based on their sex and the structural perceptions of masculinity or femininity in their particular society (*i.e.*, gender), where gendered discrimination is often based on patriarchal power structures.[72] One important factor that indicates a society's level of gender inequality or discrimination is the sex ratio.[73]

This inequality is particularly evident in East and South Asia, where the sex ratios are highly disproportionate due to gender discriminatory practices.[74] In China, the local vernacular for young adult males who will never marry is *guang gun-er*, or "bare branches" – those who will never marry because they cannot find spouses.[75] Scholars across a wide array of social sciences, including anthropology, biology, criminology, psychology, organization behavior and sociology agree that large numbers of "bare branches" lead to increased instability, violence and a potential threat to Chinese society.[76]

Due to China's former One Child Policy and the estimated 130 million missing women worldwide due to sex selective abortions and infanticides, a Chinese official magazine entitled "Theory and Time," published in Shenyang, China, predicted "that the disproportionate gender balance would lead to 'a large army of bachelors composed of 90 million men' as well as a severe breakdown in social order and the abduction and sale of women."[77] Researchers at Columbia

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68 Forsberg & Olsson, *supra* note 8.

69 Forsberg & Olsson, *supra* note 8.

70 Díaz & Valji, *supra* note 7, at 39.

71 Forsberg & Olsson, *supra* note 8.

72 *Id.*

73 *Id.;* G.A. Res. 34/180, Art. 16, U.N. Doc A/34/46 (Dec. 18, 1979) [hereinafter CEDAW].

74 *Societies That Treat Women*, *supra* note 67; Valerie M. Hudson & Andrea M. den Boer, *'Bare Branches' and Dangers in Asia*, THE WASH. POST (July 4, 2004), https://www.washingtonpost.com/archive/opinions/2004/07/04/bare-branches-and-danger-in-asia/6eb320ef-7d65-4772-98b7-f154fbd709fb/.

75 Hudson & den Boer, *supra* note 74.

76 *Id.*; Tatu Vanhanew, *Valerie M. Hudson and Andrea M. den Boer, Bare Branches: The Security Implications of Asia's Surplus Male Populations*, 5 JAPANESE J. POL. SCI. (Nov. 2004).

77 Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L. J. 731, 776 (2009).

University found that for every 1 percent rise in the ratio of men to women, violent and property crime rose by 3.7 percent.[78]

Other scholars feared that as Chinese families consciously selected male children over female children, there would be a significant increase in societal and intersocietal violence, as well as the potential for political leaders to co-opt these young men into the military in order to engage in military aggression or political violence.[79] In particular, the ability to mobilize these men for violent action or armed conflict is made easier by their hypermasculine-based culture where violence is encouraged as a means of resolving conflict, and, as they are frequently excluded from mainstream society due to their inability to find spouses or jobs, they have a higher likelihood of gathering and forming violent groups or gangs.[80] They are also more receptive to gender-discriminatory language for recruitment for these violent groups, and often already belong to groups which could be easily encouraged to engage in acts of violence.[81] Additionally, Indian scholars have also documented "a very strong relationship between sex ratios and violent crime rates in Indian states, which persists even after controlling for a variety of other possible variables."[82] Notably, the state of Kashmir, which has long been contested territory between India and Pakistan, has one of the highest sex-ratio imbalances in the world.[83]

Worldwide, single young men commit more violent crime than married young men.[84] According to sociologists, young adult men with few societal attachments from the lowest socioeconomic classes and with little opportunity to form their own families are much more likely to attempt to improve their personal and financial situations through violent and criminal behavior, working cooperatively with other single young men.[85]

Another tool for measuring gender inequality and discrimination as it relates to the stability of societies is the dimension of physical security (or insecurity) – particularly violence against women.[86] As many forms of violence against women are underreported or not even criminalized, scholars use the concept of security equality to analyze levels of physical insecurity of women, which looks at "resource distribution to protective measures set in place for different forms of violence, as violence tends to follow gender-specific patterns."[87] This could examine, for example, whether crimes which predominantly affect women, such as

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[78] Lena Edlund, *Sex Ratio and Crime: Evidence from China*, 95 REV. ECON. & STAT. 1520, 1521 (2013).

[79] Peter A. Morrison & Dudley L. Poston Jr., *China: Bachelor Bomb*, THE RAND BLOG (Sept. 14, 2005), https://www.rand.org/blog/2005/09/china-bachelor-bomb.html; Forsberg & Olsson, *supra* note 8.

[80] Forsberg & Olsson, *supra* note 8.

[81] *Id.*

[82] Hudson & den Boer, *supra* note 74.

[83] *Societies That Treat Women*, *supra* note 67.

[84] Hudson & den Boer, *supra* note 74; Vanhanen, *supra* note 76.

[85] Hudson & den Boer, *supra* note 74.

[86] Forsberg & Olsson, *supra* note 8.

[87] *Id.*

domestic violence and rape, are given equal amounts of resources, investigations, or victim support, in comparison to crimes of assault or battery, which primarily affect men.[88] Data collected by the United Nations Office of Drugs and Crime shows that although men are the primary victims of homicide globally, women bear the principal burden of lethal victimization as a result of gender stereotypes and gender inequality.[89]

Over the years, many scholars and researchers have highlighted how misogyny and oppression of women make societies poorer and less stable.[90] In a recent study, researchers ranked 176 countries for what they call the "patrilineal/fraternal syndrome," looking at issues such as "unequal treatment of women in family law and property rights, early marriage for girls, patrilocal marriage, polygamy, bride price, son preference, violence against women and social attitudes towards it (for example, is rape seen as a property crime against men?)."[91] The authors found a strong statistical link between violent political instability and the patrilineal/fraternal syndrome.[92] The syndrome explained 75 percent of the variation in a country's score on the Fragile States Index[93] and serves as an even "better predictor of violent instability than income, urbanization," or good governance (as measured by the World Bank).[94] The authors also noted that patriarchy and poverty are inextricably linked.[95] The patrilineal/fraternal syndrome explained four of five of the variations in food security, as well as four of five of the variation of scores on the UN Human Development Index,[96] on metrics as lifespan, health and education.[97] By structurally subordinating women in society, countries thus institutionalize the harms against all of their citizens.

D. Links Between Gender Inequality and Armed Conflict

> *When is terrorism not terrorism? When the political motivations are misogyny.*[98]

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[88] Forsberg & Olsson, *supra* note 8.

[89] *Global Study on Homicide 2019: Gender-Related Killing of Women and Girls*, U.N. OFF. OF DRUGS & CRIME 11 (2019), https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf (explaining that globally, women make up 64 percent of intimate partner/family-related homicide and 82 percent of intimate partner homicide).

[90] *Societies That Treat Women*, *supra* note 67.

[91] VALERIE M. HUDSON ET AL., THE FIRST POLITICAL ORDER: HOW SEX SHAPES GOVERNANCE AND NATIONAL SECURITY WORLDWIDE (Columbia Univ. Press 2020); *Societies That Treat Women*, *supra* note 67.

[92] HUDSON ET AL., *supra* note 91, at 107-43.

[93] *Country Dashboard*, FRAGILE STATE INDEX, https://fragilestatesindex.org/country-data/ (last visited Dec. 2, 2022).

[94] HUDSON ET AL., *supra* note 91, at 107-43; *Societies That Treat Women*, *supra* note 67.

[95] *See generally* HUDSON ET AL., *supra* note 91, at 167-78.

[96] *Human Development Index*, U.N. DEV. PROGRAMME, https://hdr.undp.org/data-center/human-development-index#/indicies/HDI (last visited Dec. 2, 2022).

[97] HUDSON ET AL., *supra* note 91, at 167-78.

[98] Sara Meger, *When Is Terrorism Not Terrorism*, GENDER & WAR PROJECT (Apr. 26, 2018), http://www.genderandwar.com/2018/04/26/when-is-terrorism-not-terrorism/.

Poverty and political instability are not the only harms linked to gender inequality. The relationship between international violence and domestic gender inequality has been highlighted in numerous studies on the role of gender equality and armed conflict,[99] as countries characterized by gender inequality are more likely to be involved in internal and international disputes and more likely to use various forms of violence to resolve those disagreements.[100] Research by the World Bank also links societies with higher levels of gender inequality and gender-based violence with greater risk of armed conflict and increased levels of violence within these conflicts.[101]

Additionally, researchers note the "implications of existing hierarchies and constructions of masculinities and femininities appear to play central roles" in internal or non-international armed conflicts, particularly where they intersect with other identities, such as ethnicity, religion, or class.[102] Finally, the root causes as well as the detrimental consequences of many forms of sexual and gender-based violence tend to be interconnected in many ways, especially during armed conflict and other situations of violence.[103] These interrelated and intersectional links can be a variety of factors, "such as: age (e.g., unaccompanied or separated children, children in detention, child migrants or children associated with the armed forces or armed groups); psychological, intellectual, sensory and physical impairments; situations of internal displacement and migration; and detention."[104]

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[99] *E.g.*, Mary Caprioli, *Gendered Conflict*, 37 J. PEACE RSCH. 51, 51 (2000) [hereinafter Caprioli, *Gendered Conflict*]; Mary Caprioli, *Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict*, 49 INT'L STUD. Q.161, 162 (2005) [hereinafter *Primed for Violence*]; Mary Caprioli & Mark A. Boyer, *Gender, Violence, and International Crisis*, 45 J. CONFLICT RESOL. 503, 503 (2001); Valerie M. Hudson & Andrea den Boer, *A Surplus of Men, a Deficit of Peace: Security and Sex Ratios in Asia's Largest States*, 26 INT'L SEC. 5, 5 (2002) [hereinafter Hudson & den Boer, *A Surplus of Men*]; Erik Melander, *Gender Equality and Intrastate Armed Conflict*, 49 INT'L STUD. Q. 695, 695 (2005); Hudson et al., *The Heart of the Matter: The Security of Women and the Security of States*, 33 INT'L SEC. 7, 19 (2009) [hereinafter Hudson et al., *The Heart of the Matter*]; Theodora-Isemene Gizelis, *Gender Empowerment and United Nations Peacebuilding*, 46 J. PEACE RSCH. 505, 508 (2009); Elin Bjarnegård & Erik Malender, *Disentangling Gender, Peace and Democratization: The Negative Effects of Militarized Masculinity*, 20 J. GENDER STUD. 139, 143 (2011); Jacqueline Demeritt et al., *Female Participation and Civil War Relapse*, 16 CIV. WARS 346, 354 (2014); *see also Global Conflict Risk Index*, EUR. COMM'N DISASTER RISK MGMT. CTR., https://drmkc.jrc.ec.europa.eu/initiatives-services/global-conflict-risk-index#documents/1059/list (last visited Dec. 2, 2022); Matina Halkia et al., *The Global Conflict Risk Index: A Quantitative Tool for Policy Support on Conflict Prevention*, 6 PROGRESS DISASTER SCI. 1, 1 (2020).

[100] *Primed for Violence*, *supra* note 99, at 162; *see also* Caprioli, *Gendered Conflict*, *supra* note 99, at 55; Caprioli & Boyer, *supra* note 99, at 503; Hudson & den Boer, *A Surplus of Men*, *supra* note 99, at 6; Melander, *supra* note 99, at 696; Hudson et al., *The Heart of the Matter*, *supra* note 99, at 19; Gizelis, *supra* note 99, at 508-509; Bjarnegard & Melander, *supra* note 99, at 6-7; Demeritt et al., *supra* note 99, at 347.

[101] WORLD BANK & U.N., PATHWAYS FOR PEACE: INCLUSIVE APPROACHES TO PREVENTING VIOLENT CONFLICT 116 (2017).

[102] Forsberg & Olsson, *supra* note 8.

[103] *ICRC Special Report 2020: Addressing Sexual Violence*, INT'L COMM. OF THE RED CROSS 15 (2020), https://www.icrc.org/sites/default/files/wysiwyg/Activities/Sexual-violence/icrc_sexual_violence_special_report_2020.pdf.

[104] *Id.*

Violence and conflict, whether internal or international, can be triggered by a large number of factors, often centered around various forms of grievances. Many mass killers feel a sense of personal or political grievance and their belief that only a violent response is warranted to respond to this harm,[105] while many non-State armed groups resort to violence due to a strong sense of historical and political injustice and grievances.[106] In many of these situations, there is also a "complex interaction of inequality, discrimination," deprivation, and rebellion which can lead to violence and armed conflict.[107] These factors are often in addition to or due to historical colonization, corporate resource-grabbing, and other negative historical legacies that have led to divisions between communities.[108] In addition, gender inequalities may also contribute to increasing the risk for violent conflict, as masculinized political cultures lower the threshold for violence, and unequal ratios of men versus women in communities provide large numbers of men who can be recruited for conflict.[109]

When groups have a strong sense of group identity and "othering" – or an "us versus them" mentality – violence leading to armed conflict is also likely.[110] A feeling of relative deprivation by a smaller group within a society can create "a sense of shared identity within that group based on their shared grievances and can provide a motive for violence."[111] This sense of deprivation is based on the feeling of individuals that their expectations for certain needs to be met are not being realized – or that they are not receiving everything to which they believe they are entitled.[112] This frustration over unfulfilled expectations fosters aggression and violence, and encourages or motivates groups to engage in collective violence.[113]

Systematic exploitation that becomes part of the social order thus creates a system of structural violence as well as the integral justification for violence on a broad scale.[114] Gender in particular is a fundamental aspect of "structural and cultural violence," as gender comprises the underpinning of structural inequality everywhere in the world.[115] Although gender roles shift over time and differ between various cultural contexts, "gender is used as a benchmark to determine access and power, and is the rubric under which inequality is justified and main-

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105 Taub, *supra* note 9.

106 *See generally* Ted Robert Gurr, Why Men Rebel (2015); Author's note: I am not evaluating the rationale of the perception of harms, merely observing a common emotional response that triggers violent reactions, versus non-violent political movements to address these grievances, for example.

107 *Primed for Violence*, *supra* note 99, at 162.

108 Gus Waschefort, *Africa and International Humanitarian Law: The More Things Change the More They Stay the Same*, 98 Int'l Rev. Red Cross, 593, 599 (2016).

109 *See generally* Forsberg & Olsson, *supra* note 8.

110 *Primed for Violence*, *supra* note 99, at 166.

111 *Id.* at 162-63.

112 *Id.*

113 *Id.* at 163.

114 *Id.* at 164.

115 *Id.*

tained."[116] Specifically, gender determines "roles, power relationships, responsibilities, expectations, and access to resources" at both the micro and macro levels.[117]

Gendered structural violence is maintained through gender stereotyping, exploitation, and a persistent threat of violence against women, all based on the mentality that women are inferior and treating them as such.[118] In highly patriarchal societies, children who are raised in communities where men dominate and control the women in their families view this violent and domineering interpersonal dynamic as "normal."[119] These highly patriarchal communities also promote stereotypical gender norms where manhood is perceived as being "tough," engaging in more "warlike" attitudes and conduct, and advocating that "men are superior to women."[120] Gendered structural hierarchies, based on norms of violence and oppression, often result in violence by desensitizing communities to violence and allowing a framework for justifying violence.[121] At the 1995 Fourth World Conference on Women in Beijing,[122] UNESCO noted the link between gendered inequality and violence and concluded that inequality between men and women is a strong barrier to long-lasting peace.[123]

Gendered hierarchies also have an additional role in explaining inter-ethnic conflicts, which further destabilize communities.[124] Nationalist movements are often antagonistic towards gender equality, as "men are considered the guardians of culture and tradition and any reforms to the cultural distribution of power are viewed as a threat to nationalist efforts to protect or unify the community."[125] Nationalists frequently use gendered imagery to encourage masculine heroes to fight for their homeland, and political leaders urge women to support the State's collective goals, even when they oppose gender equality goals (*i.e.*, "breeding six warriors while being a happy hausfrau").[126] This gendered nationalism is also the foundation of patriarchal militarism, defining women primarily for their role in bearing and taking care of children, as in contrast to male soldiers, and legitimizing men's control over reproduction.[127] Gender differences and cultural defini-

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[116] *Primed for Violence*, *supra* note 99, at 165.

[117] *Id.* at 164-65.

[118] *Id.* at 165.

[119] Forsberg & Olsson, *supra* note 8.

[120] *Id.*

[121] *Primed for Violence*, *supra* note 99, at 165.

[122] *Fourth World Conference on Women*, U.N. WOMEN, https://www.un.org/womenwatch/daw/beijing/fwcwn.html (last visited Dec. 2, 2022).

[123] *Statement on Women's Contribution to a Culture of Peace*, U.N. EDUC., SCI. & CULTURAL ORG. (Sept. 1995), https://www.culture-of-peace.info/annexes/declarations/Beijing.pdf.

[124] *Primed for Violence*, *supra* note 99, at 165.

[125] *Id.* at 166.

[126] *Primed for Violence*, *supra* note 99, at 166.

[127] *Id.* at 167.

tions thus become emblematic of the culture and intensify a sense of ethnic belonging.[128]

Former Special Representative of the United Nations Secretary-General on Sexual Violence in Conflict Zainab Bangura wrote:

> A common factor that presages the rise of authoritarian and extremist movements is their assault on women's rights and freedoms. This often includes strict enforcement of traditional dress codes and gender segregation, as well as the use of women's bodies as breeding ground for the next generation of fighters. Nazism included bureaus dedicated to both women and eugenics, including the sterilization of those deemed unfit, and lauded motherhood as the sole purpose of female existence. Today, the use of women as biological weapons for changing the demographics of a region is part of ISIL's genocidal campaign against religious and ethnic minorities. They are attacking the kinship ties that bind Yazidi, Christian, and Turkmen Shia communities, so that new families can be forged.[129]

Within this nationalist rhetoric, minority communities, particularly ethnic minority groups, frequently become targets of nationalist calls for violence.[130] As women usually constitute a minority group in terms of their relative power in society, and minority groups are often targeted as a means of mobilizing nationalist sentiment, minority women face increased intersectional harms of both ethnic and gender discrimination and targeting not only from within their own their own communities, but also from without.[131] At the same time, the "militarization of ethnic nationalism" frequently relies on convincing individual men that they will only be viewed as "real men" if they join the military or insurgent forces.[132] Gendered nationalism and the militarism of ethnic nationalism thus rely on highly distinct gender roles which reinforce structural inequalities and systems of violence.[133] These structural inequalities in turn play a role in facilitating ethnic conflicts,[134] as groups which observe systems of violence and oppression believe it to be "legitimate to oppress and dominate over other groups, be it women, sexual minorities, ethnic minorities, or political opposition groups."[135]

Another extremely socially destabilizing practice in patriarchal societies is polygamy.[136] Though, on average, only 2 percent of people live in polygamous households worldwide, the figures in unstable and conflict-countries are much

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128 *Primed for Violence*, *supra* note 99, at 167.

129 Zainab Bangura, *Faith in Islam & Faith in Women: Gender Justice Is Key to an Islam Without Extremes*, MEDIUM (Oct. 30, 2015), https://medium.com/the-future-of-conflict/faith-in-islam-faith- in-women-why-gender-justice-is-key-to-an-islam-without-extremes-8920277ef674.

130 *Primed for Violence*, *supra* note 99, at 166.

131 *Id.*

132 Forsberg & Olsson, *supra* note 8; *Primed for Violence*, *supra* note 99, at 167.

133 *Primed for Violence*, *supra* note 99, at 167.

134 *Primed for Violence*, *supra* note 99, at 167.

135 Forsberg & Olsson, *supra* note 8.

136 *Societies That Treat Women*, *supra* note 67.

higher.[137] For example, in war-torn countries such as Mali, Burkina Faso, and South Sudan, more than one-third of married women are married to polygamous men.[138] In large parts of northeast Nigeria controlled by the militant group Boko Haram, 44 percent of women aged fifteen to forty-nine are in polygamous relationships.[139]

If the top 10 percent of wealthy men can afford to have up to four wives each, 30 percent of men at the bottom of the economic spectrum will not be able to marry (assuming equal sex ratios in society).[140] This inability to marry or find a partner gives unmarried men a strong motivation to kill other men and commit other violent crimes.[141] Non-State armed groups often exploit male frustration to recruit members – in the Sahel, many unmarried men join rebel armed groups; in northwestern Nigeria, single men and their extended male family members have formed bandit groups, and Boko Haram allows its troops to kidnap girls;[142] and the Islamic State group institutionalized a system of rape and sexual slavery among its combatants.[143]

A recent report found that a significant percentage of fatal attacks on civilians in 2021 were attributed to the Islamic State, Al-Shabaab, the Taliban, and Jamaat Nusrat Al-Islam wal Muslimeen.[144] Some of the early indications of the increase in the spread of influence for each of these groups included a significant pushback on the rights of women, including sexual and reproductive rights, dress, education, and freedom of movement.[145] Misogynistic violence is not just a part of their range of violent tools or an incidental part of their political agenda, but a central tenet of their political goals, as control over women and their reproductive capacities is just as critical as gaining and maintaining control over physical territory and achieving success in combat.[146] Political terrorism has overtaken religious terrorism in the West, with religiously motivated attacks declining 82 percent in 2021.[147] Additionally, during the COVID-19 pandemic, many terrorist groups increasingly used internet forums and chatrooms to "spread conspiracy

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137 *Societies That Treat Women*, *supra* note 67.

138 *Id.* Stephanie Kramer, *Polygamy Is Rare around the World and Mostly Confined to a Few Regions*, PEW RSCH. CTR. (Dec. 7, 2020), https://www.pewresearch.org/fact-tank/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/#:~:text=polygamy%20is%20most%20often%20found,%25)%20and%20Nigeria%20(28%25.

139 *Societies That Treat Women*, *supra* note 67; Kramer, *supra* note 138.

140 *Societies That Treat Women*, *supra* note 67.

141 *Id.*

142 *Id.*

143 Taub, *supra* note 9.

144 GLOBAL TERRORISM INDEX 2022: MEASURING THE IMPACT OF TERRORISM, INST. OF ECON. & PEACE 15 (2022), https://www.visionofhumanity.org/wp-content/uploads/2022/03/GTI-2022-web-09062022.pdf [hereinafter GLOBAL TERRORISM INDEX].

145 Díaz & Valji, *supra* note 7, at 46.

146 *Id.* at 46-47.

147 GLOBAL TERRORISM INDEX, *supra* note 144, at 2.

theories and disinformation to undermine confidence in governments and gather more support for their ideology."[148]

In conclusion, States which have high levels of gender inequality, with strong structural systems of hierarchy, discrimination, and violence, support violent responses as a means to resolve these issues[149] and the negative impact of gender inequality at the societal level goes far beyond the impact on women alone.[150] The higher a State's levels of gender inequality, the more likely the State will suffer from armed conflict.[151]

III. Legal Frameworks Addressing Discrimination and Violence Against Women

Much has been written about the various international and regional legal frameworks which address violence against women, so I will only offer a brief summary here. The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[152] defines "discrimination against women" as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[153]

In 1992, the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee") adopted General Recommendation No. 19, an historic document which "clearly framed violence against women as a form and manifestation of gender-based discrimination, used to subordinate and oppress women."[154] It noted that gender-based violence is "'violence which is directed against a woman because she is a woman or that affects women disproportionately,' and that it constituted a violation of their human rights."[155]

In 2017, the CEDAW Committee adopted General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19.[156] "General Recommendation No. 35 elaborates on the gender-based na-

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148 GLOBAL TERRORISM INDEX, *supra* note 144, at 15.

149 *Primed for Violence*, *supra* note 99, at 172.

150 *Id.* at 173.

151 *Id.* at 171.

152 CEDAW, *supra* note 73.

153 *Id.*, art. 1.

154 *Launch of CEDAW General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*, U.N. HUM. RTS. OFF. HIGH COMM'N, https://www.ohchr.org/en/treaty-bodies/cedaw/launch-cedaw-general-recommendation-no-35-gender-based-violence-against-women-updating-generalhttps://www.ohchr.org/en/treaty-bodies/cedaw/launch-cedaw-general-recommendation-no-35-gender-based-violence-against-women-updating-general (last visited Dec. 2, 2022).

155 *Id.*

156 *Id.*

ture of this form of violence, building on the work of the Committee and other international human rights mechanisms, as well as developments at national, regional and international levels."[157] In particular, it "recognizes that the prohibition of gender-based violence has become a norm of international customary law. . . stresses the need to change social norms and stereotypes that support violence, in the context of a resurgence of narratives threatening the concept of gender equality in the name of culture, tradition or religion[,]" and provides clear liability for States who fail to protect women from violence at the hands of the government or non-State actors.[158]

In 2019, the United Nations Security Council passed Resolution 2467, which reaffirmed

> that the disproportionate impact of sexual violence in armed conflict and post-conflict situations on women and girls is exacerbated by discrimination against women and girls and by the under-representation of women in decision-making and leadership roles, the impact of discriminatory laws, the gender biased enforcement and application of existing laws, harmful social norms and practices, structural inequalities, and discriminatory views on women or gender roles in society, and lack of availability of services for survivors, and further affirm[ed] the importance of promoting gender equality by addressing these and other root causes of sexual violence against all women and girls as part of conflict prevention, conflict resolution and peacebuilding[.][159]

The 2030 Agenda for Sustainable Development was adopted by all United Nations Member States in 2015 and includes the seventeen Sustainable Development Goals ("SDGs") to ensure "peace and prosperity for people and the planet, now and into the future."[160] Goal five is to "[a]chieve gender equality and empower all women and girls" and its targets include:

> (5.1) End[ing] all forms of discrimination against all women and girls everywhere [and]; (5.2) [e]liminat[ing] all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.[161]

Goal sixteen is to "[p]romote just, peaceful and inclusive societies" and its targets include:

> (16.1) Significantly reduc[ing] all forms of violence and related death rates everywhere; (16.3) Promot[ing] the rule of law at the national and international levels and ensure equal access to justice for all [and]; (16.B)

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157 *Launch of CEDAW*, *supra* note 154.

158 *Id.*

159 S.C. Res. 2467, U.N. Doc. S/RES/2467 (Apr. 23, 2019).

160 *The 17 Goals*, U.N. DEP'T OF ECON. & SOC. AFF.: SUSTAINABLE DEV., https://sdgs.un.org/goals (last visited Dec. 2, 2022).

161 *Goal 5: Achieve Gender Equality and Empower All Women and Girls*, U.N. DEP'T OF ECON. & SOC. AFF.: SUSTAINABLE DEV., https://sdgs.un.org/goals/goal5 (last visited Dec. 2, 2022).

> Promot[ing] and enforce[ing] non-discriminatory laws and policies for sustainable development.[162]

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (also known as the "Convention of Belém do Pará") was the first legally binding international treaty that criminalizes all forms of violence against women,[163] noting "that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men."[164] The Convention specifies that "[e]very woman has the right to be free from violence in both the public and private spheres"[165] and ensures:

> [t]he right of every woman to be free from violence includes, among others:
>
> a. The right of women to be free from all forms of discrimination; and
>
> b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.[166]

The Council of Europe Convention on preventing and combating violence against women and domestic violence (also known as the "Istanbul Convention") created a legal framework at the pan-European level to "protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and domestic violence."[167] In its Preamble, the Istanbul Convention also recognizes "the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."[168]

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[162] *Goal 16: Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable, and Inclusive Institutions at All Levels*, U.N. DEP'T OF ECON. & SOC. AFF.: SUSTAINABLE DEV., https://sdgs.un.org/goals/goal16 (last visited Dec. 2, 2022).

[163] *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Belém Do Pará Convention)*, CTR. FOR WOMEN, PEACE, & SEC., https://blogs.lse.ac.uk/vaw/regional/the-americas/convention-belem-do-para/ (last visited Dec. 2, 2022).

[164] *Preamble: Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, ORG. AM. STATES (1995).

[165] *Id.*, art. 3.

[166] *Preamble: Inter-American Convention*, *supra* note 164, art. 6.

[167] *Details of Treaty No. 210*, COUNCIL OF EUR. TREATY OFF., https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=210 (last visited Dec. 2, 2022).

[168] Council of Europe Convention of Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, *opened for signature* Nov. 5, 2011, CETS No. 210 (entered into force Jan. 8, 2014).

IV. Legal and Political Remedies to Address All Forms of Misogyny, Discrimination, Violence Against Women, and Prevention of Armed Conflict

In order to effectively address all forms of misogyny, discrimination, and violence against women, and support the prevention of armed conflict, a number of legal and political tactics must be implemented. These issues are both structural, individual, and require a multi-layered approach to address these issues comprehensively.

A. Policy Approaches for Prevention of Violence and Armed Conflict

As discrimination against women and misogyny are among the foundations and early warning signs of escalating political violence and terrorism, strategic policy approaches must be created at the global, national, and local levels to address the root issues of violent misogyny which can lead to armed conflict.[169] At the global level, as discussed above, the 2030 Agenda for Sustainable Development included strong commitments by all governments to "to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls[.]"[170]

Each government bears "the primary responsibility to follow-up and review, at the national, regional and global levels, in relation to the progress made in implementing the SDGs and targets," and processes for "systematic follow-up and review at the various levels" have been developed.[171] The UN Secretary General's "Sustainable Development Goals Report 2022" noted that violence against women remains endemic, with over 641 million women (more than one in four women) having been subjected to intimate partner violence at least once, and only 57 percent of married women, or women in a union, are able to make their own knowledgeable decisions on sex, contraception use, and reproductive healthcare, largely due to laws which prevent access to relevant healthcare information.[172] All other indicators for gender equality and women's empowerment require significantly more effort to achieve their targets by the 2030 deadline. The report specifies, "[c]ommitment and bold action are needed to accelerate progress, including through the promotion of laws, policies, budgets, and institutions that advance gender equality. Greater investment in gender statistics is vital, since less than half of the data required to monitor Goal 5 are currently available."[173]

Additionally, the number of violent conflicts throughout the world is at its highest level since 1946, and 25 percent of the world's population live in con-

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[169] Díaz & Valji, *supra* note 7, at 49.

[170] G.A. Res. 70/1, U.N. Doc. A/RES70/1 (Oct. 21, 2015).

[171] G.A. Res. 70/1, *supra* note 170.

[172] THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2022, U.N. 12 (2022), https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf.

[173] *Id.* at 36.

flict-affected countries, as of the end of 2020.[174] "Human rights violations in conflict-affected countries have increased. . . and international humanitarian law has been disregarded, undermining the global compact of humanity."[175] Additionally, as "[f]eeling unsafe in public can fundamentally erode one's sense of well-being and reduce trust and community engagement, becoming an obstacle to development," the report notes that about a third of the world's population, predominantly women, say they do not feel safe walking alone in their communities at night.[176] Since women and girls comprise about 60 percent of all homicide victims killed by intimate partners or family members, the report notes that "accelerated progress will require additional policy interventions aimed at curbing lethal violence in the public arena, along with specific policies aimed at preventing gender-based killings."[177]

At the national and local levels, governments, policy makers, and human rights monitors must also focus on "trends reflecting increases in misogyny, anti-women rhetoric, political marginalization of women or women's groups, and strict enforcement of traditional gender norms, dress codes, or segregation."[178] Funding and resources should be increased to address violence against women, including in online spaces, and calls for violence based on misogyny should be treated with as much concern as every other form of violent extremism.[179] Additional efforts should be made to condemn misogynistic and discriminatory rhetoric by political leaders, creating frameworks to eradicate harassment in public, in workplaces, and online, investing in law enforcement resources to investigate violence against women, rigorous monitoring of these trends within human rights and conflict cycle analyses, and taking proactive steps to empower women and girls in every aspect of their lives.[180]

B. Accountability for All Forms of Violence against Women in Criminal Justice Systems

Effective criminal justice responses to violence against women, gender-based hate crimes, violent misogyny, domestic violence, trafficking, rape as a war crime and form of genocide, sexual slavery, and other domestic or international crimes are imperative to ensure that perpetrators do not enjoy impunity, and to send a strong message that all forms of violence against women will be prosecuted. However, current international legal frameworks and legal definitions for violent extremism and acts of terrorism fail to interpret the ideological content of men's violence and the targeting of women due to misogynistic ideals.[181] Rather

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174 *Id.* at 23.

175 *Id.* at 58.

176 THE SUSTAINABLE DEVELOPMENT GOALS REPORT, *supra* note 172, at 59.

177 *Id.*

178 Díaz & Valji, *supra* note 7, at 50.

179 *Id.*

180 *Id.*

181 *Id.*

than merely looking at the role of aggrieved masculinities, which "over-privileg[es] [the] narrative of men's struggles and disaffection," which are used as excuses to engage in violence against women,[182] legal scholars, prosecutors, judges, and other criminal justice practitioners must address the underlying bias-motivations of these crimes, and take a victim-centered approach in response.[183] Domestic and international courts must focus on a wide range of gender-based crimes, including misogynistic violence and hate crimes, in addition to crimes of sexual violence.[184] Courts should also include a wide range of justice tools, from traditional retributive justice measures to restorative and transitional justice mechanisms.

C. Peacebuilding Through Enhancing Gender Equality

While the sections above have examined the structural inequalities that may lead to violence and conflict, conversely, building societies around norms of gender equality may support non-violent methods of conflict resolution and reconciliation.[185] Since gender equality provides a normative framework to ensure respect and non-violent conflict resolution as it decreases the role of hypermasculinity, a foundation of equality may also prevent perceptions of injustice from escalating into violence or armed conflict, as well as decrease the likelihood that a post-conflict country would once again re-enter the conflict cycle.[186] Socially constructed equal gender roles, as well as respect for gender equality in the private sphere, can also expand into the public sphere, creating more peaceful and non-violent societies.[187]

Additionally, countries and societies which invest more in women and ensure their access to greater resources find that in turn, women have a stronger ability to influence and create networks within their wider communities.[188] These networks then can be used to ensure peace and create sustainable conflict resolution mechanisms.[189] In post-conflict countries, peacebuilding efforts are far more successful and long-lasting when both women and men at the local levels are engaged in peace negotiation and peacebuilding processes.[190] Women's leadership and involvement make peace agreements likelier and more long-lasting, as they enhance the healing and recovery process after conflict, and even prevent conflict

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182 *Id.* at 40.

183 *See, e.g.*, *Compendium: Practices of Civil Society and Government Collaboration for Effective Hate Crime Victim Support*, OSCE OFF. FOR DEMOCRATIC INST. & HUM. RTS. (Mar. 18, 2022), https://www.osce.org/odihr/514165.

184 Díaz & Valji, *supra* note 7, at 50.

185 Forsberg & Olsson, *supra* note 8.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

from beginning.[191] Studies have also shown that democracies are only more peaceful than non-democratic societies when they ensure gender equality.[192]

V. Conclusion

The ideological underpinnings and spectrum of misogynistic violence from individuals to larger terrorist or certain non-State armed groups using extreme violence against women are based on the desire to restore "traditional" gender norms of male dominance, maintain systemic inequality between men and women, and escalate from individual attacks into community violence and armed conflict. In order to create strong, peaceful, and resilient communities, governments and communities must make stronger efforts to dismantle structural inequalities and discrimination against women, ensure that women are treated as equal and valued members of society, use gender-sensitive and intersectional conflict analyses, include women as key leaders in peacebuilding efforts, and ensure strong criminal justice penalties for misogynistic crimes and violence against women.

When individual misogyny, systemic gender discrimination, and structural violence are reduced, tolerance of violence by the wider society will also decrease, thus leading to fewer wide-scale conflicts and a decrease in impunity for individual perpetrators who engage in violent misogynistic attacks.[193] As governments, policymakers, humanitarians, and peacemakers analyze conflict cycles, trends, and resolutions, the levels of violence, oppression, and inequality of women should be a key factor in addressing and preventing violence and armed conflict, as well as building sustainable peace.

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[191] Díaz & Valji, *supra* note 7, at 38.

[192] Forsberg & Olsson, *supra* note 8.

[193] *Primed for Violence*, *supra* note 99, at 165.

Linking Revisions to the AP I Commentary to Gendered Effects of Kinetic Operations

Jody M. Prescott*

Abstract

In 2000, UNSCR 1325 on Women, Peace, and Security called on the international community to fully implement international humanitarian law ("IHL") that protects the rights of women and girls during armed conflict. Since then, work in this area has largely avoided the parts of IHL that deal with the application of armed force. The International Committee of the Red Cross ("ICRC") is now well along in the process of updating its influential commentaries on the 1949 Geneva Conventions and the 1977 Additional Protocols. To fully implement UNSCR 1325 vis-à-vis IHL, the ICRC should use this opportunity to revise the Commentary to Additional Protocol I to include the use of gender considerations in its discussion of the principle of proportionality.

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I. Introduction

Promulgated by the UN Security Council in 2000, UNSCR 1325 on Women, Peace, and Security calls on member states "to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts."[1] Importantly, the Security Council did not limit these efforts to those portions of international humanitarian law ("IHL") that directly protect victims of armed conflict, such as the 1949 Geneva Conventions ("GCs").[2] Despite this, international efforts appear to have largely focused on international human rights law and the parts of IHL that intersect with international human rights law, such as prohibitions against sexual violence.[3] The parts of IHL that govern the conduct of armed conflict, which often offer indirect and qualified protection to civilians, such as the principle of proportionality, have in large part not been addressed.[4]

Simply mixing gender considerations into IHL and stirring will not yield the results sought by UNSCR 1325, however. The feminist critique of IHL has identified serious shortcomings in the GCs and Additional Protocol ("AP") I[5] from a gender perspective in both the texts of the treaties themselves, and the explanations of the meaning of the texts in the influential commentaries published by the International Committee of the Red Cross ("ICRC").[6] Despite these real problems, there appears to be little appetite among the international community to revisit the language of the treaties at this point.[7] Further, the current polarization between the West and the Russian Federation and the enablers of its war in

[1] S.C. Res. 1325, para. 6 (Oct. 31, 2000).

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

[3] Jody M. Prescott, *The Law of Armed Conflict and the Operational Relevance of Gender: The Australian Defence Force's Implementation of the Australian National Action Plan, in* IMAGINING LAW: ESSAYS IN CONVERSATION WITH JUDITH GARDAM 195, 215-16 (Dale Stephens & Paul Babie, eds., 2016).

[4] *See id.* at 216 (explaining that IHL concepts such as the principle of proportionality need to be addressed to protect women and girls more fully in armed conflict).

[5] Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[6] Jody M. Prescott, *NATO Gender Mainstreaming and the Feminist Critique of the Law of Armed Conflict*, 14 GEO. J. GENDER & L. 83, 93-101 (2013).

[7] JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 256 (2001).

Ukraine[8] suggests consensus in any new negotiations on the treaties could be difficult to achieve. Thus, it is unrealistic to expect new treaty language that would address the cogent points raised by the feminist critique of IHL any time soon.

It is a different situation with the commentaries, which do not require consensus among the states party to the GCs and AP I before they can be updated.[9] Although the commentaries are not official ICRC texts,[10] they are regarded as authoritative interpretations of the treaties.[11] Their weight of authority is in large part based on the experiences and work of their primary editor, Jean S. Pictet, who was the ICRC's Director for General Affairs, and the other authors, both during World War II and in the different conferences that resulted in the 1949 GCs.[12] Pictet is also credited with collaborating with the authors of the 1987 Commentary on AP I ("AP I Commentary").[13]

Revisiting the explanations set out in the commentaries, however, has already proven to be both realistic and fruitful. Beginning with its publication of an updated version of the Commentary to GC I in 2016 ("GC I Commentary"),[14] dealing with sick and wounded military personnel, the ICRC has continued to make concrete progress in revising the language of the commentaries to reflect a better understanding of the equality of treatment afforded to women under these treaties. Most recently, in 2020, the ICRC published its updated Commentary on GC III ("GC III Commentary"),[15] dealing with prisoners of war. It has set a path for reviewing the commentary for the last of the four 1949 treaties, GC IV, covering the protection of civilian populations under conditions of occupation and internment, as well as the commentaries for the Additional Protocols in time.[16]

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[8] Rodion Ebbighausen, *Why China Thinks the West Is to blame for Russia's War in Ukraine*, DEUTSCHE WELLE (Mar. 14, 2022), https://www.dw.com/en/why-china-thinks-the-west-is-to-blame-for-russias-war-in-ukraine/a-61119517.

[9] Ellen Policinski & Charlotte Mohr, *From the Gilded Age to the Digital Age: The Evolution of ICRC Legal Commentaries*, ICRC CROSS-FILES (June 8, 2022), https://blogs.icrc.org/cross-files/the-evolution-of-icrc-legal-commentaries/#:~:text=thus%20the%20original%20ICRC%20Commentaries,example%2C%20Human%20Rights%20Council%20reports.

[10] COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 7 (Jean S. Pictet, ed., 1952) [hereinafter 1952 GC I COMMENTARY].

[11] Policinski & Mohr, *supra* note 9.

[12] *Id.*

[13] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds., 1987) [hereinafter AP I COMMENTARY].

[14] *Updated Commentaries Bring Fresh Insights on Continued Relevance of Geneva Conventions*, INT'L COMM. OF THE RED CROSS (Mar. 7, 2016), https://www.icrc.org/en/document/updated-commentaries-first-geneva-convention.

[15] *Updated Commentary Brings Fresh Insights on Continued Relevance of Geneva Conventions for Treatment of Prisoners of War*, INT'L COMM. OF THE RED CROSS (July 10, 2020), https://www.icrc.org/en/document/updated-commentary-third-geneva-convention.

[16] Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and Their Additional Protocols into the Twenty-First Century*, 94 INT'L REV. RED CROSS 1551, 1554-55 (2012).

Linking Revisions to the AP I

Although the original timeline for publication of the revised AP I Commentary has slipped somewhat from what was originally planned,[17] at some point in the future it will be completed and published. While this objective is still just over the horizon in important respects, from the perspective of gender considerations in military operations, it is not too early to begin thinking about how the revised AP I Commentary could be properly updated.

The first step in this process should be an assessment of how the revisions to the commentaries respecting gender have already been made. This assessment should also evaluate how these revisions might influence both the understanding and practice of the national military establishments and the approach to working with gender considerations in the revised commentary to AP I. AP I is quite different from the GCs, because it is in many ways an intertwining of the older strand of IHL embodied in documents, such as, the Hague Regulations, which dealt with the conduct of armed conflict with the newer strand of law protecting victims of armed conflict set forth in the 1949 GCs.[18]

As noted *supra*, the feminist critique of AP I has long identified a number of significant issues with the language of the treaty and the ICRC commentary to it.[19] Perhaps the most significant decision point the ICRC will face in drafting the revisions to the AP I Commentary is whether it will forthrightly address the role that gender considerations should play in understanding and applying the law pertinent to the conduct of kinetic operations. In particular, the ICRC must decide whether it will establish a role for gender considerations in the assessment of proportionality in attacks during armed conflict.[20]

This article argues that it should. To explain why these revisions to the commentaries are necessary, this article first briefly reviews the history of the negotiations on the GCs as it relates to gender. Then, it turns to the problematic areas in the language of the GCs and the commentaries to them and show how they established a rationale for the treatment of female victims of armed conflict that is based not on equal rights with men. Instead, it details how the GC protections are based upon women's reproductive status, their relationships with male relatives, and discriminatory stereotyping as to their inherent weakness as compared to men.

Next, this article examines in detail the gender-related revisions of the commentaries to the first three GCs, and as a result it identifies what appears to be an evolution in the ICRC's treatment of gender considerations. Then, it turns to the provisions of AP I that are discriminatory against women from a feminist perspective, and the related explanations in the AP I Commentary to them. This

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[17] Henckaerts, *supra* note 16, at 1555.

[18] Christof Heyns et al., *The Definition of an "Attack" under the Law of Armed Conflict*, LIEBER INSTITUTE W. POINT: ARTICLES OF WAR (Nov. 3, 2020), https://lieber.westpoint.edu/definition-attack-law-of-armed-conflict-protection/.

[19] Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L & COMP. L. Q. 55, 57, 71, 77 (1997).

[20] *See* AIR POWER DEV. CTR., AIR FORCE DOCTRINE NOTE 1-18, GENDER IN AIR OPERATIONS 13-14 (2018) (explaining that targeting procedures should include gender considerations) (on file with author) [hereinafter AFDN 1-18].

section focuses upon the provisions of AP I and its Commentary dealing with proportionality and targeting. This article concludes by examining pioneering work done by the Australian Defence Force ("ADF") in a doctrinal note on incorporating gender considerations into proportionality analysis and targeting, and the most recent NATO doctrine on targeting to identify the potential benefits and challenges facing the ICRC as it moves to revise the AP I Commentary in the near future.

II. The GC Negotiations

World War II was marked by widespread abuse of civilians and prisoners of war, and this is reflected in the staggering number who died during the conflict.[21] Afterwards, the international community fully supported a comprehensive overhaul of the existing treaties that dealt with the protection of victims of armed conflict.[22] In 1947, the ICRC convened the Conference of Government Experts to consider revisions to these treaties.[23]

A. The Conference of Government Experts

The conference lasted two weeks, and the experts were divided into three different commissions to conduct their work.[24] The proper fashioning of treaty language that would better protect women during armed conflict was a subject of discussion within the commissions. In fairness to the commissions, it must be acknowledged that their work marked a real advance in the equality of treatment for women as men's fellow victims of armed conflict. At the same time, however, decisions were made regarding the phrasing of the basis for women's protection – "consideration due their sex," rather than equality – that would have a continuing influence on the specific scope of the protections afforded.[25]

The First Commission focused its work on updating treaty law that would eventually emerge as GC I and GC II.[26] In doing so, it accepted the formulation favored by the ICRC for describing the basis for women's protection as being "all consideration due their sex," and rejected language that would have required

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[21] 2-A Int'l Comm. Red Cross, Final Record of the Diplomatic Conference of 1949, at 9 (1949) [hereinafter Final Record, Vol. 2]; Int'l Comm. of the Red Cross, *150 Years of Humanitarian Action: The 1949 Geneva Conventions*, YouTube (May 26, 2014), https://www.youtube.com/watch?v=LBdQ-Rr4BuQ&list=playtsrWbD1_2_Mo64_l02wT_cyIa4Ncrp&index=5&ab_channel=InternationalCommitteeoftheRedCross%28ICRC%29.

[22] *See* Giovanni Mantilla, *Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions*, 28 Eur. J. Int'l L. 483, 493 (2017) (explaining the extensive work between the governments, the ICRC, and the National Red Cross and Red Crescent Societies that resulted in the 1949 Geneva Conventions).

[23] Philippe Abplanalp, *The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement*, 308 Int'l. Rev. Red Cross 520, 533 (1995).

[24] Int'l Comm. of the Red Cross, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims 1 (1947) [hereinafter ICRC, Government Experts' Report].

[25] Jody M. Prescott, Armed Conflict, Women and Climate Change 178-79 (2019).

[26] ICRC, Government Experts' Report, *supra* note 24, at 7, 75.

equal treatment of people "without any distinction" of sex.[27] Similarly, the First Commission decided it was unnecessary to expressly mention pregnant women because it "considered that such women were assimilated to the sick in general."[28] From the outset then, the context within which the subsequent negotiations and drafting work was done on GC I and GC II was not one in which women's inherent equality with men was recognized.

The Second Commission worked on updating the 1929 Geneva Prisoners of War Convention, and it believed that the language in proposed Common Article 3 (women "shall be treated with all consideration due to their sex") was not sufficient to protect women.[29] On "the contrary, it considered that as women in many countries were still placed on an inferior footing and received less consideration than men," and it proposed to add language to Article 3 which would require that the treatment afforded female prisoners of war "shall in no case be inferior to that accorded men."[30] Had this formulation been taken on board, it would have made progress in having women prisoners of war seen as the legal equals to men while still considering their different medical and security needs and requirements. This formulation was not accepted.[31]

The Third Commission focused on creating what would become GC IV for the protection of civilian victims of armed conflict.[32] Here, the ICRC favored including very specific measures to protect pregnant women and women with young children in this new treaty.[33] The basis for this protection, however, was not equal rights for women in these circumstances. Instead, the Commission in the end only agreed on language that stated women "shall be treated with all consideration due to their sex, and children with all consideration due to their age and helpless condition."[34]

B. The Diplomatic Conference

The Government Experts' work was included in four draft conventions the ICRC forwarded to a drafting conference held in Stockholm in 1948.[35] The conference's Legal Commission reviewed the drafts and made only a few amendments before approving them.[36] The approved drafts were then submitted to the diplomatic conference in Geneva which began in 1949.[37] The conference delegates worked in committees that were tasked with reviewing particular draft con-

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[27] ICRC, GOVERNMENT EXPERTS' REPORT, *supra* note 24, at 12.

[28] *Id.* at 69.

[29] *Id.* at 119.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 269.

[33] *Id.* at 301.

[34] *Id.* at 275.

[35] Abplanalp, *supra* note 23, at 533.

[36] *Id.*

[37] *Id.*

ventions, similar to the commissions of government experts at the prior conference.[38]

Committee I worked on GC I and GC II.[39] It settled on language that prohibited "any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria" and required that women "shall be treated with all consideration due to their sex."[40] Although, in isolation, the prohibition against any adverse distinction based on sex sounds like it is premised on equality, the qualifying "all consideration due to their sex" arguably changes the premise from one of full equality.

Committee II worked on CG III.[41] Regarding gender, the discussion within this Committee focused mostly on ensuring separate dormitories and "separate conveniences" for women.[42] Committee members also discussed medical examinations of prisoners of war, largely in the context of using x-rays to diagnose contagious disease.[43] There is no evidence in the record of any discussion of the different types of medical examinations or treatments that women who were prisoners of war might need to safeguard their health which men would not require.[44]

As to the basis for women's treatment under the Convention, the Committee II delegates in large part accepted the "all consideration due to their sex" formulation.[45] Here is where a curious gap first appears. Although almost all the delegates were men,[46] the British delegation included women,[47] and it persistently advocated for specific language establishing protections for female prisoners of war who were being punished for penal or disciplinary offenses.[48] It is unclear why the same provision was not made for women's ordinary camp dormitories in the final version of GC III.

III. The Gender-Related Provisions of the GCs and Their Commentaries

The diplomatic conference finished its work on August 12, 1949, and all the state parties agreed to four different conventions that had been negotiated as a result.[49] Before turning to the provisions regarding the protection of women in

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[38] PRESCOTT, ARMED CONFLICT, *supra* note 25, at 179.

[39] FINAL RECORD, Vol. 2, *supra* note 21, at 43, 45.

[40] *Id.* at 156, 159.

[41] *Id.* at 233, 235.

[42] *Id.* at 256, 259.

[43] *Id.* at 260.

[44] *See generally* FINAL RECORD, Vol. 2, *supra* note 21, at 259-60, 382, 472, 476, 582 (discussions of Art. 28 did not include the special medical exams women would need).

[45] *Id.* at 489.

[46] 1 INT'L COMM. OF THE RED CROSS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 158-70 (1949) [hereinafter FINAL RECORD, VOL. 1].

[47] *Id.* at 170.

[48] FINAL RECORD, Vol. 2, *supra* note 21, at 489-90, 494, 498, 502.

[49] Abplanalp, *supra* note 23, at 533-34.

the individual conventions, it is helpful to first examine Common Article 3,[50] which provides important and basic parts of the conventions' coverage beyond the area of international armed conflict to instances of internal armed conflict.

A. Common Article 3

As a result of the savagery of World War II, there was strong support among the national parties at the 1946 Preliminary Conference of Red Cross Societies for basic IHL protections to cover conflicts that were not international.[51] The 1947 Government Experts' Conference was also in favor of this idea, and recommended to the ICRC that irrespective of the legal status of parties to a conflict, certain principles should apply to all conflicts.[52] By the conclusion of the Diplomatic Conference, the state parties had agreed to a formulation for partial IHL coverage as set out in Common Article 3 to each of the conventions, but only in the case of actual armed conflict.[53]

As expressed in Article 3 of GC I, in all armed conflicts wounded and sick personnel of armed forces will receive humane treatment "without any adverse distinction founded on race, colour, religion or faith, sex, birth or weath, or any similar criteria."[54] In detail, the Article specifically prohibits all acts that do "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,"[55] in addition to acts that constitute "outrages on personal dignity, in particular humiliating and degrading treatment."[56] This formulation by itself clearly provides strong protection for women on a basis of equality with men. As with many things, however, the devil is in the detail, and examination of the other provisions of the conventions through the lens of the commentaries shows that this apparent equality was based instead on prevailing social notions of the time about women's subordinate role in society and their reproductive status and relationships.

B. GC I and GC II

Interestingly, GC I and GC II each have another common article, Article 12. Article 12 repeats Common Article 3's requirement that humane treatment be afforded to the wounded and sick "without any adverse distinction founded on sex," but then adds that women will "be treated with all consideration due their sex."[57] This qualifier does not appear in Common Article 3.[58]

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[50] GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3; GC III, *supra* note 2, Comm. Art. 3; GC IV, *supra* note 2, Comm. Art. 3.

[51] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L L. 37, 42-43 (1979).

[52] *Id.* at 43; ICRC, GOVERNMENT EXPERTS' REPORT, *supra* note 24, at 8-9.

[53] Elder, *supra* note 51, at 43-53.

[54] GC I, *supra* note 2, art. 3, § (1).

[55] *Id.* art. 3, § (1)(a).

[56] *Id.* art. 3, § (1)(c).

[57] *Id.* art. 12.

The 1952 Commentary to GC I (which was later matched by the 1960 GC II Commentary in this regard[59]) explains that the purpose of the article was to not exclude "distinctions made in favour of enemy wounded or sick and in order to take their physical attributes into account."[60] Accordingly, the consideration due to women was that "which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect."[61] This is repeated with a slight twist in the discussion of Article 12. Both the 1952 GC I Commentary and the 1960 GC II Commentary discussions on Article 12 state, "[t]he special consideration with which women must be treated is of course in addition to the safeguards embodied in the preceding paragraphs, to the benefits of which women are entitled equally with men. What special consideration? No doubt that accorded in every *civilized* country to beings who are weaker than oneself and whose honour and modesty call for respect."[62]

This rationale is based on a stereotypical gender role for women that makes them dependent on the good will of men to "honor" social conventions and restrain themselves from committing abuses against women.[63] Further, it is arguably based to a degree on the assessment of a substantive difference between presumably civilized Western nations versus others, while feminist critics at the same time see IHL as designed primarily to address the needs of male Western combatants and ignoring the needs of the most at-risk non-Western female civilians.[64] Thus, at its heart, as explained in the commentaries, the protection afforded to women as women under GC I and GC II is not based on equality but rather the traditional social inferiority of women,[65] particularly as practiced in the West. This problem becomes more pronounced in GC III, the convention protecting prisoners of war.

C. GC III

GC III contains many important protections for women prisoners of war, and these provisions marked substantive progress in ensuring their better treatment by Detaining Powers when they were captured.[66] However, there are troubling textual gaps in the treaty regarding gender that are not really explained well in the 1960 GC III Commentary. Further, as with the other GC's, the protections for

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[58] *See* GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3.

[59] COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 84, 91-92 (Jean S. Pictet ed., 1960) [hereinafter Pictet, 1960, GC II].

[60] 1952 GC I COMMENTARY, *supra* note 10, at 137-138.

[61] *Id.* at 140.

[62] INT'L COMM. OF THE RED CROSS, *Convention (II) of the Amelioration of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea. Geneva, 12 August 1949. Commentary of 1960, Article 12 – Protection and Care* (1960) (emphasis added), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=E22FEB6F44CDD119C12563CD00423430.

[63] Prescott, *supra* note 6, at 93-94.

[64] GARDAM & JARVIS, *supra* note 7, at 253.

[65] *Id.* at 10-11.

[66] PRESCOTT, ARMED CONFLICT, *supra* note 25, at 183.

women are not based on equality of treatment with men, but instead upon notions of weakness, honor, modesty, and familial relationships.

i. Protections for Women

GC III contains many important protections for women prisoners of war. Women prisoners of war "shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men."[67] Women prisoners of war will have separate dormitories,[68] separate hygienic facilities,[69] and those convicted of penal offenses or camp disciplinary infractions cannot be punished more severely than female military personnel of their captors for similar offenses.[70] Those convicted are to be "confined in separate living quarters from male prisoners of war and be under the immediate supervision of women."[71]

ii. Problems in Women's Protection

Alongside these important protections, there are significant textual gaps, and areas in which it does not appear that the drafters fully thought through from a realistic gender perspective. One important gap appears in GC III, Article 16, which prohibits Detaining Powers from making adverse distinctions among prisoners on the basis of "race, nationality, religious belief or political opinion, or any other distinction founded on similar criteria."[72] Curiously, this formulation excludes sex, although it is specifically included in Common Article 3.[73] Further, GC III, Article 25, does not provide that women prisoners of war will be under the supervision of women in their dormitories.[74] Although this gap was later closed in AP I, Article 75,[75] it is not clear why this textual omission occurred, given that women prisoners of war serving disciplinary punishments were specifically to be under the supervision of women.[76]

Other significant issues are related to implementation. For example, returning pregnant women prisoners of war to their home countries sounds like a very humane measure, but suppose the pregnancy resulted from rape by Detaining Power personnel. Would the captor country follow this provision and risk providing its enemy with a news item that illustrates its maltreatment of captured fe-

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[67] GC III, *supra* note 2, art. 14.

[68] *Id.* art. 25.

[69] *Id.* art. 29.

[70] GC III, *supra* note 2, art. 88.

[71] *Id.* art. 97.

[72] *Id.* art. 16.

[73] GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3; GC III, *supra* note 2, Comm. Art. 3; GC IV, *supra* note 2, Comm. Art. 3.

[74] GC III, *supra* note 2, art. 25.

[75] AP I, *supra* note 5, art. 75 § (5) (requiring that "[w]omen whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women").

[76] GC III, *supra* note 2, art. 97.

male personnel? The politicization that could surround such returns could work to undermine compliance with this provision during wartime.

Further, although GC III provides for separate hygienic facilities, these are defined as "adequate" infirmaries,[77] baths and showers, soap and water, and latrines.[78] Neither contraception services and products nor women's sanitary supplies are mentioned at all. In addition, because of the textual gap regarding the supervision of women's dormitories, the risks of pregnancy resulting from sexual intercourse with fellow male prisoners of war is also a possibility.[79]

The 1960 GC III Commentary did little to remedy the concerns raised by the convention's text. It noted that the "regard" women prisoners of war were to receive was challenging to define, but that it basically rested on three factors: women's weakness, their "honour and modesty," and the health challenges pregnancy and childbirth presented in the prison camp environment.[80] Here, "honour and modesty" were basically defined as protection against "rape, forced prostitution and any form of indecent assault."[81]

The flaws in this approach are obvious. If a woman prisoner of war was deemed dishonorable or immodest by the Detaining Power or its personnel, would she then receive less protection against sexual violence? Further, given the coercive setting of prisoner of war camps, the notion of "voluntary" prostitution in such places seems at best naïve. Finally, the Commentary noted that the protections provided to pregnant women were premised on a failure of "the precautions taken."[82] The sum of these "precautions" that appears in the treaties seems to consist only of "adequate" infirmaries and spartan hygienic facilities.[83]

The Commentary does set out a draft model agreement that parties to a conflict could use to help negotiate the implementation of Article 110's provision for prisoners of war with certain medical conditions to either be repatriated to their home countries or be accommodated in neutral countries that includes provisions related to women.[84] Those who are pregnant or suffering from obstetrical problems are to be returned to their home country.[85] On the other hand, women prisoners of war with babies and young children are eligible for accommodation

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[77] GC III, *supra* note 2, art. 30.

[78] *Id.* art. 29.

[79] Prescott, *supra* note 6, at 97.

[80] COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 147 (Jean S. Pictet, ed., 1960).

[81] *Id.*

[82] *Id.* at 148.

[83] PRESCOTT, ARMED CONFLICT, *supra* note 25, at 184-85.

[84] INT'L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 1960, I. Principles for Direct Repatriation and Accommodation in Neutral Countries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=9D802598D8253DB4C12563CD00429D17.

[85] INT'L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., Part I -. Principles for Direct Repatriation and Accommodation in Neutral Countries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/b5d2187010cecc72c12563cd0051b6d6.

in neutral countries,[86] but are not required to be returned to their home countries.[87]

In different militaries across the world, gender mainstreaming efforts, either voluntary in terms of national action plans or their equivalents promoting greater career opportunities for women,[88] or involuntary in the sense of massive personnel requirements due to a war providing opportunities for women to serve in different military positions such as in the case of Ukraine,[89] are slowly but surely increasing the number of female military personnel in military formations. Further, they are now more likely to find themselves in combat or combat-related situations where the risk of becoming sick or wounded, or prisoners of war, is greater than in the past.[90] Mindful of this, it is important to see how the ICRC has been updating the GC Commentaries to get a sense of how it might approach the AP I Commentary in the future.

IV. Gender in The Recent Commentary Revisions

As noted *supra*, the ICRC has completed revisions to the Commentaries on the first three 1949 Conventions already and is working on the GC IV Commentary now.[91] At some point in the near future, it would appear poised to begin working in earnest on the AP I Commentary. One might reasonably assume that those provisions of AP I that deal with the protection of victims of armed conflict, the Geneva strand of the treaty, would have an approach applied to them that was very similar to that used in revisions of the 1949 Conventions, including the revisions related to gender. To understand how it might approach gender considerations into the material parts of AP I that deal with kinetic operations, it is useful first to chart the evolving approach the ICRC has taken in the commentaries it has revised so far.

A. GC I and GC II

It is useful for analysis purposes to essentially combine the examination of the revised commentaries for GC I and GC II together. They deal with very similar subject matter, largely the treatment of the sick and wounded, and in the negotiation process that led to their drafting, a single commission or committee consid-

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[86] *Convention (III), Part I, supra* note 85.

[87] *See generally id.* (Annex section A covers those sorts of cases that would receive what is likely the most favorable treatment from a prisoner of war's perspective: being returned to their home country. Section B covers those sorts of cases that would receive what is likely the next most favorable treatment: being accommodated in a neutral country rather than by their enemies).

[88] PRESCOTT, ARMED CONFLICT, *supra* note 25, at 198-226.

[89] Haley Britzky, *Ukrainian Women Are Showing the World What They're Made of in the Fight Against Russia*, TASK & PURPOSE (Mar. 9, 2022, 3:32 PM), https://taskandpurpose.com/news/ukraine-women-military/.

[90] Anita Ramasastry, *What Happens When GI Jane Is Captured? Women Prisoners of War and the Geneva Conventions*, FINDLAW (Apr. 2, 2003), https://supreme.findlaw.com/legal-commentary/what-happens-when-gi-jane-is-captured.html.

[91] *See supra* notes 15-18 and accompanying text.

ered them together.[92] Most importantly for this article, as will be explained *infra*, when it comes to considering gender and the protections afforded to women, the revised commentaries are essentially twins.

i. Revised GC I Commentary

The revised GC I Commentary Introduction explains that the ICRC believed it was necessary to update the commentary provisions in general "to reflect the practice that has developed in applying. . . the Conventions and Protocols during the decades since their adoption, while preserving those elements of the original Commentaries that are still relevant."[93] In describing the specific structure of the revised commentaries on individual GC I articles, the Introduction notes that although the "precise content of the discussion section depends on the article under scrutiny," the discussions would briefly describe, "where relevant, how the application in practice of a provision may affect women, men, girls and boys differently[.]"[94]

To best appreciate how the ICRC then incorporated gender concerns into the revised GC I Commentary, it is perhaps most useful to focus on the changes to the individual commentaries on Articles 3 and 12, which as noted *supra* are common to both GC I and GC II. In the 1952 GC I Commentary discussion of Common Article 3, there was no mention of women or gender.[95] However, the discussion of GC I, Article 12 emphasized the prohibition against adverse distinctions between the sick and wounded in providing medical treatment on the basis of sex, and it contained many references to the protections afforded women.[96] The content of these references will be examined in detail when comparing the 1952 GC I Commentary provisions with those of the 2016 revision.

Turning first to the comparison of the 1952 GC I Commentary on Common Article 3 with the 2016 revisions, in terms of gender specifically, the revised commentary notes that in assessing the severity of pain or suffering of a sick or wounded individual, factual elements including the person's gender must be included.[97] It also notes that although GC IV (on the protection of the civilian population and internees) specifically prohibited rape, forced prostitution, and indecent assault upon women, AP I, Article 75 prohibited these acts irrespective of the victim's sex and that this gender-neutral understanding of the prohibition against sexual violence had been used in decisions by international criminal

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92 *See supra* notes 27, 39, 40 and accompanying text.

93 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITIONS OF THE WOUNDED AND SICK IN THE FIELD 3 (Knut Dörmann et. al. eds., 2016) [hereinafter 2016 GC I COMMENTARY].

94 *Id.* at 16.

95 *See generally* INT'L COMM. OF THE RED CROSS, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva 12 August 1949, Commentary of 1952, Art. 3 – Conflicts Not of an International Character* (1952), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=1919123E0D121FEFC12563CD0041FC08.

96 1952 GC I Commentary, *supra* note 10, at 137-38, 140.

97 2016 GC I COMMENTARY, *supra* note 93, at 217.

courts.[98] It qualifies this recognition by observing that women and girls still constituted the majority of victims of sexual violence during armed conflict.[99]

In terms of the humane treatment guaranteed under Common Article 3, the 2016 GC I Commentary recognized that this was context specific, and that "there is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways."[100] Thus, an understanding of humane treatment needed to include "[s]ensitivity to the individual's inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society[.]"[101] This understanding applied as well to determining the standard of medical care that was due to a person.[102]

This language reflects in many respects the practice of "gender mainstreaming," which has as its purpose gender equality. In 1997, the UN Economic and Social Council defined gender mainstreaming as:

> [T]he process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.[103]

While laudable in many respects, it is not obvious that basing appropriate treatment for female personnel who are wounded and sick on a policy concept is necessarily the right approach for explaining the application of legal requirements. This presents a potential weakness in the business case for why the 2016 GC I Commentary's approach to gender should persuade military organizations to take these revisions on board without reservations or qualifications. Yes, as the internationally recognized arbiter of IHL, the ICRC is well placed to revise the original commentaries,[104] but these revisions should have a more solid legal foundation.

In its favor, however, the 2016 GC I Commentary was very forthright in providing specific examples of how Common Article 3's standards applied in armed conflict to women, referencing the findings of international tribunals where applicable, and without using dated euphemisms that themselves reflected a discriminatory mindset. For example, it pointed out that female detainees who were

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[98] 2016 GC I COMMENTARY, *supra* note 93, at 238.

[99] *Id.*

[100] *Id.* at 193.

[101] *Id.* at 193, 202.

[102] *Id.* at 261.

[103] *Gender Mainstreaming, Extract from Report of the Economic and Social Council for 1997 (A/52/3 8 September 1997)*, WOMEN 2000, https://www.un.org/womenwatch/daw/csw/GMS.PDF (last visited Oct. 13, 2022).

[104] JODY M. PRESCOTT, EMPIRICAL ASSESSMENT IN IHL EDUCATION AND TRAINING: BETTER PROTECTION FOR CIVILIANS AND DETAINEES IN ARMED CONFLICT 17 (2021).

pregnant or nursing might "require tailored nourishment and medical care or adjustments in the organization and equipment of their accommodation."[105] As another example, in discussing the prohibition against degrading treatment set forth in Common Article 3, it specifically included "sexual slavery, including the abduction of women and girls as 'bush wives'[.]"[106] Finally, it identified as prohibited cruel treatment "gender-based humiliation such as shackling women detainees during childbirth."[107]

The revisions related to Article 12, which deals specifically with the protection and care of the wounded and sick, offer a similar mix of positive and negative features that potentially weaken its overall persuasiveness. The discussion of GC I, Article 12 now notes that appropriate humane treatment is based on gender in part,[108] and that accounting for the differences between sexes in providing proper medical care is based on "social and international legal developments in relation to equality of the sexes."[109] By itself, this sounds favorable.

However, in the footnote to this statement, the 2016 GC I Commentary lists the 1966 adoption of the International Covenant on Civil and Political Rights by the UN General Assembly as the legal development marker for women being recognized as having equal rights with men.[110] Even casual students of international law will be underwhelmed by the strength of this citation in support of this rationale. The UN Charter recognized equal rights for women when it was signed in 1945,[111] although during the negotiations of the conventions in the late 1940s, the ICRC supported formulations of the protections for women that were not based on equality, as noted *supra*.[112] Suggesting that the law first changed in 1966 to recognize legal equality for women with men is at the very least ahistorical.

Similarly, the GC I Commentary notes that the treaty's requirement for providing women medical treatment different from that given to men is based not on the position that "they have less resilience, agency or capacity within the armed forces or as civilians, but rather acknowledges that women have a distinct set of needs and may face particular physical and psychological risks."[113] In doing so, it explicitly recognizes that the original language of the 1952 GC I Commentary referred to women's weakness, honor and modesty as the basis for their humane treatment under the convention. This too sounds favorable.

However, the discussion goes on to simply note that this "was a product of the social and historical context of the time" and "would no longer be considered

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105 2016 GC I COMMENTARY, *supra* note 93, at 201-02.

106 *Id.* at 228-29, 240.

107 *Id.* at 213-14.

108 *Id.* at 488.

109 *Id.* at 506.

110 *Id.*

111 U.N. Charter art. 1, ¶ 3.

112 *See supra* notes 28-49 and accompanying text.

113 2016 GC I COMMENTARY, *supra* note 93, at 506.

appropriate."[114] While those statements are true, it is not the complete truth. Simply saying that times have changed ignores the reality of the negotiations of the 1949 conventions from a historical and legal perspective. It would have been better if the drafters of the 2016 GC I Commentary had forthrightly come to grips with the ICRC's role in creating both the texts of the conventions and the gloss placed on them by the original commentaries.

ii. GC II Revised Commentary

For purposes of this article's analysis, a brief examination of the provisions of the revised 2017 GC II Commentary, concerning the protection of wounded, sick, and shipwrecked military members, will suffice. Many parts are exactly the same as in the revised 2016 GC I Commentary, such as the structure of the discussions of the commentaries on the individual articles,[115] the reliance on gender mainstreaming as a rationale for the revisions,[116] and the examples given of the specific real-world experiences that would violate the convention's prohibitions against inhumane and degrading treatment.[117]

There is one slight difference worth noting, however. In the discussion of GC II, Article 12, the footnote that deals with the dated and discriminatory approach of basing protection on women's weakness, honor, and modesty included an additional sentence: "For a more detailed debate and feminist critiques of humanitarian law, see Gardam/Jarvis, Haeri/Puechguirbal, and Durham."[118] This is more significant than it might seem at first. Prior to this, the ICRC tended to shun the feminist critique of armed conflict and argued instead that the real problem was people not following the existing rules.[119] Though small, it is perhaps a hint of an evolving approach within the ICRC in drafting the commentaries that became more evident just a couple of years later when the ICRC published its revisions to the 1960 GC III Commentary on prisoners of war.

B. GC III

The Introduction to the revised 2020 GC III Commentary shows both continuity in the ICRC's handling of gender in the revisions and at least partial recognition that it needed to get out in front of a gap in the GC III text that is troubling from a feminist perspective and the problems posed by the outdated rationale of women's protection from sexual violence being based on their honor

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[114] 2016 GC I COMMENTARY, *supra* note 93, at 506.

[115] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITIONS OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 18-19, (Knut Dörmann et al. eds., 2017) [hereinafter 2017 GC II COMMENTARY].

[116] *Id.* at 210, 272, 503.

[117] *Id.* at 222, 237.

[118] *Id.* at 521.

[119] Prescott, *Law of Armed Conflict*, *supra* note 3, at 103.

and family rights.[120] The continuity is shown by the use of the same methodology of discussing the revisions to the articles as set forth in the revised GC I and GC II Commentaries. This includes the brief but important factor of "where relevant, how the application in practice of a provision may affect women, men, girls and boys differently[.]"[121]

i. Textual Gap

A textual gap is found in GC III, Article 16, which prohibits "adverse distinction based on race, nationality, religious belief, political opinion or any other distinction founded on similar criteria."[122] As noted *infra*, this provision notably does not include sex explicitly. The ICRC takes an interesting approach to this obvious gap in the revised commentary. Instead of noting that sex might be another distinction based on similar criteria, it lists other grounds that would not be permitted bases for adverse distinction, including disability, education level, and family connections, but not sex. In doing so, it perhaps takes the position that the omission of sex was not a mistake but was in fact purposeful. If this is the case, then the Introduction's recommendation to use relevant professionals such as gender specialists to help ensure equal treatment of prisoners of war is artful.[123]

ii. Problems in Women's Protection

The Introduction also sets the context for the rationale that it finds applicable to the protections afforded female prisoners of war under GC III. It states that the rules were "a product of their times,"[124] which is an artful way to dodge attributing responsibility for their drafting. However, it then forthrightly states that those formulations do not meet current standards, such as the notion that sexual violence against women was prohibited because it was deemed an attack on their honor and a violation of their family rights.[125] Instead, that prohibition is based on the "violence to women's physical and psychological integrity."[126] Thus, the revised Commentary "analyses the specific needs of women interned as prisoners of war from the perspective of contemporary practice and legal requirements."[127] This is a much more solid legal rationale than the reliance on gender mainstreaming concepts seen in the revised GC I and GC II Commentaries.

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120 *See* INT'L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 2020 Introduction*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19 [hereinafter ICRC, *Commentary of 2020 Introduction*].

121 1 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONER OF WAR 36 (Kurt Dörmann et al. eds 2020) [hereinafter 2020 GC III COMMENTARY, VOL. I].

122 *Id.* at 10.

123 *Id.* at 11.

124 *Id.* at 9.

125 *Id.*

126 *Id.*

127 *Id.*

This is not to say that gender mainstreaming concepts are absent from the 2020 GC III Commentary. In fact, they are expressed in the revisions to the discussion of Common Article 3, using almost identical language as was used in the Commentaries to GC I and GC II.[128] What the Introduction clarifies though is that their importance is based on the use of these concepts in practice by states, and it is not just a theory of how to look at gender considerations.[129]

iii. Other Specific Articles

Turning now to the discussions of other specific articles of GC III that are illustrative of the ICRC's approach, GC III, Article 13 requires humane treatment of prisoners, and sets out the obligation to protect them at all times, "particularly against acts of violence or intimidation[.]"[130] The 1960 GC III Commentary's discussion of this article did not address sexual violence or its gendered effects. The revised 2020 GC III Commentary notes, however, that although Article 13 does not state that sexual violence is prohibited, "it does so implicitly because it establishes an obligation of humane treatment and requires protection against violence or intimidation."[131]

This discussion is important for two reasons. First, it shows that the drafters of the 2020 GC III Commentary were thinking broadly about the different provisions of GC III that lent themselves to addressing gender concerns, even if they did not explicitly mention "women." Second, it shows reliance on legal interpretation of the actual text without needing to import any policy considerations of gender mainstreaming for justification.

GC III, Article 14 requires respect for the persons and honor of prisoners, and specifically addresses women prisoners of war.[132] The 1960 GC III Commentary addresses the situation of women prisoners of war, but largely in the sense that the main points to consider in determining the regard due to them under Article 14 were women's weakness, their honor and modesty, and pregnancy and childbirth.[133] The revised 2020 GC III Commentary did not refute this analysis directly; it deftly ignored it and interpreted the text of the article itself, stating that it was "not to be understood as implying that women have less resilience, agency or capacity within the armed forces, but rather as an acknowledgment that women have a distinct set of needs and may face particular physical and psychological risks."[134] Again, although the discussion of Article 14 in the revised commentary is not free of gender mainstreaming language, the focus in the revi-

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[128] 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 209, 219, 280.

[129] ICRC, *Commentary of 2020 Introduction*, *supra* note 120.

[130] GC III, *supra* note 2, art. 13.

[131] 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 577-78.

[132] GC III, *supra* note 3, art. 14.

[133] INT'L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva. 12 August 1949: Commentary of 1960, Article 14: Respect for the Person of Prisoners*, para. 2.2 (1960), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=64864A7A2AB7E2F6C12563CD00425C7E.

[134] 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 616-17.

sions is on the text of the convention itself, and finding a way to accommodate concerns about the outdated, discriminatory language from the original commentary without doing violence to the words of the article.

The 2020 GC III Commentary is also notable for the way it telegraphs revisions to the discussions of other articles that have been critiqued for their insufficiency by feminist IHL writers. For example, the phrase "with all regard due to their sex" is now explained as not just making sure women prisoners of war have separate dormitories and adequate clothing, it also means that Detaining Powers "are obliged to ensure that the medical services available to female prisoners of war are adequately equipped to address women's gynecological and reproductive health issues,"[135] and to provide "sufficient and suitable sanitary products, including sanitary towels and the means to dispose of them[.]"[136]

In sum, there appears to be an evolution in the ICRC's approach to revising the GC commentaries to deal with the issues identified by the feminist critique of IHL. It appears that the ICRC is ever less reliant on notions of gender mainstreaming to justify why gender considerations should be taken on board when interpreting and applying the treaties and is instead taking a more legally defensible approach of showing how these new understandings fit within the existing treaty text. This evolution is not completely even, and there still appear to be some important areas, such as in the case of textual gaps, where the ICRC's explanations are less than completely convincing. However, overall, the ICRC's approach shows promise as it works on the revisions of the GC IV Commentary and moves on toward revisiting the 1987 AP I Commentary.

V. Gender-Related Provisions of AP I and Its Commentary

Before we assess the approach taken in AP I regarding the protection of women, it is useful to first briefly note the international security situation that formed the backdrop to its negotiations. The first diplomatic conference session on the new treaty was held in 1974,[137] and the Additional Protocols to the 1949 Geneva Conventions were finalized in 1977.[138] At this time, after the U.S. retreat and eventual defeat in Vietnam, the Cold War between the U.S. and the Soviet Union and their respective allies had begun warming back up.[139] Most of the colonies of European states had become independent by this time, and non-international armed conflicts had birthed a number of new states.[140] A number of armed conflicts were still ongoing at the time, including insurgencies in Namibia, Rhodesia, and South Africa against apartheid white regimes.[141]

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[135] 2020 GC III COMMENTARY, VOL. I, *supra* note at 618.

[136] *Id.*

[137] Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 32 (1983).

[138] AP I, *supra* note 5.

[139] *See* GORDON S. BARRASS, THE GREAT COLD WAR: A JOURNEY THROUGH THE HALL OF MIRRORS 186-211 (2009).

[140] *See* RAYMOND F. BETTS, DECOLONIZATION 23, 27, 31-32, 40, 60-62, 112-13 (2d ed. 2004).

[141] *See* JOHN W. TURNER, CONTINENT ABLAZE: THE INSURGENCY WARS IN AFRICA 1960 TO PRESENT 16-99 (1998).

In this context, the negotiations on AP I took a different and perhaps more ambitious approach to IHL than the drafters used for the 1949 Geneva Conventions. AP I effectively merged the Geneva strand of IHL regarding victims of international armed conflict (and Common Article 3's limited coverage for victims of non-international armed conflict) with the Hague strand of IHL concerning the conduct of international armed conflict into one single treaty.[142] In doing so, AP I did more than just combine existing legal requirements. For example, the definition of international armed conflict was expanded include wars against colonial or racist regimes, and the requirements upon combatants to be afforded prisoner of war status were significantly liberalized. In terms of the protection of women and girls, some of these changes were not favorable, at least for female civilians.

A. AP I and Its Commentary

Consistent with the provisions of the 1949 Geneva Conventions, AP I provides certain enhanced protections for women, but many of these provisions follow the rationale of the Geneva Conventions positions of women as caregivers and their inherent weakness rather than equality irrespective of sex.[143] There were certain new protections which are indirect in nature, and although they could in certain circumstances mitigate the more severe effects of armed conflict upon women and girls, this was not noted as a basis for the protections. These include provisions found in AP I, Articles 8-20, 35, 39, 41-51, 58, 67, 75, and 79.

In particular, AP I, Article 75, titled "Fundamental Guarantees," prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[144] The AP I Commentary notes that the intent of this article was to expand the scope of humane treatment to people who might otherwise have not been fully covered by existing treaties.[145] Regarding the prohibition of enforced prostitution and indecent assault, the AP I Commentary notes that it applied irrespective of sex.[146] It also notes that regarding the respect of people's "honour," this term was used in GC III, Articles 14 and 34,[147] but of course, this usage was described differently for women than it was for men in the 1960 GC III Commentary.

On the other hand, Article 76 of AP I is specifically titled "Protection of women."[148] It states women are to receive "special respect," and to be protected "against rape, forced prostitution and any other form of indecent assault."[149] In the event they are held for "reasons related to the armed conflict," women who

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[142] 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at *ix* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2006).

[143] PRESCOTT, ARMED CONFLICT, *supra* note 25, at 187-88.

[144] AP I, *supra* note 5, art. 75.2(b).

[145] AP I COMMENTARY, *supra* note 13, at 865, 867, 868.

[146] *Id.* at 874.

[147] *Id.* at 871.

[148] AP I, *supra* note 5, art. 76.

[149] *Id.* art. 76.1.

are pregnant or who have dependent infants are to "have their cases considered with the utmost priority."[150] Further, pregnant women and those with dependent infants who are convicted of offenses "related to the armed conflict" should not receive death sentences, and if they do, they "shall not be executed."[151]

These are all important improvements in the treatment of women. As the AP I Commentary points out, this greatly expanded the protections for women against sexual assault and enforced prostitution because it was not limited to situations of occupation or internment, and instead, it "covers all women who are in the territory of Parties involved in the conflict."[152] However, as to the speedy resolution of cases involving pregnant women and those with dependent infants and the rendering and execution of death sentences against them, the intent of these provisions appears to have been the enhancement of the protection of fetuses and born children, rather than women.[153] The Commentary relates the rationale for these provisions back to the "respect for the person and honour" set out in Article 75,[154] which can be traced back to the 1960 GC III Commentary's use of the dated and discriminatory understanding of this phrase for women.

B. Challenges and Opportunities in Revising the AP I Commentary

Under Article 44 of AP I, captured irregular combatants are accorded prisoner of war status so long as they carried their weapons in the open before they attacked, and they are no longer required to wear distinctive insignia and uniforms.[155] Under GC III, however, combatants could not receive prisoner of war status unless they had commanders who were responsible for their subordinates' actions, they wore a fixed and distinctive sign visible at a distance identifying them as combatants, they carried their weapons in the open, and the military operations in which they were engaged were conducted in accordance with IHL.[156] This standard was significantly liberalized in AP I.

The liberalization of this standard has been criticized as working against the protection of women and girls in armed conflict. For example, during the fighting in Afghanistan, there were reported instances of Taliban fighters using civilians as cover and taking civilians hostage as they conducted attacks.[157] Noted international feminist law scholar Judith Gardam has argued that actions such as these have the unintended effect of legitimizing "the use of women and children as shields" just before an attack is launched.[158] This complicates applying the prin-

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150 AP I, *supra* note 5, art. 76.2.

151 *Id.* art. 76.3.

152 AP I COMMENTARY, *supra* note 13, at 892.

153 *Id.* at 895-96.

154 *Id.* at at 893.

155 AP I, *supra* note 5, art. 44.3(b).

156 GC III, *supra* note 2, art. 4.A(2).

157 *Afghanistan Taliban "Using Human Shields" – General*, BBC NEWS (Feb. 17, 2010, 4:09 PM), http://news.bbc.co.uk/2/hi/south_asia/8519507.stm.

158 Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUSTL. Y.B. INT'L L. 265, 276 (1988–1989).

ciple of distinction to protect these female civilians when the attacked force responds with armed force itself,[159] often to their complete detriment in many cases. Tragically, in the 20-year conflict that followed the U.S. invasion in 2001, many Afghan civilians found themselves caught in the crossfire between the Taliban and other insurgent forces on one side and Afghan and Western government forces on the other.[160]

Since the time the AP I Commentary was published, there have been important efforts to better refine the understanding of when one becomes a combatant who can be lawfully engaged by an adversary, such as the ICRC's work on explaining the meaning of direct participation in hostilities.[161] Despite such efforts, it would be very challenging to revise the AP I Commentary to redress the impact of the laxer standard for protected combatancy upon civilian women and children, because the text of AP I, Article 44 is very plain, and does not easily lend itself to a gendered interpretation.

The language of the AP I Commentary explaining the article is extensive, and it is obvious from even a cursory reading that it is geared to the protection of guerrilla fighters and not civilians. In this sense, Article 44 is protective of both male and female guerilla fighters, but the reality is that most irregular combatants today are still male. The increased protection of the relatively few guerrilla fighters who are women, therefore, comes at the expense of their relatively more numerous civilian sisters. Thus, modifying the AP I Commentary language related to Article 44 to address this gendered concern and increase protection for civilian women and girls would come at some cost to the protection afforded to irregular fighters.

However, there is one area involving kinetic operations that could be fruitfully addressed to achieve greater protection for females in armed conflict—the principle of proportionality. Under AP I, Article 51, indiscriminate attacks against civilians by military forces are prohibited, and this includes "attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[162] The AP I Commentary on this provision provides no further detail on what sorts of injuries to civilians or damages to their property are covered.

This then provides an opportunity to revise the AP I Commentary language to include the gender-differentiated effects upon civilians into the analysis of an attack without having to modify interpretations that might have been relied upon by armed forces for many decades, but which are now outdated due to their discriminatory basis. In this context, the pioneering work done by the ADF in a doctrinal note on gender in air operations from 2018 provides a potential starting

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159 Judith Gardam, *supra* note 158.

160 *Afghanistan: Record Civilian Casualties in 2021, UN Reports*, BBC NEWS (July 26, 2021), https://www.bbc.com/news/world-asia-57967960.

161 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, 90 INT'L REV. RED CROSS, 991, 991 (2008).

162 AP I, *supra* note 5, art. 51.5.b.

point, as does the most recent NATO doctrine on targeting, in assessing the benefits and challenges of taking this approach.

VI. Targeting Doctrine and Gender

At the moment, there are few military publications that explore or explain the role that gender considerations could play in targeting, and by extension, in applying the principle of proportionality. There are two that are worthwhile to review, however, the ADF's Air Force Doctrine Note 1-18, GENDER IN AIR OPERATIONS, and NATO's Allied Joint Publication (AJP)-3.9, ALLIED JOINT DOCTRINE FOR JOINT TARGETING.

A. Air Force Doctrine Note 1-18

In the hierarchy of ADF Air Force doctrinal publications, the doctrinal note is an unusual document. It is intended to address "specific doctrinal matters that need to be formally articulated between major doctrinal reviews" of higher-level, capstone doctrine, and "to inform and promote discussion on a specific doctrine subject and may not necessarily represent an agreed position."[163] Accordingly, doctrine notes "remain current for a limited time and are either then incorporated into approved doctrine or archived."[164]

Air Force Doctrine Note (AFDN) 1-18, GENDER IN AIR OPERATIONS, was published in 2018, but it is difficult to assess its current status since most ADF operational doctrine does not appear to be available to the public online. However, it still provides an example of how the inclusion of gender considerations in proportionality analysis and targeting could be practicably explained. Perhaps as importantly, it also provides an example of how important it is to avoid human rights law rationales as a basis for these explanations.

AFDN 1-18 uses the hypothetical example of a bridge to explain the differences between first order and subsequent order effects that should be considered in targeting in terms of gender.[165] If an enemy were using the bridge to transport weapons, then the destruction of the bridge could provide a force with a legitimate military advantage in obstructing the enemy's logistics, which would be a first order effect.[166] But if the local population used the bridge as well to access essential supplies, then its destruction could result in gendered second order effects, such as forcing local women "to travel further [sic] afield, on unfamiliar and less secure, well-known or well-lit routes to gather" these supplies, such firewood or water.[167]

The third order effects that could flow from this could be the increased risk of sexual or gender based violence that the women would face through use of these

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[163] AFDN 1-18, *supra* note 20, at v.

[164] *Id.*

[165] *Id.* at 16.

[166] *Id.*

[167] *Id.*

less-secure alternatives.[168] Because targeting in conformance with IHL requires taking necessary precautions to minimize collateral damage, "[a]pplying a gender perspective in analysing information and assessing intelligence allows greater clarity of the direct and indirect effects of targeting."[169] Further, from a utilitarian perspective, "collateral damage or unintended civilian death occurring because of [sic] Air Force employing kinetic weapons could prove to be highly counter-productive to the aims and objectives sought by Government in the conflict."[170]

The doctrinal note, however, also discloses the tension inherent in taking gender in placing it in an operational military context. It notes that the "militarisation and operationalisation of the Women, Peace and Security agenda. . .must not be seen as an operational tool for the exploitation of military advantage."[171] The doctrine note argues that "[s]uch approaches focus on the operational effectiveness of military or police strategies which seek to forestall an imminent threat, however do so in ways that may threaten women and women's rights," degrade their safety, and "side line or marginalise gender equality goals (e.g. Community building and family resilience)."[172] Accordingly, the UNSCR 1325 themes of conflict prevention and protection are to "form the underlying narrative when applying the gender perspective as a means to ensure we 'do no further harm' to the population by our military actions and decisions and thereby inhibit or prolong the recovery for the population."[173]

While laudable from a philosophical perspective, this is not how armed conflict works. Lawful application and implementation of the principle of proportionality by commanders and operators does not require that there be no harm to civilians or their property in the course of an attack.[174] To only use gender-differentiated information and analysis in the course of an attack when it can be guaranteed to not result in additional harm to any particular woman or girl is both impracticable and counterproductive to the goal of making gender considerations an integral part of mission planning. Overall, norming the consideration of gender across a headquarters or a unit should lead to greater protection for women and girls in armed conflict in general, but it will not necessarily result in greater protection for all individual women and girls in the area of operations.

Three years after AFDN 1-18 was published, NATO published its updated targeting doctrine,[175] which meaningfully included gender considerations in the joint targeting process. This doctrine, and perhaps as importantly the U.S. reser-

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168 AFDN 1-18, *supra* note 20, at 16.

169 *Id.* at 32.

170 *Id.* at 20.

171 *Id.* at 17-18.

172 *Id.* at 18.

173 *Id.*

174 AP I, *supra* note 5, art. 51.5(b).

175 NATO Standardization Office (NSO), *NATO Standard Allied Joint Publication (AJP) 3.9 Allied Joint Doctrine for Joint Targeting*, NATO (Nov. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033306/AJP-3.9_EDB_V1_E.pdf.

vations to it, shows the practical challenges in trying to wedge a role for gender advisors ("GENADs") and gender information in current targeting processes.

B. AJP-3.9, Allied Joint Doctrine for Joint Targeting

NATO functionally defines "joint targeting" as "taking actions in one or more of the operational domains, using all capabilities available, against a target, in order to create an effect in one or more of the physical, virtual, or cognitive dimensions."[176] An "effect" can be non-lethal, such as a change in attitude towards a force by the local population because of an information action, or lethal, such as the destruction of an enemy headquarters because of a missile strike. Examples of operational domains include land, air, and cyberspace.[177]

The joint targeting process is cyclical, moving through phases in which targets are developed, missions are planned and executed, effects on targets are assessed, and on the basis of the assessments, commanders issue new targeting guidance, beginning the process anew.[178] In the target development phase, AJP-3.9 has GENADs provide a gender analysis of the target.[179] The assessment phase includes integration of a gender perspective that identifies the different effects on women, men, boys and girls.[180] AJP-3.9 states that the "integration of a Gender perspective contributes to the orchestration of fighting power" and that "close cooperation between GENAD, LEGAD [legal advisors], targeteers, and intelligence is necessary."[181]

NATO operates by consensus, but not perfect consensus. To move things along, NATO members will agree to certain things but caveat that agreement with reservations. The U.S. reservations regarding the role of the GENAD are worthwhile reading in whole:

> Reservation 10. The U.S. does not endorse the requirement for targets to be reviewed by a [GENAD] prior to target validation. The US will follow joint doctrine which requires intelligence (J2 [staff section]), operations (J3 [staff section]), and [LEGAD] review of targets to ensure they meet military objectives and [IHL]. The US has no similar role or function of a GENAD during target development and validation.[182]

The phrasing of this reservation is important. The U.S. has trained GENADs,[183] but their purpose is to execute the Department of Defense imple-

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176 NATO Standardization Office (NSO), *supra* note 175, at 1-3.

177 *Id.*

178 *Id.* at 1-14.

179 *Id.* at 1-15, 1-16.

180 *Id.* at 1-19.

181 *Id.* at 1-27.

182 *Id.* at VII.

183 Jody M. Prescott, *Moving from Gender Analysis to Risk Analysis of Failing to Consider Gender*, 165 ROYAL UNITED SERV. INST. J. 1, 2 (2020).

mentation plan[184] for the military portions of the U.S. strategy on women, peace, and security.[185] The U.S. strategy focuses on actions to promote gender equality before a conflict and after a conflict, but studiously avoids carving out a role for gender considerations in the deadly parts of deadly armed conflict.[186] This gap presents practical problems in operationalizing gender considerations in the targeting process if the U.S. is taking the lead in supporting targeting operations.

Even if a nation or group of nations took the lead, and these nations did use their GENADs in the manner set out in AJP-3.9, it is still not clear what value the GENADs would bring to the targeting process. Comparing the GENAD's role in the process with the LEGAD's role highlights this. Military lawyers will likely be present at all staff meetings during all phases of the Joint Targeting Cycle, from assessing nominations of targets to targeting lists to providing real-time legal advice in an operations center as targets are engaged. They will have received substantial education in IHL and undergone training in its application. Importantly, they will have internationally recognized standards that they can apply to issues during the Joint Targeting Cycle.[187]

GENADs, on the other hand, are apparently expected to provide advice only when targets are developed originally, in the form of a gender analysis, and then later when the engagements of the targets are assessed to see whether the desired effects were achieved.[188] They might have an academic degree in some aspect of gender-related studies, but they do not have professional degrees as the military lawyers will. They will hopefully have received training in gender in military operations, but it is unlikely this training lasted more than a couple of weeks.[189] The largest gap between the LEGADs and the GENADs, though, is the standard that GENADs would apply to their analysis. What, for example, would be the standard they would apply to a typical gender analysis that would allow them to credibly say to a commander that an operation should not proceed because it was not sufficiently gender-sensitive?

These are the sorts of practical problems that would need to be solved before any revisions to the AP I Commentary that incorporated gender considerations into the analysis of proportionality could become useful in the field in providing greater protection to women and girls in armed conflict.

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[184] U.S. Dep't of Def., Women, Peace, and Security Strategic Framework and Implementation Plan (June 2020), https://media.defense.gov/2020/Jun/11/2002314428/-1/-1/1/WOMEN_PEACE_SECURITY_STRATEGIC_FRAMEWORK_IMPLEMENTATION_PLAN.PDF.

[185] Exec. Off. Pres., United States Strategy on Women, Peace, and Security (June 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/WPS_Strategy_10_October2019.pdf.

[186] Jody M. Prescott, *Gender Blindness in US Doctrine*, 50 Parameters, 21, 22-23 (2020).

[187] Nathalie Durhin, *The Role of Legal Advisors in Targeting Operations: A NATO Perspective*, 60 Mil. L. & L. War Rev. 47, 50 (2022).

[188] NSO, AJP 3.9, *supra* note 175, at 1-15, 1-16, 1-19.

[189] Prescott, *Gender Analysis to Risk Analysis*, *supra* note 183, at 4.

VII. Conclusion

To most effectively link the future revisions of the AP I Commentary to the gendered effects of kinetic operations, the discussion of AP I, Article 51 could be revised to clearly explain why the gender-differentiated effects of applying armed force in situations involving civilians and their property should be considered. This explanation would need to provide useful examples of how this could be done, perhaps along the lines set out in the ADF doctrine note. If this happened, it could be a meaningful step forward in realizing the goal of greater protection for women and girls in all areas of international humanitarian law as set out in UNSCR 1325.

There are two caveats that should inform the ICRC's efforts if it were to choose this path. First, for the sake of the credibility of the revisions, it would be important that the ICRC only stake out positions that it can credibly defend against those whom it wishes to convince. Second, since the general statement of the legal principle of proportionality set out in AP I, Article 51, will not change, any change in the discussion in the AP Commentary about it will need to be reflected in doctrine, military educational criteria, training programs, and operational standard operating procedures. As shown by the gender-related provisions in the NATO targeting doctrine and the U.S. reservations thereto, this means that the ICRC must identify convincing real-world examples of how the inclusion of gender considerations in kinetic operations would work in a practicable way.[190]

The ICRC need not complete this task all by itself. Military organizations are the ones best suited to determine how an enhanced understanding of proportionality that includes gender considerations can be accomplished in their activities and operations. Mindful of classification issues, this might require the ICRC to engage with militaries in a different fashion than it does ordinarily, moving discussions with them into the weeds of application where it is no longer the acknowledged expert. Awkward perhaps, but if it could be accomplished, it could lead to militaries investing more in sex and gender-disaggregated data collection and analysis in operations, to form a more actionable picture of gender considerations in mission areas. This would meet the letter of UNSCR 1325 to work with all aspects of IHL to achieve the greater protection of women and girls in situations of armed conflict.

[190] *See* Jody M. Prescott, *The Principle of Proportionality and the Operational Relevance of Climate Change– A Gendered Perspective*, 43 NATO LEGAL GAZETTE (forthcoming Dec. 2022) (providing an example of a hypothetical targeting standard operating procedure).

Gender and Counterterrorism: How the United States' Underestimation of Women's Roles in Violent Extremism Threatens National Security

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Abstract

Discourse surrounding conflict and terrorism is often confined by gendered binaries which conflate masculinity with violence and femininity with peace and passivity. The social adoption of these archetypes has encouraged policy makers and security officials to paint men as combatants or orchestrators of extremism, while women are thought of as mere collaterals to war. However, the number of women involved in extremist groups is rising both domestically and abroad. As the essentialization of femininity becomes increasingly dangerous, the exigency to reimagine national security initiatives grows. This comment argues that the United States has reached a critical juncture in its counterterrorism policy and must avoid rigidity in favor of a more nuanced understanding of how gender influences the risk of radicalization. Recognizing that most research in this area focuses on how extremist groups leverage their influence to extort and subjugate women, this comment focuses on women's roles as both perpetrators and potential mitigators of violence.

Table of Contents

I. Introduction

In the fall of 2000, the United Nations Security Council ("UNSCR") unanimously adopted Resolution 1325 ("UNSCR 1325"), declaring the role of women in conflict prevention, peace-building and subsequent post-conflict reconstruction

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to be critical.[1] Less than one year later, on September 11, 2001 ("9/11"), suicide attackers commandeered U.S. passenger jets, flying them into skyscrapers in lower Manhattan, killing thousands and igniting a war that has engulfed the ensuing decades of American foreign policy.[2] At the time of the attack, very little was known about the motivations of the hijackers.[3] However, as the events unfurled, the surrounding discourse became rife with "hegemonic masculinity, militarism, and war."[4] On the evening of the attacks, then President George W. Bush, addressed the nation in no uncertain terms: "We will make no distinction between the terrorists who committed these acts and those who harbor them."[5] This statement became the foundation for what would later be known as The Bush Doctrine – a set of national security strategies promising preemptive wars on perceived enemies and unilateral actions by the United States ostensibly in defense of global democracy, both abroad and at home.[6]

The highly reactionary and, at times, draconian political rhetoric of this era found force in binaries – "Either you are with us, or you are with the terrorists."[7] These stark distinctions lent themselves to a series of typecasts, which the U.S. heavily relied upon as it tried to compose the profile of its enemy.[8] In the context of 9/11, portraits of American heroism were predominantly male, highlighting political figures such as New York City Mayor Rudolph Giuliani and President Bush, as well as largely male professions such as firemen and police officers, who were lauded for their roles as first responders.[9] Heroism therefore became

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[1] Office of the Special Adviser on Gender Issues and Advancement of Women, *Landmark Resolution on Women, Peace and Security*, U.N., https://www.un.org/womenwatch/osagi/wps/ (last visited Oct. 9, 2022); *see generally* S.C. Res. 1325 (Oct. 31, 2000).

[2] Patrick Jackson, *September 11 Attacks: What Happened on 9/11?*, BBC NEWS (Aug. 3, 2021), https://www.bbc.com/news/world-us-canada-57698668.

[3] Interview by David Ignatius with Dr. Condoleezza Rice, Former U.S. Secretary of State, WASH. POST (Sept. 10, 2021) (explaining that the first plane was perceived to be an "accident," and then when the second plane hit the World Trade Center, she believed it to be a terrorist attack. It wasn't until the next day that George Tenet, the CIA Director at the time, formally attributed the attack to al-Qaeda), https://www.washingtonpost.com/washington-post-live/2021/09/10/911-twenty-years-later-with-condoleezza-rice/.

[4] Jezzamine Faye Matias-Martinsen, *A Feminist Perspective in Countering Terrorism – Does it Really Matter?*, 12 ARRELANO L. & POL'Y REV. 39, 51 (2014).

[5] Gary L. Gregg II, *George W. Bush: Foreign Affairs*, UNIV. VA. MILLER CTR., https://millercenter.org/president/gwbush/foreign-affairs (last visited Oct. 09, 2022).

[6] *Id.* It should be noted that the Bush Doctrine was met with mixed reviews. Gregg explains that while neoconservatives were in strong support of the "idea of the United States acting on its own to ensure the country's security and to protect the American people – preemptively, if necessary," others found the policies to be extreme and its objectives of spreading democracy to be naïve.

[7] President George W. Bush, Address to Joint Session of Congress and the American People (Sept. 20, 2001, 9:00 PM), http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html; *see also* Hilary Charlesworth & Christine Chinkin, *Editorial Comment: Sex, Gender, and September 11*, 96 AM. J. INT'L L. 600 (2002).

[8] Jayne Huckerby, *Feminism and International Law in the Post 9/11 Era*, 39 FORDHAM INT'L L. J. 533, 542 (2016).

[9] Charlesworth & Chinkin, *supra* note 7, at 600. Other notable players of this time include Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, Vice President Dick Cheney, and the head of the National Security Council, Condoleezza Rice. Rice was one of the few, if not the only, women intimately involved with the post-9/11 White House policy response.

synonymous with a sort of action-laden masculinity. The enemy, however, was also male.[10] Not only were all nineteen of the 9/11 hijackers men, but the terrorist organizations backing their actions were also run entirely by men.[11] Women were thus noticeably absent from both the "us" and the "them" of the post-9/11 political dichotomies.

The "War on Terror" is not unique in this regard. Conflict, and by extension, terrorism has long been understood within a gendered binary.[12] Men leave to fight, while the women stay to maintain civil society. Through the masculinization of conflict, women have been effectively relegated to the fringes of the narrative.[13] Women are instead understood as static, collaterals of war, or transitively, as naïve victims coerced into criminal operations.[14] This means that while their male counterparts are regarded as deadly, disciplined fanatics, female fighters are often viewed as mere casualties to the cause.[15] As such, women are neither perceived as serious threats, nor have they been the target of meaningful counterterrorism policy.

The twentieth anniversary of the 9/11 attacks and the recent withdrawal of American forces from Afghanistan invites the U.S. to reflect on the past costs, present status and future policies surrounding American counterterrorism both domestically and abroad. In the two decades following the invasion of Afghanistan, the United States has spent over eight trillion dollars on its foreign counterterrorism efforts.[16] The price of war goes far beyond mere dollars, however, having been fought at the expense of over 7,000 slain U.S. soldiers, over 360,000 civilian lives, nearly 40 million displaced people, and countless more who have been left to cope with residual effects of conflict such as malnutrition,

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[10] This note uses terms such as "male" and "female" to refer to the social conceptions of femininity and masculinity. Gender is thus distinct from "sex," which refers to the biological markers associated with being born a man, woman, or gender-diverse person. While there is meaningful debate about the overall utility of gendered distinctions, here, I believe them to be useful to illustrate how society conceptualizes both conflict and victimhood.

[11] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4, 56 (authorized ed., 2004).

[12] *See generally* JOSHUA S. GOLDSTEIN, WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA (2001).

[13] Susan N. Herman, *Women and Terrorism: Keynote Address,* 31 WOMEN'S RTS. L. REP. 258, 259 (2010).

[14] Jamille Bigio & Rachel Vogelstein, *Why Understanding the Role of Women Is Vital in the Fight against Terrorism*, THE WASH. POST (Sept. 10, 2019, 5:35 PM), https://www.washingtonpost.com/opinions/2019/09/10/why-understanding-role-women-is-vital-fight-against-terrorism/ [hereinafter *The Role of Women in Terrorism*]; Jamille Bigio & Rachel Vogelstein, *Women and Terrorism: Hidden Threats, Forgotten Partners*, COUNCIL ON FOREIGN RELS. (May 2019), https://cdn.cfr.org/sites/default/files/report_pdf/Discussion_Paper_Bigio_Vogelstein_Terrorism_OR.pdf [hereinafter *Hidden Threats, Forgotten Partners*]; Charlesworth & Chinkin, *supra* note 7.

[15] *See Hidden Threats, Forgotten Partners*, *supra* note 14, at 6.

[16] Neta C. Crawford, *The U.S. Budgetary Costs of the Post-9/11 Wars*, WATSON INST. INT'L & PUB. AFF.: COST OF WAR 1 (Sept. 1, 2021). Note that this figure is inclusive of the $5.8 trillion which has been spent in the two decades since 9/11 and also the estimated future obligations (*i.e.*, long-term medical care and disability payments for veterans), "which will likely exceed $2.2 trillion in federal spending."

housing insecurity and environmental decimation.[17] Despite this massive expenditure of both resources and human life, the number of extremist fighters for the Islamic State alone has increased by over 200 percent since 2001.[18]

Domestically, the counterterrorism landscape is also being called upon to shift in response to growing concerns within the country. The Federal Bureau of Investigation ("FBI"), the primary federal agency responsible for investigating terrorism, has warned that domestic terrorism poses a persistent and ever-progressing threat to the country's citizens and its economy.[19] In recent years, in fact, domestic terrorists have caused more arrests and deaths nationally than international extremists, inspired primarily by violent racial biases and anti-authority sentiments.[20] As the FBI adapts to the unique exigencies across international and domestic terrorism, it must also account for broadening demographics, as women are becoming increasingly radicalized on a global scale.[21] With these new challenges, compounded by the destabilizing effects of U.S. withdrawal from Afghanistan, the country now finds itself on the precipice of a new era for national security.[22]

Having failed to cabin the spread of terrorism at an enormous cost, the U.S. must now adopt new strategies in its counterterrorism efforts. The country's approach to counterterrorism has historically been chided as erratic and inconsistent. Where it *has* been consistent, however, is in its repeated failures to recognize the critical and lethal role of women in terrorism.[23] The highly militarized scripts of the post-9/11 era have suppressed international legal developments acknowledging the need for women's participation in conflict resolution, while simultaneously creating restrictive categories which ignore the possibility

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[17] Crawford, *supra* note 16; David Vine et al., *Creating Refugees: Displacement Caused by the United States' Post 9/11 Wars*, WATSON INST. INT'L & PUB. AFF.: COSTS OF WAR 1 (Aug. 19, 2021). The displacement figure is a conservative estimate encompassing people living in Afghanistan, Iraq, Pakistan, Yemen, Somalia, the Philippines, Libya, and Syria. With regard to Syria, the calculation only accounted for "displacement experienced in the five Syrian provinces where U.S. military personnel have fought and operated."; *Refugees & Health*, WATSON INST. INT'L & PUB. AFF.: COSTS OF WAR (last updated Aug. 1, 2021), https://watson.brown.edu/costsofwar/costs/human/refugees; Neta C. Crawford & Catherine Lutz, *Human Cost of Post 9/11 Wars: Direct War Deaths in Major War Zones, Afghanistan & Pakistan (Oct. 2001 – Aug. 2021); Iraq (March 2003 – Aug. 2021); Syria (Sept. 2014 – May 2021); Yemen (Oct. 2002-Aug. 2021) and Other Post-9/11 War Zones*, WATSON INST. INT'L & PUB. AFF.: COSTS OF WAR (Sept. 1, 2021).

[18] *The Role of Women in Terrorism*, *supra* note 14.

[19] *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the Comm. on Homeland Sec. H.R.* 116 Cong. (2019) (testimony of Michael McGarrity, Counterterrorism Chief of the FBI).

[20] *Id.*

[21] *See generally* Farah Pandith et al., *Female Extremists in QAnon and ISIS Are on the Rise. We Need a New Strategy to Combat Them*, NBC NEWS (Dec. 11, 2020, 3:30 AM), https://www.nbcnews.com/think/opinion/female-extremists-qanon-isis-are-rise-we-need-new-strategy-ncna1250619.

[22] Nilofar Sakhi & Annie Pforzheimer, *Missing the Bigger Implications of US Withdrawal from Afghanistan*, MIDDLE E. INST. (July 29, 2021), https://www.mei.edu/publications/missing-bigger-implications-us-withdrawal-afghanistan.

[23] Sebastian Rotella, *Global Right-Wing Extremism Networks Are Growing. The U.S. Is Just Now Catching Up*, PROPUBLICA (Jan. 22, 2021, 5:30 AM), https://www.propublica.org/article/global-right-wing-extremism-networks-are-growing-the-u-s-is-just-now-catching-up; *The Role of Women in Terrorism*, *supra* note 14.

of women as bona fide security threats.[24] Under this framework, women are neither the problem nor the solution. The resulting erasure effectuates an "affirmation of a gendered international law and a continuation of a model of international relations ignorant of its gendered underpinnings."[25] Basing counterterrorism efforts and accountability mechanisms on an outdated archetype of the passive woman not only cedes power to terrorist regimes, but it also essentializes femininity at the expense of national security.

As we adapt our policies to the changing times, the U.S. must create a uniformed approach across relevant federal agencies for the implementation of the Council on Foreign Relations' ("CFR") 2019 proposals and UNSCR 1325. This will ideally result in more robust research into the radicalization of women and also create an influx of women participating professionally in U.S. security programs. This comment argues that U.S. counterterrorism strategy critically ignores the roles that women play in the perpetration of violent extremism. Part II delves into the historical underpinnings of female involvement in various global terrorist operations. Next, Part III discusses the geo-political forces which have led to a rise in women as perpetrators. Part IV turns its focus back to the United States, analyzing its current approach to national security as it relates to counterterrorism. Finally, Part V summarizes some of the prevailing recommendations for how the United States can adopt a more nuanced approach to how it treats the intersection of femininity and counterterrorism.

II. Background

Throughout history, women have been involved in terrorism in a myriad of contexts. From the Black Widows in Chechnya to the women's wing of the Ku Klux Klan, women have long been both perpetrating and normalizing terrorist-sponsored violence.[26] Despite this, terrorism is generally considered a male-dominated arena.[27] This section aims to elucidate some of the key roles that women have played in notable terrorist organizations, while also establishing how patriarchal structures have often worked to relegate women to ancillary positions within the operations.

A. Early Female Terrorist Participation

Female involvement in terrorist groups garnered early attention in the twentieth century with the upsurge of domestic terror organizations in both Latin

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[24] Gina Heathcote, *Feminist Reflections on the "End" of the War on Terror*, 11 MELB. J. INT'L L. 277, 278 (2010).

[25] *Id.* at 296.

[26] Mia Bloom & Ayse Lokmangolu, *From Pawns to Knights: The Changing Role of Women's Agency in Terrorism?*, STUD. CONFLICT & TERRORISM 1-2 (2020) (noting that female terrorists are often referenced in popular media by "patriarchally deemed names," including "jihadi brides" and "Black Widows").

[27] Mia Mellissa Bloom, *Death Becomes Her: The Changing Nature of Women's Role in Terror*, 11 GEO J. INT'L AFF. 91, 91 (2010) [hereinafter *Death Becomes Her*].

America and Europe.[28] In Latin America, the rise and fall of numerous dictatorships and violent military regimes in the post-WWII era destabilized much of the region.[29] The resulting disparities in education, jobs and wealth spurred mass, armed mobilizations in several countries.[30]

Traditionally, Latin American countries have observed rigid gender roles rooted in part in the Catholicism of the Spanish conquerors who colonized the region in the fifteenth century.[31] The concept of *machismo* prescribes a masculine role for men which "assigns their zone of influence outside of the home."[32] While *marianismo* "restrict[ed] women's influence to the home, keeping chaste and caring for the family, much like the idyllic Virgin Mary."[33]

However, in the wake of political upheaval, women were called upon to defy such patriarchal conventions and act as combatants against oppressive dictatorial regimes. Guerilla opposition movements like the Sandinistas of Nicaragua, the Revolutionary Armed Forces of Colombia ("FARC"), and Guatemala's National Revolutionary Unity guerrillas saw unprecedented levels of participation from local women.[34] Against traditional notions of *marianismo*, these female combatants fought alongside men, and many even ascended to positions of power and leadership within such organizations.[35]

Around the same time in Europe, women were similarly engaged across various levels of terrorist organizations, many of which were spawned by ethnonationalist conflicts.[36] Women founded militant groups such as Germany's Baader-Meinhof Gang – named after its female ideological leader, Ulrike Meinhof – and played critical support roles in conflicts such as Spain's Basque nationalist movements, of which women comprised about seventeen percent of the separatist party.[37] Like their Latin American counterparts, the European women of such conflicts expanded their roles beyond the home and onto the metaphorical battlefield. For example, in Northern Ireland, throughout the decades-long period coined "the Troubles," women were amongst the most dangerous operatives for the Provisional Irish Republican Army ("PIRA").[38] Notably, sis-

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[28] Rachael Lavina, *Women in Terrorism: How the Rise of Female Terrorists Impacts International Law*, 30 CONN. J. INT'L L. 241, 244 (2015).

[29] *Id.* at 245.

[30] *Id.*

[31] Margaret Gonzalez-Perez, *Women Terrorists*, 31 WOMEN'S RTS. L. REP. 286, 289 (2010).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 289-90.

[35] *Id.* at 290.

[36] Bloom & Lokmangolu, *supra* note 26, at 3.

[37] *Id.*

[38] *Id.*; Women's involvement in the PIRA is particularly illustrative of the long-standing history of women acting as violent operatives. In the late 1960s the IRA fractioned into two distinct groups: the "Officials" who were based in Dublin and advocated for peaceful means to united Ireland, and the "Provisionals" who were based in Belfast and resorted to violent tactics to achieve unity. While the PIRA is not presently listed as a proscribed terrorist group by the State Department, the group is notable for its repeated assassinations, sniper attacks and bombing campaigns. *See* Kathryn Gregory, *Provisional Irish Republican Army (IRA) (aka, PIRA, "the provos," Óglaigh na hÉireann) (UK separatists)*, COUNCIL ON

ters Dolours and Marian Price were responsible for hundreds of injuries and several deaths following multiple bombing campaigns on London in the early 1970s.[39] The Price sisters made headlines when they were later sentenced to life in prison for their involvement in the March London Bomb attacks.[40] Curiously, however, subsequent studies and coverage of the PIRA seldom includes analyses of women as combatants.[41]

The United States offers comparatively few historic examples of female membership, let alone leadership, within terrorist organizations.[42] In the case of the Ku Klux Klan, this is due to the group's explicit rejection of feminism in its entirety.[43] Because the Ku Klux Klan conceptualizes women's utility to its white supremacy movement within the confines of domesticity, women were not permitted to hold formal roles within the organization, and were instead limited to furthering "their primary goal [of] raising as many white Christian babies as possible," while also participating in marches, distributing literature, and cooking.[44]

B. The Modern Era of Female Involvement

Although acts of terrorism continue to occur both globally and domestically, from a U.S. national security standpoint, the modern conversation is largely centered on jihadist groups out of the Middle East and Northern Africa. The term "jihad," translated literally, means "to strive."[45] There are two distinct classifications of jihad: Greater Jihad, the internal struggle against sin, and Lesser Jihad, the violent subsect that is more well-known in modern media.[46] In recent decades, Western news outlets have conflated Lesser Jihad with any act of savagery committed against a U.S. citizen by a radical group. The *Qur'an*, however, only permits defensive acts, stating that: "You may fight in the cause of God against those who attack you, but do not aggress. God does not love the aggressors."[47] Suicide, a popular form of martyrdom by modern jihadists, is also expressly forbidden in the *Qur'an*.[48] The terrorist acts perpetrated under the guise of jihadism are therefore more aptly characterized as military strategy rather than Islamic sacrament. Nevertheless, the weaponization of jihadism and the strategic manipu-

FOREIGN RELS. (Mar. 16, 2010, 8:00 AM), https://www.cfr.org/backgrounder/provisional-irish-republican-army-ira-aka-pira-provos-oglaigh-na-heireann-uk; *see generally Designated Foreign Terrorist Organizations*, U.S. DEP'T OF STATE: BUREAU OF COUNTERTERRORISM, https://www.state.gov/foreign-terrorist-organizations/ (last visited Oct. 9, 2022).

[39] Bloom & Lokmangolu, *supra* note 26, at 3; *see generally* PATRICK RADDEN KEEFE, SAY NOTHING: A TRUE STORY OF MURDER AND MEMORY IN NORTHERN IRELAND (1st ed. 2019).

[40] Bloom & Lokmangolu, *supra* note 26, at 3.

[41] *Id.*

[42] Gonzalez-Perez, *Women Terrorists, supra* note 31, at 290.

[43] *Id.* at 291.

[44] *Id.*

[45] Margaret Gonzalez-Perez, *The False Islamization of Female Suicide Bombers*, 28 GEND. ISSUES 50, 52 (2011).

[46] *Id.*

[47] *The Qur'an*, (2:190).

[48] *Id.* at (2:195).

lation of religious doctrine have created one of the greatest threats to U.S. national security in recent decades.

Jihadism has long been inherently patriarchal, both as a result of its interpretation of Islam and also the societal norms "from which many jihadist ideologues emerged."[49] Prior to the 2000s, extremist groups throughout these regions predominantly followed traditional Salafi-jihadi teachings, which largely prohibited women's participation on the battlefield.[50] Women's roles in jihad were thus limited to supportive and domestic functions.[51] In a similar vein to the women of the early twentieth century Ku Klux Klan, jihadist groups believed women were useful to their movement insofar as they were able to birth and indoctrinate future generations of radicals.[52] Women were also tasked with their children's religious upbringing, as well as supporting their husbands, whether that be through keeping his house, or even raising money for the cause.[53] What women could not do, however, was participate in combat.

Twenty-first century wars and the reactionary security measures implemented after the 9/11 terrorist attacks have presented new hurdles for the proliferation and success of radical jihadism. As militant organizations have had to adjust to new counterterrorism crackdowns, many of the groups have been forced to loosen their ideological parameters to permit women to participate in combat.[54] In the context of the Islamic State, military and territorial losses have increased the pressure to expand its forces in the name of preserving the physical caliphate.[55] As these losses have continued to mount, publications out of the Islamic State have reneged the traditional patriarchal underpinnings of jihad, going as far as to say that women are not only permitted to engage in combat, but are now religiously obligated to fight on behalf of the caliphate.[56] These new pressures have allowed for women to transition from peripheral, supporting roles to more forward facing, operational positions.[57] Chief amongst those roles is that of a suicide bomber.

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[49] Lydia Khalil, *Behind the Veil: Women in Jihad after the Caliphate*, LOWY INST. (June 25, 2019), https://www.lowyinstitute.org/publications/behind-veil-women-jihad-after-caliphate.

[50] *Id.* It should be noted, however, that while this comment focuses its analysis on women within Jihadist groups, women were used as combatants in other, non-Jihadist secular groups throughout the Greater Middle East prior to the 21st century. The first-known female suicide attack was perpetrated by Sana'a Youcef Mehaidli on behalf of the Syrian Social Nationalist Party in 1985. Further, groups such as the PKK began using female bombers as early as the 1990s. For a more in-depth history of women as combatants, *see* Ken Sofer & Jennifer Addison, *The Unaddressed Threat of Female Suicide Bombers: Women Terrorists Are an Increasing Problem,* CTR. FOR AM. PROGRESS (Jun. 5, 2012), https://www.americanprogress.org/issues/security/news/2012/01/05//the-unaddressed-threat-of-female-suicide-bombers/; *see also* Mia Bloom, *Mother. Daughter. Sister. Bomber.*, 61 Bull. Atomic Scientists 54, 56 (2005).

[51] Khalil, *supra* note 49.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Khalil, *supra* note 49.

[56] *Id.*

[57] *Death Becomes Her, supra* note 27, at 92.

Globally, female suicide bombers were responsible for over 230 attacks between the years of 1985 and 2008.[58] In 2017 alone, the Global Extremism Monitor ("GEM") recorded 100 suicide attacks conducted by 181 female militants.[59] These operations resulted in a successful detonation of explosives 4 out of 5 times on average and the deaths of 279 people, 94 percent of whom were civilians.[60] Two of the main groups deploying these female suicide bombers are jihadist organizations, Boko Haram and ISIS in Iraq and Syria.[61] The face of foreign terrorism is therefore evolving. A narrative which was once characterized by the violent adventures of zealously devoted men is now desperately searching to regain its footing within the home. But women's participation in combat does more than just bolster jihadi forces – it legitimizes it as a "purposeful social revolution, a return to the true Islamic way of life and a means to a complete society."[62]

On the domestic front, United States officials are also grappling with how to approach the rising threat of far right-wing extremism. Once fringe networks of political conspiracy theorists are now becoming progressively more mainstream in the wake of Donald Trump's presidency. Perhaps most notorious amongst them is the cultlike conspiracy movement, QAnon.

QAnon refers generally to a collection of online conspiracy theories which falsely allege that the "world is run by a cabal of Satan-worshiping pedophiles" comprised mainly of major Democratic political figures.[63] QAnon began in October 2017 with a post on a message board called "4chan" from an anonymous account using the moniker "Q Clearance Patriot."[64] As the online lore grew, the name was later shortened to just "Q." Q claims to be a government official with access to classified information from the Trump administration, and while their identity remains unknown, Q has amassed tens of thousands of online followers.[65] Similar to trends in Jihadi extremism, the U.S. right-wing extremist movement is evolving to encompass and embolden new swaths of society, notably gaining significant support amongst women. While QAnon gained its initial traction on hypermasculine message boards, its supporters can presently be found proselytizing across the internet – from Peloton forums to Instagram.[66]

Q's influence has also bled into the offline world. Like Islamic State extremist groups, QAnon appeals to women by exploiting their altruism and maternal in-

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[58] *Death Becomes Her, supra* note 27, at 92.

[59] GLOBAL EXTREMISM MONITOR: VIOLENT ISLAMIST EXTREMISM IN 2017, TONY BLAIR INST. FOR GLOB. CHANGE 68 (Sept. 2018), https://institute.global/sites/default/files/inline-files/Global%20Extremism%20Monitor%202017.pdf.

[60] *Id.*

[61] *Id.*

[62] Khalil, *supra* note 49.

[63] Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), https://www.nytimes.com/article/what-is-qanon.html.

[64] Kevin Roose, *supra* note 63.

[65] *Id.*

[66] Lili Loofbourow, *It Makes Perfect Sense that QAnon Took off with Women this Summer*, SLATE (Sept. 18, 2020, 12:58 PM), https://slate.com/news-and-politics/2020/09/qanon-women-why.html.

stinct to protect children."[67] The messaging has proven its salience amongst American women, having inspired numerous violent attacks. For example, Jessica Prim, a female QAnon supporter, was arrested in May of 2020 for carrying one dozen knives and livestreaming her trip to New York City to assassinate now-President Joe Biden.[68] Mere months later, authorities arrested and charged another Q-supporting woman with aggravated assault after she drove her car into a group of people that she claimed were kidnapping children.[69] What started as online threats are increasingly becoming offline realities. As women become more meaningfully involved in both global and domestic terrorist operations, it is critical that the U.S. reimagines its approach to counterterrorism efforts, starting with an investigation of how and why women are being recruited.

III. Discussion

The expanded roles of women in terrorist organizations tell two opposing stories, each true in their own right: one of women as organizers and perpetrators of unspeakable violence, and the other of women as agency-lacking collaterals of conflict. While foreign extremist groups systematically subjugate women through means of sex trafficking, financial extortion, and forced recruitment, this section specially delves into the rise of women as perpetrators, rather than as victims. The research on female domestic terrorism is relatively sparse. As such, this section focuses primarily on jihadist extremism, but still notes the stark parallels between how jihadi and far-right groups appeal to women through their recruitment mechanisms.[70]

A. Feminine Stereotypes

The myth that women exist solely as ancillary actors, or victims of terrorist violence, is steeped in patriarchal notions of femininity which seek to depict women as custodians of civility and therefore separate them from conflict.[71] Susan Herman, the former President of the ACLU, suggests that this false duality may be traced to three underlying stereotypes:

> First, that women are apolitical; second, that division of labor between men and women is based on physical differences in the ability of men and

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[67] Pandith et al., *supra* note 21.

[68] *Id.*

[69] *Id.*

[70] In decades past, left-wing extremism has been a concern of U.S. national security policy with groups such as the Weather Underground and the Provisional Party of Communists engaging in guerilla warfare. However, acts of violence by left-wing extremist groups has drastically dropped since the 1980s. While left-wing groups have historically featured a higher percentage of women in their ranks, this comment focuses on right-wing groups as they are the more relevant threat to current national security interests. Further, the increase of female membership in right-wing groups is of particular note for future policy recommendations. For more information on the history of left-wing extremism in the U.S., *see* Karl A. Seger, *Left-Wing Extremism: The Current Threat*, CTR. FOR HUM. RELIABILITY STUD. (Apr. 2001).

[71] Herman, *supra* note 13, at 261.

> women to undertake certain acts, and third, that a woman's primary purpose and function is to be a mother and a wife rather than having an individual identity of her own.[72]

Through the "masculinization of conflict" women are cast as secondary characters in a male-dominated story.[73] Thus, women's involvement in combat not only flies in the face of such deeply entrenched sexism, but it may also be perceived as a direct challenge to male authority. When women are involved, it is said to be a reflection of the impotence of male leadership, rather than the volition of the female fighter.[74] Female terrorists are in turn posited as symptoms of failures rather than agents of chaos.

The practical effects of relying on stereotypes to build criminal profiles have been borne out through the successes of female terrorists. In the context of the War on Terror, antiquated views of gender are further compounded by cultural paternalism. Americans, as a function of Western liberalism, often paint Islamic women as being oppressed, rather than emboldened by their environments.[75] This emphasis on victimhood and passivity is then weaponized by jihadist groups to bolster the efficacy of their female insurgents.[76] The result is two-fold. First, female terrorists are more lethal, killing roughly four times more people on average than their male equivalents, in part because they are profiled less often and less scrupulously by security officials.[77] Second, the shock value of women operating as successful combatants, capable of evading advanced national security mechanisms, increases their propaganda value in a war which relies heavily on alarmism.[78]

To better protect ourselves, we need not eschew of all notions of gender. Gender, and how one is socialized in relation to it, can be a critical informant into a person's motivations. However, the essentialization of femininity comes at a grim cost. Depoliticizing female violence "denies women agency and fails to acknowledge their perceived grievances [which] leads to dangerous gaps in security response."[79] There must be a greater emphasis placed on investigating the spectrum of factors which may motivate a woman to participate in extremism.

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[72] Herman, *supra* note 13, at 261-62.

[73] *Id.* at 263.

[74] Frances S. Hasso, *Discursive and Political Deployments by/of the 2002 Palestinian Women Suicide Bombers/Martyrs*, 81 FEMINIST REV. 23, 36 (2005).

[75] Huckerby, *supra* note 8, at 543; *see also* Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of the "Progress" of Muslim Women,* 39 U. BALTIMORE L. F. 153, 153 (2009).

[76] *Death Becomes Her*, *supra* note 27, at 93.

[77] *Id.*

[78] *Id.*

[79] U.N. SEC. COUNCIL COUNTER-TERRORISM COMM. EXEC. DIRECTORATE, GENDER DIMENSIONS OF THE RESPONSE TO RETURNING FOREIGN TERRORIST FIGHTERS: RESEARCH PERSPECTIVES 11 (2019).

B. The Rise in Female Recruitment

Presently, there is very little research regarding women's involvement in terrorism.[80] Material on jihadist women tends to portray them as either victims of terror, or alternatively, as "depressed, crazy, suicidal, or psychopathic" perpetrators whose actions were spurred under the pressure of a man.[81] What little research does exist, however, is largely focused on the phenomenon of female suicide bombers.[82] Studies are thus limited to anecdotal evidence such as interviews with the bomber's friends and families.[83] Even then, the data offer little insight into the rise in female terrorism. With combatants representing only a sliver of the roles for female operatives, the available research belies the motivations of women participating as medics, guards, recruiters, and general sympathizers.[84]

While we may not be able to pinpoint *why* women are increasingly attracted to extremism, we can deduce *how* their involvement is coming about. As a highly accessible and ubiquitous form of communication, social media has become the weapon of choice for both domestic and foreign extremist groups. Recruitment efforts, although obviously tailored to the nuances of the group's target populations, rely generally on appeals to the "inherent altruism" of women.[85] The Islamic State, for example, utilizes online campaigns which tout the importance of camaraderie and sisterhood.[86] This sort of positive messaging is then spun into calls to action around issues such as helping the children who have been orphaned under the Assad regime in Syria with hopes of attracting seemingly well-meaning women into their ranks.[87]

Women themselves are also powerful tools for jihadist recruitment, particularly in Western countries. In fact, studies suggest that ISIS' reliance on Western female recruiters is so substantial that there are female-run media factions which hold quasi-official standing in the broader ISIS media wing.[88] As recruiters, Western women will often prey upon teenage girls' discomfort with interacting with strange men online to gain their confidence and draw them into the larger movement under the guise of inclusion and group-belonging.[89] The potential for community is then sweetened with promises of material stability and a greater

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[80] *Death Becomes Her*, *supra* note 27, at 92.

[81] *Id.*

[82] Huckerby, *supra* note 8, at 551.

[83] *Death Becomes Her, supra* note 27, at 92.

[84] Amanda N. Spencer, *The Hidden Face of Terrorism: An Analysis of the Women in Islamic State*, 9 J. STRATEGIC SEC. 74, 91 (2016) (detailing that the findings were derived from both quantitative analyses and case studies using a sample of 72 women who had been involved in ISIS, both within the U.S. and abroad. The data from these individual cases were based on secondary sources including open-source information-media reports, web-based content, public data, and academic research studies. For a more detailed discussion of her processes and findings, *see* pages 89-98).

[85] Pandith et al., *supra* note 21.

[86] *Hidden Threats, Forgotten Partners*, *supra* note 14, at 5.

[87] Pandith et al., *supra* note 21.

[88] Spencer, *supra* note 84, at 85.

[89] Pandith et al., *supra* note 21.

sense of agency under the caliphate, making a life of extremism increasingly attractive.[90]

American-based groups employ similar tactics. In the summer of 2020, QAnon launched a social media campaign, cleverly named "Save the Children."[91] The slogan co-opted the name of a legitimate anti-trafficking charity in order to grow its conspiracy that Democrats and Hollywood elites are engaged in a child-trafficking ring.[92] Save the Children content quickly spread across various social media platforms including Facebook, Instagram, Twitter, and Tik Tok, and is credited with revitalizing the QAnon community after Facebook took actions to curtail its influence.[93]

While various platforms tried to limit the movement's reach, the misinformation was difficult to contain due to its aesthetic appeal and the message's digestibility. Visually speaking, much of the Save the Children misinformation is disseminated through the use of brief videos and pastel, sharable graphics.[94] Propagating such weighty and unfounded accusations in this way has resulted in "a kind of aesthetic context collapse."[95] While the carefully crafted graphics catch women's eyes, the brevity inherent to infographics and Instagram videos lends itself to the vagueness of the underlying claims. The content is thus "not only compelling and dramatic . . . [but] also easily shared in other parenting groups with little indication of their far-right origins."[96] At the center of the messaging is again an ethos-laden appeal to women predicated on maternal duty and the belonging to a united front.

Recruitment itself is motivated by a number of factors. As previously discussed, one of the major driving forces behind the increasing numbers of female recruits is that women are less likely to be profiled as terrorists and are able to go undetected in situations where their male counterparts may be more conspicuous.[97] Female terrorists also elicit a number of emotional responses. The shift away from male-dominated combat has notably created significant anxiety as governments are being forced to reimagine their enemies.[98] This fear of the unknown has resulted in women receiving, on average, eight times more media attention than their male counterparts.[99] As a result, terrorist groups are incentivized to increasingly recruit women, as they are statistically more effective at

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[90] Spencer, *supra* note 84, at 85.

[91] Chuck Goudie et al., *More Women Being Lured into Extremist Groups Like QAnon during Pandemic, Educators Say*, ABC 7 CHICAGO (Mar. 16, 2021), https://abc7chicago.com/women-qanon-conspiracy-covid-pandemic-donald-trump/10424353/.

[92] Kevin Roose, *How 'Save the Children' Is Keeping QAnon Alive*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/28/technology/save-the-children-qanon.html.

[93] *Id.*

[94] Loofbourow, *supra* note 66.

[95] *Id.*

[96] Annie Kelly, *Mothers for QAnon*, N.Y. TIMES (Sept. 11, 2020), https://www.nytimes.com/2020/09/10/opinion/qanon-women-conspiracy.html.

[97] Lavina, *supra* note 28, at 250.

[98] *Id.* at 251.

[99] *Id.*

inciting fear and outrage in their targets.[100] It is therefore critical to account not only for the modalities in which women are being actively recruited to extremist organizations, but also for the underlying motivations that cause said groups to seek out female participation.

IV. Analysis and Recommendations

As women's contributions to violent extremism have grown, the United States has begun paying closer attention to the threat posed by women and amending their previous approaches to counterterrorism. However, there is still significant work to be done in defense of U.S. security interests. This section provides a brief overview of the country's current counterterrorism measures and expounds on some of the prevailing policy recommendations for the future.

A. Current Approaches to Counterterrorism in the U.S.

In the immediate aftermath of the 9/11 attacks on the World Trade Center, the United States enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "Patriot Act").[101] The Patriot Act was born out both necessity and also a collective, national panic. It hurriedly created several new terrorism-related federal crimes and provided specific government agencies with vastly expanded surveillance powers.[102] The Act facilitated the breadth of such surveillance powers by lowering the standard of proof required for a search warrant from "probable cause" to "reasonable cause."[103] While the Act is not entirely controversial, it has notably resulted in racial and gendered profiling.[104] The Bush Administration declared a ban on racial and ethnic profiling by federal agencies in June of 2003, but this ban notably did not encompass gender.[105] As such, men continue to be searched at an outsized rate, while women are able to gain much easier access to soft targets domestically.[106]

On an international scale, the United Nations Security Council ("UNSC") similarly launched into action in the weeks following 9/11. In late October of 2001, the UNSC unanimously adopted Resolution 1373, which bound all member states to a terrorist intelligence exchange scheme.[107] The Resolution further established the UNSC Counterterrorism Council which was tasked with enforcing

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[100] Lavina, *supra* note 28, at 251.

[101] *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 115 STAT. 272, 107-56 (2001).

[102] *Surveillance under the USA/Patriot Act*, ACLU, https://www.aclu.org/other/surveillance-under-usapatriot-act.

[103] Ashley Nicole Reynolds, *So You Think a Woman Can't Carry out a Suicide Bombing? Terrorism, Homeland Security, and Gender Profiling: Legal Discrimination for National Security*, 13 WM. & MARY J. WOMEN & L. 667, 677 (2007).

[104] *Id.* at 689.

[105] *Id.*

[106] Lavina, *supra* note 28, at 253.

[107] S.C. Res. 1373 (Sept. 28, 2001).

compliance amongst the member states.[108] What the resolution did *not* do, however, was codify a specific definition for the term "terrorist."[109] At the time, this created a concern that terrorism may become a sort of amorphous offense under which authoritarian regimes could prosecute non-violent opposition, and in turn legitimize human rights violations.[110] Yet, under the pressure and immediacy of the circumstances, the Resolution prevailed.

Curiously, in successive resolutions, the UNSC has continuously declined to provide a concrete definition.[111] Although this seems to create a nefarious catch-all, the Council's inaction has actually diluted member states' prosecutorial power.[112] Absent a universal definition for "terrorism," member states are under no obligation to find a mutual definition in inter-state matters.[113] The result is a jurisdictional tangle which often precludes extradition, and ultimately, criminal liability.[114] In the United States, federal law similarly does not define terrorism. Instead, law enforcement and federal agencies rely on a litany of definitions, which are often colored by the agenda of the drafter.[115] The exigency underlying early terrorism legislation encouraged law makers to paint with broad strokes. However, now, over twenty years later, such boundless power has made it difficult to concretely name the enemy and has neutered states' ability to effectuate justice.

In the years following the Patriot Act and Resolution 1373, the U.S. has enacted a slew of female-oriented counterterrorism legislation, including the 2011 U.S. National Action Plan on Women, Peace and Security, the 2016 joint U.S. State Department-U.S. Agency for International Development ("USAID") strategy to counter violent extremism, and the 2017 Women, Peace and Security Act, amongst others.[116] Unfortunately, these policy initiatives are rendered somewhat moot as the "broader U.S. counterterrorism policy, including the 2011 and 2018 U.S. National Strategies for Counterterrorism . . . largely ignore[s] women" and relegates "only a negligible fraction of the broader budget" to such efforts.[117]

The FBI has similarly failed to fully realize the threat that female terrorists pose to the United States. Following 9/11, the FBI began paying informants

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108 S.C. Res. 1373, *supra* note 107; *see also* Matias-Martinsen, *supra* note 4, at 41.

109 Matias-Martinson, *supra* note 4, at 41.

110 *Id.*

111 Ben Saul, *The Legal Black Hole in United Nations Counterterrorism*, IPI GLOB. OBSERVATORY (June 2, 2021), https://theglobalobservatory.org/2021/06/the-legal-black-hole-in-united-nations-counterterrorism/.

112 *Id.*

113 *Id.*

114 *Id.*

115 *See* Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years after 9/11*, 33 U. PA. J. INT'L L. 1, 18-19 (2011); *see also* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249-50 (2004) (examining the "twenty-two definitions or descriptions of terrorism and related terms in federal law").

116 *Hidden Threats, Forgotten Partners*, *supra* note 14, at 16.

117 *Id.* at 17.

within Muslim communities to aid in its terrorism investigations.[118] Men are most often the targets of such investigations, while women are most often either informants or are leveraged to pressure their male relatives into becoming informants.[119] Women in this sense are regarded as mere pawns rather than significant threats.

Domestically, the fight against terrorism is often stunted by sweeping arguments related to First Amendment protections of free speech and political associations. While the Patriot Act and the FBI maintain their aforementioned powers here, domestic terrorism is viewed as a "second-tier investigative priority."[120] Further, there is little consensus amongst federal agencies on how to generally identify domestic terrorism.[121] This is likely due to the fact that federal law does not define domestic terrorism as a specific criminal offense.[122] In fact, for years the FBI abided by a *de facto* policy which "forbade [agents] from opening a domestic terrorism investigation against anyone who had not yet committed a violent act in furtherance of his cause, unless there was evidence violence was imminent."[123] This policy, unsurprisingly, did not extend to foreign terrorism.[124] Although it is no longer in place, this policy, and the disjointed approach to the investigation and prosecution of domestic terrorism, reveal some of the underlying weaknesses in America's counterterrorism efforts.

B. Policy Recommendations

If current trends continue, terrorist organizations' reliance on female perpetrators will only rise. To promote stability and better address relevant threats, the U.S. should expand roles for women in counterterrorism efforts on an occupational level, adopt measures which account for the increasing security threat posed by women, and also create a concrete definition of "terrorism."[125] In May

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[118] *A Decade Lost: Locating Gender in U.S. Counter-Terrorism*, NYU SCH. L. CTR. FOR HUM. RTS. & GLOB. JUST. 82 (2011).

[119] *Id.*

[120] Ken Dilanian, *Biden May Have Trouble Cracking Down on Domestic Terrorism because of Free Speech and the FBI*, NBC NEWS (Feb. 5, 2021, 4:00 AM), https://www.nbcnews.com/politics/justice-department/biden-may-have-trouble-cracking-down-domestic-terrorism-because-free-n1256727.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] The federal government has incredibly wide latitude to designate individuals and groups as foreign terrorists, requiring only reasonable suspicion to justify the designation. *See* Michael German & Faiza Patel, *What Does It Mean to Designate the Muslim Brotherhood a Foreign Terrorist Organization?*, JUST SEC. (Jan. 26, 2017), https://www.justsecurity.org/36826/designate-muslim-brotherhood-foreign-terrorist-organization/; *see also* 18 U.S.C. 2339B (2012). Inherent to such unfettered power is the risk of over-criminalization. There is a rising concern that, if given similarly broad powers in the domestic context, the federal government would criminalize ideologies, rather than violence itself. Activists have pointed out that this may create a slippery slope which allows for the silencing of dissenting political, religious and racial minority groups; for further discussion on how the government should prioritize the safety of minority groups in future counterterrorism efforts, *see* Michael German & Sara Robinson, *Wrong Priorities on Fighting Terrorism*, BRENNAN CTR. FOR JUST. (Oct. 31, 2018), https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism.

of 2019, the CFR published a comprehensive series of proposals aimed at U.S. counterterrorism policy with regard to women.[126] Notably, the CFR recommends the creation of an advisory council focused on women's roles as perpetrators, and also potential mitigators, of terrorism.[127] This council, through the cooperation of the U.S. Secretary of State, Secretary of Defense, CIA Director, and USAID Administrator, would investigate "gender specific drivers of radicalization and terrorist recruitment activities."[128] To ensure a robust and thoughtful response, the CFR suggests that the council should regularly consult women leaders in shaping their prevention and deradicalization efforts.[129]

They further recommend doubling female participation in the Department of State's Antiterrorism Assistance program by 2022, and propose a quota requiring all countries participating in security programs with the U.S. to have delegations which are at least 30 percent female.[130] The CFR states that "terrorist and violent extremist groups exploit the absence of women in the security sector" and that the proposed measure would work to provide women with increased opportunities while also setting a positive precedent for male and female national security officials working in harmony.[131] Agencies should be weary in the framing of such efforts, however, so as to avoid the suggestion that women are only useful to counterterrorism insofar as they have novel forms of influence.[132] Although women may provide localized expertise, inclusion of women in such programs should be rooted firmly in gender equality. Women have the right to participate in all areas of governmental decision making as members of American society and not merely as quotas.

Finally, the CFR urges the U.S. government to "invest in research on women to better understand women's participation in domestic extremist movements."[133] This effort should be a coordinated project amongst federal agencies and academics and should establish concrete mechanisms delineating responsibilities and data reporting structures.[134] Under this initiative, Congress should also provide a standardized, federal definition for the crime of terrorism to ensure clarity moving forward.

V. Conclusion

It has been nearly two decades since the 9/11 attacks, and while the United States has adopted various legislation related to women's roles in counterterrorism, the policies tend to lack the cohesion and resources to be integrated with

126 *See Hidden Threats, Forgotten Partners*, *supra* note 14, at 19-23.

127 *Id.* at 20.

128 *Id.*

129 *Id.* at 20-21.

130 *Id.* at 22.

131 *Id.*

132 Huckerby, *supra* note 8, at 555.

133 *Hidden Threats, Forgotten Partners*, *supra* note 14, at 23.

134 *Id.*

broader security measures. Further, the efforts which *have* been made adhere to outdated notions of femininity, treating radicalized women as novelties rather than bona fide threats. Gender provides a meaningful framework for conceptualizing the modern state of terrorism, but only insofar as we are willing to recognize women as dynamic actors with motivations that reach beyond domestic duties. It is therefore critical that the U.S. reimagines its stale, sexist approach to counterterrorism and adopt a more comprehensive strategy for ensuring security for Americans.

Settler Colonialism and Assimilative Education: Comparing Federal Reconciliation Efforts for Indigenous Residential and Boarding Schools in Canada and the United States

Holly Jacobs*

Abstract

This article compares the historical development, purpose and legacy, and subsequent reconciliation and reparations efforts of Indigenous residential and boarding schools in the United States and Canada. In both nations, these schools comprised but one piece of a carefully crafted network of federal policies aimed at the removal, assimilation, and cultural genocide of Indigenous peoples, and as a result, had destructive and lasting effects on those they oppressed. By taking a comparative approach and examining the laws and policies surrounding boarding schools in light of settler colonialism, this article hopes to illuminate the efficacy of reconciliation efforts of each nation. Additionally, this article attempts to draw some conclusions regarding possible next steps for each country. The article concludes that the implementation of boarding schools in the U.S. and Canada constituted a deliberate policy of cultural genocide, and that reconciliation and reparations efforts in both countries have not yet achieved important goals, including increased Indigenous involvement and support for Indigenous self-determination regarding the outcomes of these efforts.

Keywords

Indigenous, residential school, boarding school, Canada, United States, settler colonialism, cultural genocide, assimilation, education.

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I. Introduction

Residential schooling was always more than simply an educational program: it was an integral part of a conscious policy of cultural genocide.[1]

In May and June of 2021, Canadian officials discovered nearly one thousand unmarked graves on the sites of former residential schools for Indigenous children.[2] The harrowing legacy of these institutions has surfaced once again, inciting outrage, investigation, and renewed attempts at reconciliation and reparations.[3] The Canadian Truth and Reconciliation Commission ("TRC") has made some effort in the recent past to bring information about residential schools to light, as well as to make reparations for them, but these efforts still fall short.[4] In the United States, news of the unmarked graves prompted Secretary of the

[1] TRUTH AND RECONCILIATION COMMISSION OF CANADA, A KNOCK ON THE DOOR: THE ESSENTIAL HISTORY OF RESIDENTIAL SCHOOLS FROM THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 29 (2016) (explaining that the Royal Proclamation of 1763 mandated that any future transfer of "Indian land" would take the form of a Treaty between sovereigns) [hereinafter A KNOCK ON THE DOOR].

[2] In May of 2021, 215 unmarked graves of Canada's Tk'emlúps te Secwépemc First Nation were discovered at the Kamloops Indian Residential School, located about 160 miles northeast of Vancouver. U.S. SEC. OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE MEMORANDUM, at 1 (2021), https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf [hereinafter Haaland Memo]; *see also* Yuliya Talmazan, *Canada Pressured to Find All Unmarked Indigenous Graves after Children's Remains Are Found*, NBC NEWS (June 3, 2021), https://www.nbcnews.com/news/world/canada-pressured-find-all-unmarked-indigenous-graves-after-children-s-n1269456; *see also Canada: 751 Unmarked Graves Found at Residential School*, BBC NEWS (June 24, 2021), https://www.bbc.com/news/world-us-canada-57592243 (stating that in June of 2021, 751 more unmarked graves were discovered by the Cowessess First Nation at the Marieval Indian Residential School in Saskatchewan).

[3] *See* The Canadian Press, *UN Human Rights Experts Call on Canada to Investigate Residential School Burial Sites*, CITY NEWS TORONTO (June 4, 2021), https://toronto.citynews.ca/2021/06/04/un-human-rights-experts-call-on-canada-to-investigate-residential-school-burial-sites/ [hereinafter Canadian Press]; *see also* Noelle E. C. Evans, *A Federal Probe into Indian Boarding School Gravesites Seeks to Bring Healing*, NPR NEWS (July 11, 2021), https://www.npr.org/2021/07/11/1013772743/indian-boarding-school-gravesites-federal-investigation [hereinafter Noelle E. C. Evans].

[4] *See Truth and Reconciliation Commission of Canada*, GOV'T CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525#chp1 (last modified Sept. 29, 2022) (explaining that the TRC began to be implemented in 2007, with its main goal being to facilitate reconciliation among Indigenous peoples who were affected by residential schools) [hereinafter *Truth and Reconciliation Commission of Canada*]; *see also Healing Voices Movement – Stories*, NAT'L NATIVE AM. BOARDING SCH. HEALING COALITION, https://boardingschoolhealing.org/education/healing-voices-movement-stories/ (last visited Dec. 2, 2022) (stating that prior to the TRC, only 30% of people knew about residential schools in Canada. After the TRC, approximately 70%).

Interior Deborah Haaland to issue a memorandum outlining the Federal Indian Boarding School Initiative as an attempt to "shed light on the scope of [the] impact" of these schools on Indigenous children and families.[5] From 1860 until 1978, the U.S. maintained its own system of 367 Indigenous boarding schools, forcibly displacing thousands of children from both their families and their cultures.[6] In the roughly forty years that followed, few efforts have been made to address the consequences of these schools. In the meantime, Indigenous peoples have been left in a limbo of unanswered questions, inadequate apologies,[7] and generational trauma.[8]

In both nations, the creation of residential schools served a sweeping and essential purpose for the settler governments: to eradicate Indigenous culture and instead assimilate Indigenous peoples into the culture of the colonizers. While education is usually viewed as a tool for social progress, the case of residential schools in North America makes clear that this notion of "progress" is strictly defined by those in power. Schooling can indeed be a means to better people, but it can also be a means to force adherence dominant cultural norms, as well as to inculcate these beliefs over generations until the original cultures are entirely erased. To properly address the destruction they caused, the corresponding goal of any reconciliation or reparations effort must be to squarely acknowledge the cultural genocide and assimilation that was explicitly desired by the Canadian and American governments.

While calls to investigate the full scope of residential schools have been made by Indigenous peoples, historians, and even human rights experts,[9] most initiatives fail to fully rise to the task. By examining the settler colonial foundations of each nation, this comment compares the current treatment of Indigenous residential schools in Canada and the U.S. Section II provides a brief historical overview of settler colonial theory, then details the history of residential schools in both countries. Section III then discusses the current state of law and policy comprising each country's effort to investigate and make reparations for the atrocities that resulted. In Section IV, the article moves to critical analysis of various federal reconciliation and reparation efforts.[10] Section V concludes with the proposi-

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[5] Haaland Memo, *supra* note 2, at 3.

[6] David A. Love, *Residential Schools Were a Key Tool in America's Long History of Native Genocide*, THE WASH. POST (Aug. 10, 2021), https://www.washingtonpost.com/outlook/2021/08/10/residential-schools-were-key-tool-americas-long-history-native-genocide/.

[7] *See* Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It*, INDIAN COUNTRY TODAY (Jan. 13, 2010), https://indianlaw.org/node/529.

[8] *See* Erin Blakemore, *A Century of Trauma at U.S. Boarding Schools for Native American Children*, NAT'L GEOGRAPHIC (July 9, 2021), https://www.nationalgeographic.com/history/article/a-century-of-trauma-at-boarding-schools-for-native-american-children-in-the-united-states; *see also* Mary A. Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/.

[9] Canadian Press, *supra* note 3.

[10] There is an important distinction between the term "reconciliation" and the term "reparations." Reconciliation emphasizes restoring good relations or encouraging compatibility between two previously adversarial groups, while reparation centers making amends for a wrong committed, or compensating a party who has been injured in some way. While both are laudable goals for any commission addressing boarding schools, reconciliation-only goals have been criticized for being solely concerned with "rescu-

tion that even if best efforts are assumed on the part of both governments, the current settler colonial nature of each nation suggests that placing this responsibility in the hands of the colonizers will likely not provide adequate justice. Indigenous peoples[11] must be given the directive role and be supported in conducting investigations independent from the federal governments in order to have any chance of accomplishing meaningful reconciliation or reparations.[12]

II. Background

A. Researcher Positionality and Limitations

It must be noted at the outset that this article is limited by researcher perspective. My perceptions of this research are constrained by my positionality as a non-Indigenous, white American. Positionality describes "an individual's world view and the position they adopt about a research task and its social and political context."[13] It also affects the "totality of the research process," and it is essential for researchers to acknowledge their positionality in order to understand how their positionality both shapes their work and influences their understanding of that work.[14] In the case of researching issues facing Indigenous communities, it is crucial to reflect on one's own foundation of knowledge and recognize the ways in which Western thought, history, and methodology can affect research and analysis. Particularly when it comes to cultural research, the risk of misinterpretation and assumption runs high, and it is of the utmost importance to interrogate the ways in which one's own perspective, personal views, and implicit biases

ing settler normalcy" and "rescuing settler future" without forcing settlers to reckon with their own privilege and the settler norms they have established. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 35 (2012). This means that while reconciliation can and should be a goal, restoring good relations will not occur without settlers first acknowledging the harms they caused, and making reparations for those harms. *See also* Stephanie Irlbacher-Fox, *Traditional Knowledge, Co-Existence and Co-Resistance*, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 145 (2014).

[11] A note on terminology: throughout the article, the term "Indigenous peoples" is used to refer to the peoples Indigenous to both present-day Canada and the present-day United States. In Canada, the term "Aboriginal" is used in legal settings, such as lawmaking and case law, but the term "Indigenous peoples" is used to refer to the First Nations, Inuit, and Métis in all other situations. In the United States, the term "Indian" or "American Indian" is a settler-created legal term and is only used when discussing laws and policies in which the term already exists. In all other instances in this article, the term "Native American" is used. Additionally, the term "residential schools" was used primarily in Canada, and the term "boarding schools" was used primarily in the U.S. These are used interchangeably throughout, but both refer to the same type of institution.

[12] A note on scope: this article focuses only on federal law and policy in relation to the Indigenous peoples of Canada and the United States. This means that while several states and provinces have investigations and initiatives that go further than federal efforts, they will not be discussed here. Additionally, this means that relations with individual Tribal nations and Indigenous communities will similarly not be raised, as they fall outside the scope of the article. Finally, although only mentioned in this article in passing, UNDRIP and the Genocide Convention are among several international human rights instruments that could apply to the case of residential schools, and these remedies should not be forgotten in broader context.

[13] Andrew G. D. Holmes, *Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide*, 8 INT'L J. EDUC. 1, 1 (2020).

[14] *Id.* at 3.

may affect interpretation of findings. I have attempted to be cognizant of my own positionality throughout, and I encourage readers to try to do the same. It is crucial to also have awareness of the positionality of Aboriginal and American Indian policy in history, and to remember that each law and policy discussed herein was carefully crafted by white settlers with the purpose of controlling and destroying Indigenous peoples and their cultures. This promoted white settler status over time, and that privilege remains to this day. By making a conscious effort to recognize this context, one can more clearly see the ways in which residential schools, though no longer widely active in either country, manifested this will at the time and have since continued in legacy to perpetuate settler control and silence Indigenous voices.

B. Colonialism and Settler Colonialism in North America

North America as it exists today was created by colonization, a term that at its most abstract can be defined as "a broader process of territorial acquisition and establishment of the rule of one group of people over another."[15] Colonizers reject "cultural compromises with the colonized population" because they are "convinced of their own superiority and of their ordained mandate to rule."[16] Western colonialism in particular produced a hegemonic knowledge system in North America, an essential part of which was the invalidation of epistemological stances of the colonized Indigenous peoples, the aim being to create one single culture through which all knowledge is spread.[17] In Canada and the U.S., colonizers created a system of formal education through which they could exercise control over the Indigenous peoples, ensuring erasure of their own cultures and assimilation into a new, settler-colonial society.[18]

Colonial policy in North America was that of a civilizing mission,[19] meaning that when it came to education, all subjects given access to education were taught the colonial culture and language.[20] The ultimate goal of these schools was to turn the Indigenous peoples into rule-following, functioning citizens of the new governments in Canada and the U.S., meaning all aspects of Indigenous cultures

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[15] JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 4 (Shelley Frish trans., Markus Wiener Publishers, 1997) (2005).

[16] *Id.* at 17.

[17] Tavis D. Jules et al., *Imperialism, Colonialism, and Coloniality in Comparative and International Education: Conquest, Slavery, and Prejudice, in* THE BLOOMSBURY HANDBOOK OF THEORY IN COMPARATIVE AND INTERNATIONAL EDUCATION 37, 41 (Tavis D. Jules, Robin Shields & Matthew A.M. Thomas, eds., 2020).

[18] There are two types of colonial policy in education: adaptive and assimilative. Adaptive is most commonly associated with British colonies in Africa and India, whereas assimilative was notably used by the French in northern Africa. Colonialism of Indigenous peoples in North America was assimilative as well, with the main goals being complete cultural erasure and assimilation into the new nations of Canada and the U.S. *Id.* at 46-47.

[19] *See also* A KNOCK ON THE DOOR, *supra* note 1, at 20 (explaining that the "civilizing mission" rested on a belief of cultural and racial superiority).

[20] Also known as a "mission civilastric," civilizing missions attempted to adopt colonized peoples as citizens and members of the new nation, chiefly by means of assimilative education policies. Jules et al., *supra* note 17, at 46.

(religion, language, values, etc.) were to be annihilated and replaced.[21] "The theoretical underpinning of colonialism is critical because educational policies are situated in their historical contexts, and the colonial education system is nested within larger colonial policies and structures."[22] For example, in Canada, the propagation of European values and beliefs was "the prime justification and rationale" for the implementation of residential schools for Indigenous peoples.[23]

However, many scholars also contend that the type of colonialism that occurred in North America was a unique form, which has been titled "settler colonialism."[24] Settler colonialism "destroys to replace;" because settlers colonize with the intent to stay, settler colonialism "strives for the dissolution of native societies," while also erecting "a new colonial society on the expropriated land base."[25] Moreover, "[t]erritoriality is settler colonialism's specific, irreducible element," meaning that by having their land forcibly taken, Indigenous peoples subjected to settler colonialism also have their identity forcibly taken, for "where they are *is* who they are, and not only by their own reckoning."[26] The permanence of settler colonialism is unique from other forms of colonialism, as "invasion is a structure and not an event."[27] Though isolated moments of invasion occur, settlers come to stay, thereby turning their moment of invasion into a long-lasting structure. One only needs to look at the existence of reservations or widespread loss of Indigenous languages (among many other things) for proof of this structure.

Settlers also romanticize themselves in order to preserve innocence.[28] This is a "way of erasing colonialism and Indigenous nations" and "characterizes the erasure of continued settler colonialism."[29] In the U.S., for example, by presenting America, then Western expansion, then even the moon landing as a "new frontier," settlers effectively spread an inspirational rhetoric that enabled them to reclaim the continent as their own without facing the realities of their genocidal practices. Specific also to the North America is "settler self-indigenization," which is a historical condition and "deep psychosis" that has rewritten the narra-

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[21] The unique effect of such education policy is to create a group of people whose culture has been effectively erased from their lives, but whose new culture does not belong to them. In French Algeria, these people were called "evolues," a people who were neither Muslim in a cultural sense, nor European like their colonizers. Jules et al., *supra* note 17, at 48; "Ultimately, colonial education was about gaining 'mental' control over subjects to ensure that bureaucratic apparatuses functioned to serve the colonial masters." Jules et al., *supra* note 17, at 49.

[22] Jules et al., *supra* note 17, at 49.

[23] A KNOCK ON THE DOOR, *supra* note 1, at 24.

[24] *See* ROXANNE DUNBAR-ORTIZ, NOT "A NATION OF IMMIGRANTS": SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION 18-50 (2021) [hereinafter DUNBAR-ORTIZ]; *see also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDAL RES. 387 (2006); *see also* Mahmood Mamdani, *Settler Colonialism: Then and Now*, 41 CRITICAL INQUIRY 596 (2015).

[25] Wolfe, *supra* note 24, at 388.

[26] Wolfe, *supra* note 24, at 388 (emphasis in original).

[27] *Id.*

[28] DUNBAR-ORTIZ, *supra* note 24, at 34.

[29] *Id.*

tive; for example, in the U.S., instead of settlers who took over an already inhabited and deeply cultured continent, settlers were the "birth of something new and wondrous, literally, the US American race, a new people born of the merger of the best of both worlds, the Native and the European, not a biological merger but something more ephemeral involving the disappearance of the Indian."[30]

The distinction between colonialism and settler colonialism is particularly important in the case of residential and boarding schools because they are largely unmentioned in common historical knowledge, therefore making a lasting contribution to the cultural genocide of Indigenous peoples. "The objective of settler colonialism is to terminate Indigenous peoples as nations and communities with land bases in order to make the land available to European settlers. Extermination and assimilation are the methods used."[31] Residential schools were one of the most successful forms of assimilation ever employed in North America. Most important to note is that "settler colonialism as a mode of domination. . . has typically resisted formal decolonization."[32] This means that understanding the settler colonial history of Canada and the United States is absolutely crucial to the study of residential and boarding schools. Only by ultimate transparency about the settler version of history that has historically been reproduced, including the ways in which Indigenous history was silenced, will any steps towards reparations and decolonization occur. Moreover, settler people and their governments must acknowledge and dismantle their own white settler privilege. "Settler colonialism is an ongoing phenomenon; writing its history is charged with a presentist preoccupation."[33]

C. Historical Overview of Residential Schools in Canada

The development of residential school policy in Canada can be traced back to early Treaty negotiations, in which federal officials clearly expressed the government's intent to assimilate Indigenous peoples into Canadian society.[34] The legislation of the mid-1800s made this purpose very clear. The Canadian government did not shy away from assimilationist goals, first in 1857 with the Gradual Civilization Act,[35] then in 1869 with the Gradual Enfranchisement Act,[36] and finally in 1876 with the Indian Act,[37] which was subsequently revised multiple times. Most

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30 DUNBAR-ORTIZ, *supra* note 24, at 35-36.

31 *Id.* at 23.

32 Lorenzo Veracini, *Introduction: Settler Colonialism as a Distinct Mode of Domination, in* THE ROUTLEDGE HANDBOOK OF THE HISTORY OF SETTLER COLONIALISM 1, 3 (Edward Cavanaugh & Lorenzo Veracini, Eds., 2017).

33 Veracini, *supra* note 32, at 2.

34 A KNOCK ON THE DOOR, *supra* note 1, at 26.

35 *See* Amanda Robinson, *Gradual Civilization Act*, CAN. ENCYCLOPEDIA (Mar. 3, 2016), https://www.thecanadianencyclopedia.ca/en/article/gradual-civilization-act.

36 *See Background on Indian Registration*, GOV'T CAN., https://www.rcaanc-cirnac.gc.ca//1540405608208/1568898474141.

37 *See* A KNOCK ON THE DOOR, *supra* note 1, at 28, 37 (explaining that the Indian Act defined who was and who was not "Indian," as well as the process through which one could lose status as an "Indian"); *see also* Zach Parrott, *Indian Act*, CAN. ENCYCLOPEDIA (Feb. 7, 2006), https://

notably, the 1894 and 1895 Amendments to the Indian Act gave the government the authority to require schooling for Indigenous children until age eighteen,[38] and the 1920 Indian Act gave the federal government power to make it mandatory for every Indigenous child to attend residential school, while also making it illegal for them to attend any other educational institution.[39]

In 1879, a Canadian politician named Nicholas Davin conducted a brief study of boarding schools in the United States and recommended that Canada establish similar schools, but that Canada's residential schools should specifically be operated by the churches.[40] Some of the first residential schools were located in southern Ontario and were operated by Methodist missionaries through the 1850s, and the first of what would become a large string of Roman Catholic residential schools opened in current-day British Columbia in the early 1860s.[41] However, the federal government first opened such schools in 1883 and 1884, assuming all costs for running the schools, but delegating their operations to the Roman Catholic Church.[42]

By 1931, residential schools were nearing their peak, with eighty schools in operation. The Catholic and Protestant churches provided much of the direction for these schools, which is notably different from the civil service motivations in schools in the U.S.[43] Maximum enrollment was reached in the 1956-57 school year, with 11,539 students in attendance.[44] The late 1940s, directly following World War II, saw the beginning of the decline of residential schools in Canada, with a 1951 Amendment to the Indian Act recommending integration of Indigenous children into public schools.[45] A transition from a system of educational assimilation to a system of child welfare also took place during this time, with former residential schools increasingly being used as welfare facilities. This period is also called the "Sixties Scoop," which refers to the systematic removal of Indigenous children from their parents without consent, and was essentially the transfer of children from one institution, schools, to another, welfare facilities.[46]

The effects of the Sixties Scoop were felt far and wide, and by the time residential schools closed in the 1970s, the number of children taken into care by

www.thecanadianencyclopedia.ca/en/article/indian-act#:~:text=the%20Indian%20Act%20attempted%20to,identities%20through%20governance%20and%20culture.

[38] ANDREW WOOLFORD, THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES 73 (2015) [hereinafter THIS BENEVOLENT EXPERIMENT]; *see also* A KNOCK ON THE DOOR, *supra* note 1, at 35-36.

[39] A KNOCK ON THE DOOR, *supra* note 1, at 28 (noting additionally that the Indian Act of 1920 also gave the federal government the power to strip people of their status as an "Indian" against their will).

[40] *Id.* at 30.

[41] *Id.* at 25.

[42] *Id.* at 32 (explaining that these schools were built in present-day Saskatchewan and Alberta, and in 1884 there were only twenty-seven students in the three schools).

[43] WOOLFORD, *supra* note 38, at 93-94.

[44] A KNOCK ON THE DOOR, *supra* note 1, at 38.

[45] *Id.* at 43 (adding that by 1960, the number of students in "non-Indian" schools surpassed the number of students in residential schools).

[46] *Id.*

child-welfare agencies had skyrocketed.[47] Finally, in the late 1960s the federal government took control of all residential schools in southern Canada and began systematically closing the facilities.[48] Between 1995 and 1998, the last seven schools in southern Canada were closed. By the time the last residential school was shut down, the system had been in place for over 160 years.[49]

D. Historical Overview of Boarding Schools in the United States

In 1818, the House Committee declared, "[i]n the present state of our country, one of two things seems to be necessary: either that these sons of the forest should be moralized or exterminated."[50] The resulting "solution" was passing the 1819 Indian Civilization Act, which established funding for religious groups and other individuals to live among and educate the Indigenous peoples.[51] 1830 saw the passage of the Indian Removal Act, followed by *Cherokee Nation v. Georgia*[52] in 1831, in which Chief Justice John Marshall drew the now well-known analogy that the Indian Nations have a relation to the United States which resembles "that of a ward to his guardian."[53] Despite the Cherokee Nation's efforts to remain in their ancestral homeland, Congress authorized their forcible removal, resulting in the Trail of Tears.[54] When the remaining members of the Tribe reached the final destination, present-day Oklahoma, schools were established. By 1842, there were 52 "Indian schools" reporting an enrollment of 2,132 students, and in 1871 there were 286 schools with 6,061 students.[55]

Westward expansion in the United States led to a policy change in the 1860s and '70s, shifting the strategy from removing Indigenous peoples to the West to "segregating them on reservations and treating them as government wards."[56] In 1873, the Civilization Fund of 1819 was repealed and replaced with an appropriation by Congress of ten times the funds previously provided. The 1878 *Annual Report of the Commissioner of Indian Affairs* stated that education of Indigenous

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[47] A KNOCK ON THE DOOR, *supra* note 1, at 44 (noting that in 1977, Indigenous children accounted for 44 percent of children in care in Alberta, 51 percent of children in care in Saskatchewan, and 60 percent of children in care in Manitoba).

[48] *Id.* at 45-46.

[49] *Id.* at 46 (arriving at this figure by dating the beginning of the system with the opening of the Mohawk Institute in the 1930s); *see also* Erin Hanson et al., *The Residential School System*, INDIGENOUS FOUNDS. (2020), https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/ (noting also that control over Indigenous peoples of Canada has not disappeared, but has shifted to other institutions. For example, as recently as 2018, Indigenous women have made reports of forced sterilization, and modern child welfare systems continue to disproportionately apprehend Indigenous children).

[50] JON REYHNER ET AL., AMERICAN INDIAN EDUCATION: A HISTORY 45 (2006) [hereinafter REYHNER ET AL.].

[51] *Id.* at 53; *see also* WOOLFORD, *supra* note 38, at 53.

[52] Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831).

[53] *Id.*

[54] It is estimated that 4,000 of the 11,500 Native Americans who started on this journey died along the way. REYHNER ET AL., *supra* note 50, at 55.

[55] About half of these schools were in present-day Oklahoma, comprised of the Cherokee, Choctaw, Chickasaw, and Creek Nations. REYHNER ET AL., *supra* note 50, at 47.

[56] *Id.* at 71.

children was the quickest way to "civilize Indians," and that such education could only be given "to children removed from the examples of their parents and the influence of the camps and kept in boarding schools."[57] The object of education policy was "unquestionably the gradual absorption of the Indians in the great body [of] American citizenship."[58]

By 1887, there were 68 government boarding schools with 5,484 students in attendance, and an additional 41 schools with 2,553 students were operated under contract with the Indian Bureau, mostly by religious organizations.[59] While much of the curriculum of residential schools in the U.S. was influenced by civil goals rather than religious ones, Christian organizations played a large part in the running of these schools.[60] However, because of the constitutional separation of church and state, federal funding for mission schools was phased out from 1894 to 1900. Although the schools won the right to get tribal funds held in trust by the United States, the number of mission schools gradually declined after this period.[61]

However, the majority of residential schools in the U.S. were government boarding schools, which were often located in old forts and run like military organizations.[62] From 1890 to 1930, the number of boarding schools increased from 60 to 136, with the student population eventually reaching 28,333. One such school was the Carlisle Indian School, whose headmaster, Richard Henry Pratt, became famous for his saying, "kill the Indian, save the man."[63] It is estimated that by 1926, nearly 83 percent of Indigenous school-age children were attending boarding schools.[64] The end of World War II, however, saw a renewed call to "set the American Indian free."[65] Congress found a "final solution" in terminating reservations and with them, their federal trust status. Instead, States were to assume responsibility for the education of all Indigenous children in public schools, and gradually, this is what occurred.

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[57] REYHNER ET AL., *supra* note 50, at 71.

[58] *Id.* at 75.

[59] There were also day schools, but 94 percent of funding went to the boarding schools. REYHNER ET AL., *supra* note 50, at 72-73.

[60] From 1837-1893, for example, the Presbyterian Church's Board of Foreign Missions sent 450 missionaries to 19 Tribes. *Id.* at 112.

[61] *Id.* at 137-38.

[62] *Id.* at 132.

[63] "'A great general has said that the only good Indian is a dead one,'" Capt. Richard H. Pratt, the founder of one of the first boarding schools, wrote in 1892. 'In a sense I agree with the sentiment, but only in this: That all the Indian there is in the race should be dead. Kill the Indian in him and save the man.'" Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html; *see also* Northern Plains Reservation Aid, *History and Culture: Boarding Schools*, AM. INDIAN RELIEF COUNCIL (last visited July 17, 2022), http://www.nativepartnership.org/site/PageServer?pagename=Airc_hist_boardingschools.

[64] *U.S. Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. (last visited July 17, 2022), https://boardingschoolhealing.org/education/us-indian-boarding-school-history/.

[65] REYHNER ET AL., *supra* note 50, at 232.

III. Discussion

This section examines the current status of laws and policies regarding investigating and making reparations for residential schools in both Canada and the United States. It also explores what, if any, remedial quality these laws have had for Indigenous peoples.

A. Discussion of Current Law in Canada

Section 35 of the Constitution Act explicitly contains a provision outlining Aboriginal peoples' rights, including treaty rights, land claims, and the right to participation in constitutional conferences.[66] Aboriginal peoples are defined as including "the Indian, Inuit and Métis peoples of Canada" and the section clarifies that all rights are guaranteed equally to both sexes.[67] However, the Section recognizes only *existing* rights; it does not delineate or define which rights fall under the category of "existing," and importantly, it does not extend to Aboriginal rights that had been extinguished prior to the section's passing in 1982.[68] As explained in detail below, interpretation of this provision came largely in the form of Supreme Court cases such as *Calder*[69] and *Sparrow*.[70] "Existing" has come to mean that any Aboriginal rights that had been extinguished by treaty prior to 1982 were effectively lost; as they were not in existence when the section was passed, in the eyes of Canadian law, they no longer existed and are currently not protected by the Constitution. Additionally, Section 35 does not enumerate Aboriginal rights like Sections 1 through 34 do for Canadian citizens, leaving Aboriginal rights to be defined by the courts on a case-by-case basis.[71] Section 35 also exists separately from the Charter of Rights and Freedoms,[72] meaning that while separating these rights reinforces the unequal position of Indigenous peoples in Canadian society, Section 35 is not subject to the "notwithstanding clause"[73] and the federal government may not override Aboriginal rights.

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[66] Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, C. 11 (U.K.) §§ 35-35.1 [hereinafter Rights of the Aboriginal Peoples of Canada].

[67] *Id.* §§ 35(2) & 35(4).

[68] *Id.* § 35(1); *see also* Erin Hanson, *Constitution Act, 1982: Section 35*, INDIGENOUS FOUNDS. (last visited July 17, 2022), https://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/.

[69] Calder v. British Columbia, [1973] S.C.R. 313 (Can.).

[70] R v. Sparrow, [1990] 1 S.C.R. 1075 (Can.).

[71] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, C. 11 (U.K.) §§ 1-34.1 [hereinafter Canadian Charter of Rights and Freedoms]; *see also* John P. McEvoy, *Aboriginal Activities and Aboriginal Rights: A Comment on R v. Sappier; R v. Gray*, 6 INDIGENOUS L. J. 1 (explaining more recent cases that refine the term "existing" right even further, including that Canadian courts have taken a more expansive approach regarding the rights themselves, yet less expansive when it comes to the exercise of those rights).

[72] Canadian Charter of Rights and Freedoms, *supra* note 71; Rights of the Aboriginal Peoples of Canada, *supra* note 66.

[73] Canadian Charter of Rights and Freedoms, *supra* note 71, § 33 (allowing Parliament or the Legislature of a province to derogate from sections of the Charter, specifically from section 2 (fundamental freedoms), sections 7 to 14 (legal rights) and section 15 (equality rights). If invoked, Section 33 precludes judicial review of legislation under the listed Charter sections).

However, Section 35, along with other iterations of Indigenous rights, have been the subject of much judicial interpretation. The Supreme Court of Canada has an established body of case law mostly decided after the enactment of Section 35 in 1982,[74] which has set some parameters for Indigenous rights, mostly concerning land ownership and use, but without having broader reparative effects for survivors of residential schools. For example, in *Calder v. Attorney-General of British Columbia*, which predates Section 35, the Supreme Court first grappled with Aboriginal title to land that existed prior to colonization and was not merely granted by statute.[75] Calder and Nisga'a Elders sued the government of British Columbia, claiming that Nisga'a title to their lands had never lawfully been extinguished. Although they did not win in any of the lower courts, Calder and the Nisga'a appealed to the Supreme Court, hoping to provide all Indigenous peoples with title affirmation.[76] While the Court did not rule in their favor, it did find that Aboriginal title had indeed existed at the time of colonization of the continent, independent of colonial law.[77] This was the first time that the Canadian government had recognized the original existence of Aboriginal title to land, and the decision served both as an important foothold for Indigenous peoples in their fight to claim title to their land, as well as an initial foray into the recognition of Indigenous peoples' rights.

Perhaps one of the most landmark cases is *R. v. Sparrow*, in which the Supreme Court delineated criteria to determine whether government infringement upon Indigenous rights was justifiable, and then laid out a test that has come to be known as "the Sparrow test."[78] The Court set the test as an interpretation of the language contained in Section 35, specifically the terms "existing" rights and "recognized and affirmed" rights.[79] The plaintiff, Musqueam band member Ronald Sparrow, had been arrested for using a fishing net that was longer than was permitted by license.[80] The Musqueam band decided to defend Sparrow's charge, arguing that Section 35 reinforced Sparrow's right to fish.[81] Because the Court

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[74] Only four consequential decisions will be elaborated upon here due to their unique holdings and relevance to this article. The Supreme Court of Canada has nine judges representing the four major regions of the country. It hears appeals from all appeal courts in all the provinces and territories, and its judgments are final. *The Judicial Structure*, GOV'T CAN., https://www.justice.gc.ca/eng/csj-sjc/just/07.html (last visited Aug. 19, 2022).

[75] Calder v. British Columbia, *supra* note 69, at 413.

[76] *Id.*; *see also* Tanisha Salomons, *Calder Case*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/calder_case/ (last visited Aug. 19, 2022).

[77] Calder v. British Columbia, *supra* note 69, at 314 (holding that while the "area in question did not come under British sovereignty until the Treaty of Oregon in 1846" meaning that the Nisga'a were outside the scope of the Proclamation in 1763, the Nisga'a territory became part of the Colony of British Columbia when it was established in 1858).

[78] *See* R. v. Sparrow, *supra* note 70 at para. 67-83 (constructing the Sparrow test); *see also* Tanisha Salomons & Erin Hanson, *Sparrow Case*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/sparrow_case/ (last visited Aug. 19, 2022).

[79] Rights of the Aboriginal Peoples of Canada, *supra* note 66, § 35(1).

[80] R. v. Sparrow, *supra* note 70, at para. 3.

[81] *Id.* (arguing that the Musqueam retained the right to fish in the area, their rights to the land had never been extinguished by treaty, any infringement on Aboriginal fishing rights was invalid, and the restriction on net length was not justified by reasons of conservation).

found that the Aboriginal right to fish had not been extinguished, this right was "existing" at the time of Sparrow's arrest.[82] This holding affirmed the notion that any right that had been previously extinguished, by treaty or otherwise, is not within the protection of the Constitution. Additionally, the Court held that the words "recognized and affirmed" as they appear in Section 35 mean that the government must have sufficient justification in order to override Aboriginal rights.[83] The "Sparrow test" first defines whether a right has been infringed, then explains what could justify such an infringement such that it does not amount to a constitutional violation.[84] As with the enactment of Section 35, the *Sparrow* ruling was met with mixed reactions. While the decision affirmed important Aboriginal rights, it also confirmed that those rights are not absolute, and that the Canadian government may infringe upon them so long as the second part of the test is met. Additionally, the Court left many questions regarding different elements of adequate justification unanswered.[85]

Though the previous two cases helped to define the extent of Indigenous peoples' rights more clearly, the decisions did not directly address the harm done to generations of people at the hands of residential schools. *Mowatt v. Clarke* was a significant victory for survivors of physical and sexual abuse seeking justice against their former residential schools.[86] A former student of St. George's Indian Residential School in Lytton, British Columbia, brought suit against the federal government, the diocese, and the Anglican Church of Canada, citing grievous harms of sexual abuse during their time at the school and alleging breach of fiduciary duty, negligence, and vicarious liability.[87] Clarke, the dormitory supervisor at the school, had already pleaded guilty at the time of this suit and was in prison, but the trial court judge held that the plaintiff could recover damages from all defendants. This meant that the government of Canada and the Anglican Church could be held vicariously liable for the individual actions of a residential school employee.[88]

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[82] R v. Sparrow, *supra* note 70, at para. 24.

[83] *Id.* at para. 62.

[84] *Id.* at para. 70, 74 (holding that a right is infringed upon if it: imposes undue hardship on the First Nation, is considered by the court to be unreasonable, or prevents the right-holder from exercising that right. An infringement might be justified if: it serves a valid legislative objective (such as conservation of natural resources), there has been as little infringement as possible in order to achieve the desired result, fair compensation has been provided, and Aboriginal groups were consulted or at least informed); *see also* Salomons & Hanson, *supra* note 78.

[85] *See* Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550; *see also* Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 (holding that the government has a duty to consult tribes, but not explicitly defining what "adequate consultation" is).

[86] Mowatt v. Clarke, [1999] 11 W.W.R. 301; *see also* Erin Hanson et al., *The Residential School System*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/#survivors-demand-justice (last visited Aug. 19, 2020) (explaining that before 1980, fewer than 50 convictions were obtained of more than 38,000 claims of sexual and physical abuse submitted for independent adjudication).

[87] Mowatt v. Clarke, *supra* note 86, at para. 1.

[88] *Id.* at para. 2, 204.

Recently, legislative efforts to investigate residential schools have been amplified, likely due to increased discoveries of unmarked graves at former schools.[89] However, attempts by the Canadian government to make reparations for the past began in earnest in 1998 with the establishment of the Aboriginal Healing Foundation ("AHF").[90] The AHF was federally funded with grant money, as well as managed and run by Indigenous peoples, and had an eleven-year mandate given by the federal government to direct healing initiatives addressing the legacy and impact of residential schools.[91] Although the AHF officially closed in 2014, when the mandate was up, it provided essential services to Indigenous communities such as healing centers, while also fulfilling a research mandate to establish a knowledge base regarding long-term health impacts of the residential schools.[92]

The closing of the AHF was mitigated by the establishment of the Truth and Reconciliation Commission ("TRC"). In 2007, the largest class-action settlement in Canadian history, the Indian Residential Schools Settlement Agreement, took place. One element of the settlement was the creation of the TRC, with the goal of creating an investigative organization to facilitate reconciliation among Indigenous communities affected by residential schools.[93] The TRC, like the AHF, was given a mandate with a specified ending date, however, when the TRC closed in 2015, it transferred all historical documents and records to the National Centre for Truth and Reconciliation ("NCTR") at the University of Manitoba. This process allowed the mandate given to the TRC to endure, meaning that research, protection of histories, and education of the public continue via this organization to this day.[94]

The official mandate of the TRC outlined seven specific goals of the Commission, as well as the powers, duties, procedures, and positions included in the Commission.[95] Additionally, the mandate required the completion of "three essential event components" including national events, community events, and individual statement-taking and truth-sharing. Near the end of the mandate, it established the National Research Centre (the aforementioned NCTR), specifying that it shall be made available to "former students, their families and communities, the general public, researchers and educators who wish to include this his-

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[89] *See, e.g.*, The Canadian Press, *UN Human Rights Experts Call on Canada to Investigate Residential School Burial Sites*, CITYNEWS (June 4, 2021), https://toronto.citynews.ca/2021/06/04/un-human-rights-experts-call-on-canada-to-investigate-residential-school-burial-sites/.

[90] *FAQs*, ABORIGINAL HEALING FOUND., https://www.ahf.ca/faqs (last visited Aug 19, 2022).

[91] *Id.* (stating that $350 million in federal grant money was initially given to the Foundation, then they received an additional $125 million from the Indian Residential School Settlement Agreement in 2007).

[92] *About Us*, ABORIGINAL HEALING FOUND., https://www.ahf.ca/about-ushttps://www.ahf.ca/about-us (last visited Aug. 19, 2022).

[93] *Truth and Reconciliation Commission of Canada*, *supra* note 4; *About the NCTR*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/ (last visited Aug. 19, 2022) [hereinafter *About the NCTR*].

[94] *About the NCTR*, *supra* note 93.

[95] Mandate for Truth and Reconciliation Commission, *Schedule N*, Indian Residential Schools Settlement Agreement, 1-2, (May 8, 2006), https://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf [hereinafter *Schedule N*].

toric material in curricula."[96] In its eight years of operation, the TRC traveled to all parts of Canada, heard from more than 6,500 witnesses, hosted seven national events across the country, and presented and published its findings in a final report, including ninety-four recommendations to further reconciliation efforts between Canadians and Indigenous peoples.[97] The government of Canada has since promised "to be committed to a renewed nation-to-nation relationship with Indigenous peoples," as well as "to design a national engagement strategy for developing and implementing a national reconciliation framework" informed by the TRC's findings.[98]

While the continued existence of the NCTR does indeed create an essential space for healing and reparations,[99] the Canadian government has recently taken additional legislative steps to address the harms of residential schools and the cultural genocide they caused. Bills C-8 and C-15 are remarkable and necessary pieces of legislation that move the country further towards increased reconciliation. Bill C-8 officially recognizes Indigenous status and rights as part of the oath that all Canadians take when becoming citizens.[100] The Act amended the Citizenship Act in order to include "a solemn promise to respect the Aboriginal and treaty rights of the First Nations, Inuit and Métis peoples" in the Oath or Affirmation of Citizenship.[101] This new oath recognizes the fact that Indigenous rights are both affirmed by Section 35 of the Constitution, as well as derived from historic use of the land by Indigenous peoples.[102]

Bill C-15 establishes the framework for adopting and implementing into federal legislation the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), requiring that all levels of government recognize and affirm

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[96] *Schedule N*, *supra* note 95, at 11.

[97] *Truth and Reconciliation Commission of Canada*, *supra* note 4; *Truth and Reconciliation Commission of Canada*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/history-of-the-trc/truth-and-reconciliation-commission-of-canada/ (last visited Aug. 28, 2022).

[98] *Truth and Reconciliation Commission of Canada*, *supra* note 4.

[99] *See generally About the NCTR*, *supra* note 93 (showing that the NCTR houses thousands of records and documents, and its website contains teaching resources, educational programs, research opportunities, and much more regarding continued investigation and sharing of the knowledge base built by the TRC); the continued mandate of the NCTR states it will be a steward for the experiences of survivors of residential schools, will continue the research begun by the TRC, and will build a foundation for reconciliation through promoting public education on the history of residential schools. *Our Mandate*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/about-the-nctr/our-mandate/ (last visited Dec. 2, 2022).

[100] Sarah El Gharib, *Canada Just Passed 2 New Laws to Affirm Rights of Indigenous Peoples*, GLOB. CITIZEN (June 22, 2021), https://www.globalcitizen.org/en/content/canada-laws-national-indigenous-peoples-day/ [hereinafter El Gharib].

[101] The Oath now fully reads: "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada, including the Constitution, which recognizes and affirms the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples, and fulfil my duties as a Canadian citizen." Citizenship Act, R.S.C. 1985 c 29, amended by S.C. 2021 c 13 (Can.) at § 24.

[102] *See* Immigration, Refugees and Citizenship Canada, *Canada's Oath of Citizenship Now Recognizes First Nations, Inuit and Métis Rights*, CISION (June 21, 2021), https://www.newswire.ca/news-releases/canada-s-oath-of-citizenship-now-recognizes-first-nations-inuit-and-metis-rights-826712179.html.

those rights as well.[103] The United Nations adopted this document in 2007, but Canada and only a few other countries have formally enacted the principles contained within.[104] Additionally, the bill requires all levels of government to carry out implementation of UNDRIP by means of policies and programs, all in cooperation with Indigenous peoples, and to make sure that the laws of Canada are consistent with the rights recognized in the document. Previously, Section 35 afforded Indigenous peoples with a bare minimum of recognized rights, and the only path to prove and fight for individual rights was lengthy, costly litigation in the courts on a case-by-case basis. However, Bill C-15 enumerates and explains many specific rights, adopting all forty-six articles contained in UNDRIP.[105] From the right to traditional medicines[106] to the right of dignity and diversity of their cultures,[107] Bill C-15 is the most comprehensive and extensive piece of legislation recognizing and affirming Indigenous rights in Canada, and is the first concrete step towards aligning law with previously made promises, declarations, and mandates. Through enacting this bill, Canada has also presented itself as an example of a nation that was not only willing, but also able, to implement a crucial international human-rights instrument.

B. Discussion of Current Law in the U.S.

The United States Constitution only mentions the word "Indian" three times, and all references are economic or operational in nature rather than regarding human rights. Two of the three uses are in Article I, first in Section 2 as a clarification on enumeration for determining a state's number of representatives in Congress ("excluding Indians not taxed"),[108] and second in Section 8, providing Congress the power to regulate commerce "with the Indian Tribes."[109] The third reference is in Section 2 of the Fourteenth Amendment, again regarding apportionment of Representatives and "excluding Indians not taxed."[110] Indigenous peoples are now of course American citizens, and therefore are granted all individual rights delineated in the Constitution, but there is no explicit, separate provision within the Constitution recognizing and affirming Indigenous rights. Because of this, the Supreme Court developed a large body of law defining the status of Indigenous peoples and Tribes within the dual federal and state system.

Case law has served as the foundation of Indigenous rights in the United States, beginning in the early 1800s with the Marshall trilogy. *Johnson v.*

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[103] United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.) [hereinafter C 14]; *see also* El Gharib, *supra* note 100.

[104] El Gharib, *supra* note 100.

[105] *See* Perry Bellegarde, *The Passage of Canada's UNDRIP Bill Is a Triumph We Should All Celebrate*, GLOBE & MAIL (June 21, 2021), https://www.theglobeandmail.com/opinion/article-the-passage-of-canadas-undrip-bill-is-a-triumph-we-should-all/.

[106] C 14, *supra* note 103, art. 24.

[107] *Id.* at art. 15.

[108] U.S. CONST. art. I, § 2.

[109] U.S. CONST. art. I § 8.

[110] U.S. CONST. amend. XIV, § 2.

M'Intosh,[111] *Cherokee Nation v. Georgia*,[112] and *Worcester v. Georgia*[113] were the first essential cases decided regarding rights of Indigenous peoples, especially in relation to the new, colonial government. These cases were the genesis of the trust doctrine, claiming that Indian Tribes are "domestic dependent nations"[114] of the United States, and also establishing extremely limited Tribal land rights.[115] Further case law established the federal government's jurisdiction over enumerated "major" crimes committed within Indian territory and explained that Congress's authority over Indigenous peoples flows from a relationship akin to a "guardian and his ward."[116] The body of case law continued to establish parameters around Indigenous peoples through paternalistic and controlling underlying policies. For example, in *Lone Wolf v. Hitchcock*,[117] the Court held that in cases involving a controversy between Indigenous Tribes and the government, Congress has the power to unilaterally abrogate an Indian treaty. The basic reasoning was this: since the U.S. had always acted with authority over Indigenous peoples, it would continue to do so.[118] The Court also denied Tribes criminal jurisdiction over non-Indians who committed crimes within reservation boundaries in *Oliphant v. Suquamish Indian Tribe*.[119] In this decision and later in *Montana v. United States*,[120] the Court found there to be implied limitations on Tribal sovereignty due to their dependent status, and that Tribes do not have "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations" unless Congress explicitly grants it.[121]

Although most case law has historically gone to defining the legal status of Indigenous peoples as a whole within the United States, a handful of cases discuss cultural practices. For example, *Lyng v. Northwest Indian Cemetery Protective Association*[122] considered whether a logging project would violate Indigenous rights to free exercise of religion. Although it was conceded that the project would have "devastating effects on traditional Indian religious practices," the Court held that the Government could not be entirely divested "of its right to use what is, after all, *its* land."[123] *Lyng* can be best understood alongside *Oregon v. Smith*,[124] in which the Court upheld a state law prohibiting religious use of

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111 Johnson v. M'Intosh, 21 U.S. 543 (1823).

112 Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

113 Worcester v. Georgia, 31 U.S. 515 (1831).

114 Cherokee Nation, *supra* note 112.

115 *See generally* Johnson, *supra* note 111.

116 *Ex Parte* Crow Dog, 109 U.S. 556 (1883) led to Congress passing the Major Crimes Act; United States v. Kagama, 118 U.S. 375 (1886) affirmed Congress's power to pass the Act and represented a clear shift away from Tribal sovereignty.

117 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

118 *Id.* at 565.

119 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

120 Montana v. United States, 450 U.S. 544 (1981).

121 *Id.* at 564.

122 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

123 *Id.* at 453 (emphasis in original).

124 Oregon v. Smith, 494 U.S. 872 (1990).

peyote. Finding that an individual's religious beliefs do not excuse him from following an otherwise valid law, the Court also held that "to permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[125] In both *Lyng* and *Smith*, the Court refused to apply the heightened standard of scrutiny requested, that there be a compelling government interest. Though the Supreme Court has undoubtedly developed a comprehensive body of case law since the founding of the country, it has consistently defined Indigenous rights as either equivalent to non-Indigenous, individual rights, or as even less (*i.e.*, language specifying dependency or guardianship). The legislative branch has taken some ameliorative measures in an effort to move towards reconciliation.

In 1992, the U.S. Senate passed Joint Resolution 222, which designated that year as the "Year of Reconciliation Between American Indians and non-Indians."[126] The document recognized the 500th anniversary of the arrival of Christopher Columbus on the continent and as such, offered the year as "an opportunity for the United States to honor the indigenous peoples of this continent" in an effort to "develop trust and respect."[127] The resolution called upon the people to "lay aside fears and mistrust" and to "strive towards mutual respect and understanding."[128] The attempt to reconcile the quincentennial celebration of the arrival of colonization in America with proclaiming it to also be the "Year of the American Indian" largely fell flat. Columbus Day was still met with public protests, and nothing substantive changed regarding Indigenous peoples' rights.

Years later, during the Obama administration, the Senate passed another resolution, this time issuing an historic apology "to all Native Peoples on behalf of the United States."[129] The bill acknowledges a "long history of official depredations and ill-conceived policies by the Federal Government regarding Indian tribes" and offers a corresponding apology.[130] It recognizes many of the harms done to Indigenous peoples, such as violating treaties, while also expressing the contribution of Indigenous peoples to the country as people who have "honored, protected, and stewarded this land we cherish."[131] The resolution then goes on to lay out the formal acknowledgement of "former wrongs," an apology for "violence, maltreatment, and neglect," and to commend State governments "that have begun reconciliation efforts."[132] Yet with all the noble intentions of the bill, it contained no foundation for concrete action towards reconciliation, nor did it contain any specific reparations. In fact, at the very end of the document, placed in the last three lines is the following disclaimer:

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[125] Oregon v. Smith, *supra* note 124, at 879.

[126] S.J. Res. 222, 102nd Cong. (1992) (enacted).

[127] *Id.*

[128] *Id.*

[129] S.J. Res. 14, 111th Cong. (2009) (enacted).

[130] *Id.*

[131] *Id.*

[132] *Id.*

Nothing in this Joint Resolution –

(1) authorizes or supports any claim against the United States; or

(2) serves as a settlement of any claim against the United States.[133]

While the disclaimer severely limits its use, the resolution is still an historic apology by Congress, albeit not from the government directly, but "on behalf of the people of the United States." However, when President Obama signed the bill into law, Indigenous peoples and other critics were quick to correctly point out that there were no public announcements and no press conferences, and it was buried in a defense appropriation spending bill.[134] Further, the apology did not mention boarding schools and had no legal effect on Indigenous peoples' rights.

It was not until very recently that any meaningful developments took place at the federal level, specifically with the proposed establishment of the Truth and Healing Commission on Indian Boarding School Policy Act.[135] This marks the first federal effort in the United States "to formally investigate and document. . . cultural genocide, assimilation practices, and human rights violations of Indian Boarding Schools."[136] The purpose of the Act is also to research the ongoing impact of the boarding schools on Indigenous families and communities, and to develop recommendations for the government in order to "heal the historical and intergenerational trauma" caused.[137] The Act also requires representatives from different Tribes and geographic areas, mental-health practitioners, members of Indian organizations with expertise in boarding schools, boarding school survivors, and family members of current students.[138] The Commission must "locate, document, analyze, and preserve" boarding school records and survivors' stories, as well as submit reports and proposals for legislative and administrative action. Although not yet passed, the Act stands to bring about a true turning point in the history of Indigenous rights and reconciliation in the U.S. The inclusion of the terms "cultural genocide" and "human rights" in the text of the bill are important signifiers of acknowledgment, considering that the United States has never admitted that it attempted to commit a cultural genocide with its boarding school policies.[139] Additionally, it will educate the American public as to the true history surrounding the boarding schools, bringing much-needed transparency and

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[133] S.J. Res. 14, *supra* note 129.

[134] *See, e.g.*, Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It*, INDIAN COUNTRY TODAY (Jan. 13, 2010), https://indianlaw.org/node/529.

[135] S. 4752, 116th Cong. (2020) (noting identical bills introduced simultaneously in both House and Senate); *see also* Harvard Law Review, *Recent Legislation: Truth and Healing Commission on Indian Boarding School Policy Act*, HARV. L. REV. BLOG (Nov. 21, 2020), https://blog.harvardlawreview.org/recent-legislation-truth-and-healing-commission-on-indian-boarding-school-policy-act/ [hereinafter HARVARD LAW REVIEW BLOG].

[136] S. 4752, *supra* note 135.

[137] *Id.*

[138] HARVARD LAW REVIEW BLOG, *supra* note 135.

[139] *Id.*

understanding to the issue. While the bill awaits passage and enactment, it has since been reintroduced to the 117th Congress.[140]

In the meantime, the Department of the Interior launched an investigation (the Federal Indian Boarding School Initiative) into over 365 boarding schools, aiming "to address the intergenerational impact" of the schools and to "shed light on the unspoken traumas of the past."[141] In a secretarial memo, Secretary of the Interior Deborah Haaland acknowledged that the purpose of the boarding schools was to culturally assimilate Indigenous children and that severe traumas resulted.[142] The Federal Indian Boarding School Initiative's primary goals are identification of boarding school facilities and sites, as well as the location of student burial sites at or near those facilities. The investigation is planned to proceed in two phases: Collect Relevant Information, and Tribal Consultation.[143] Over the course of the investigation, the aim is to uncover and record experiences of Indigenous children who were placed into boarding schools and to "shed light on the scope of that impact."

In late 2021, President Biden issued a proclamation naming October 11 Indigenous Peoples' Day, which is observed the same day as Columbus Day.[144] While officials across the country, including school board leaders, governors, and entire cities, had already named the holiday and observed it accordingly, the recent presidential proclamation is significant because it acknowledges and celebrates Indigenous peoples on a federal level. Additionally, the 117th Congress has proposed several bills that would potentially affect Indigenous rights, including a bill to establish Native American language resource centers,[145] a bill to enhance protection of cultural heritage,[146] and the reintroduction of the bill to establish the Truth and Healing Commission.[147]

IV. Analysis

A. Analysis of Canadian Law

Certainly, Canada can be seen as a progressive example in relation to U.S. constitutional and court-created law. The existence of Section 35 alone places Canada far ahead of the U.S. when it comes to basic recognition of rights specific only to Indigenous peoples. However, the separation of Section 35 from the Ca-

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[140] *Warren, Davids, Cole Reintroduce Bipartisan Bill to Seek Healing for Stolen Native Children and Their Communities*, WARREN.SENATE.GOV (Sep. 30, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-davids-cole-reintroduce-bipartisan-bill-to-seek-healing-for-stolen-native-children-and-their-communities.

[141] Noelle E. C. Evans, *supra* note 3.

[142] Haaland Memo, *supra* note 2.

[143] *Id.*

[144] *See* Allison Prang, *Indigenous Peoples' Day and Columbus Day: What to Know*, WALL ST. J. (Oct. 11, 2021), https://www.wsj.com/articles/columbus-day-indigenious-peoples-day-what-to-know-11633787027.

[145] S. 989, 117th Cong. (2021); H.R. 2271, 117th Cong. (2021).

[146] S. 1471, 117th Cong. (2021); H.R. 2930, 117th Cong. (2021).

[147] S. 2907, 117th Cong. (2021); H.R. 5444, 117th Cong. (2021).

nadian Charter of Rights and Freedoms is significant, because instead of enumerating and protecting specific rights of Indigenous peoples, the Canadian government instead limited the scope to those rights existing at the time of ratification in 1982. The inclusion of Section 35 was therefore a double-edged sword: it recognized and affirmed rights inherent only to Indigenous peoples, yet severely underrepresented and constrained those rights by defining them as "existing" and leaving any further clarification to the courts. Moreover, there has also been some debate among scholars regarding the actual value of Section 35, with some arguing that acceptance of the Constitution amounts to acceptance of a colonial form of rule based in non-Indigenous ideologies such as private property ownership and individual rights. By complying with Section 35, critics say, Indigenous peoples also conform to the notion that colonial power is the supreme law of the land.[148] However, others claim that Section 35 at minimum settles a tumultuous relationship between Indigenous peoples and the Canadian government, with at least basic rights now having guaranteed protection from government infringement with zero consequences.[149]

Generally, Supreme Court rulings regarding Indigenous rights have established that Aboriginal title to land did originally exist independent of colonial law, which was an essential recognition.[150] However, the overall effect of doing so remained a narrow avenue for Indigenous peoples claiming original title to land, with costly and lengthy case-by-case litigation as the only option for recourse. Additionally, the Supreme Court of Canada did eventually define what an "existing" right was in *R. v. Sparrow*, which again was a landmark decision affirming the existence of Indigenous rights.[151] However, *Sparrow* also served a much weightier and longer-lasting purpose for the Canadian government: by defining Indigenous rights and outlining the *Sparrow* test (which delineates when such a right has been violated), the Supreme Court provided a legal blueprint for purposely structuring laws around Indigenous rights. So long as the government did not violate the *Sparrow* test, they would not violate existing Indigenous rights. This case is an excellent example of the tenacious survival skills of colonial structures; while affirming and defining Indigenous rights, the Court also wrote into law a nearly permanent workaround for legislatures across Canada to continue to override them. By passing the test, such violations have now become completely unchallengeable in a court of law. A further example of colonial perpetuation can also be found in *Mowatt v. Clarke*.[152] There, while the court provided an essential path to justice for survivors of the horrific abuses at residential schools, the ruling still stands largely alone in the larger body of case law ad-

148 *See, e.g.*, Lee Maracle, *The Operation Was Successful, but the Patient Died, in* ARDITH WALKEM & HALIE BRUCE, EDS., BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 309-315 (2003).

149 *See, e.g.*, John Borrows, *Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples, in* ARDITH WALKEM & HALIE BRUCE, EDS., BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 225 (2003).

150 *E.g.*, Calder, *supra* note 69.

151 R. v. Sparrow, *supra* note 70.

152 Mowatt v. Clarke, *supra* note 86.

dressing Indigenous rights and residential schools. While the courts of course cannot draft and enact new law like the legislature can, the holding of *Mowatt* could have extended much further and provided an easier, more accessible course of relief for survivors.

Legislatively, Canada has been fairly active in the realm of Indigenous rights since the passage of Section 35 in 1982. Beginning with the establishment of the Aboriginal Healing Foundation ("AHF") in 1998, Canada has consistently made a country-wide effort to investigate, document, and preserve Indigenous histories and how grievously they were harmed by residential schools. Most importantly, the AHF was federally funded, but run by Indigenous peoples, meaning that those overseeing the processes of information gathering and recordation were Indigenous. This was an important turning point in the overarching story of colonialism in Canada, because starting with the AHF, the colonizers (the Canadian government) were no longer in sole direction of affairs affecting Indigenous peoples. By placing the first efforts at reconciliation and reparations in the control of those directly affected by residential schools, Canada's government took an essential step towards meaningful reconciliation. Though the AHF had a limited mandate, its long-term success was ensured by the establishment of various healing centers and record housing centers across the country.

The creation of the Truth and Reconciliation Commission ("TRC") represents a crucial point in the exposure and dismantling of colonial systems in Canada. This legislation was substantial, as it outlined many Indigenous-defined research and reconciliation mandates. However, it is notable that the TRC did not arise naturally from the legislative body of the federal government. Instead, it was the direct result of the largest class-action lawsuit by Indigenous peoples in Canada's history, which in turn led to the Indian Residential Schools Settlement Agreement. While any such step towards reconciliation is of course positive, it is both disappointing and unsurprising that the creation of the TRC only occurred because of painstaking, grassroots Indigenous efforts, and was not at all initiated by the government of the colonizers. This underscores the notion that settler colonialism persists to this day, meaning that any reconciliation or reparations effort will not be effective if all decisions and definitions of progress are left to the colonial governments and not placed squarely in the hands of Indigenous peoples.

Regardless, the work the TRC performed over the course of its federal mandate was irreplaceable and of the utmost importance. By conducting thousands of interviews, performing extensive research, and thoroughly documenting all its findings, the TRC established a large body of data concerning the harmful effects of residential schools on Indigenous peoples of Canada, then formed recommendations for reconciliation based upon their extensive research. Any effort to repair harms done in the past must begin with in-depth research that exposes all histories with the maximum amount of transparency. The TRC fulfilled this goal, beginning a massive information collection process that allowed the Canadian government to operate on well-informed and most importantly, Indigenous-led, recommendations. Following the end of the TRC's mandate, the establishment of the National Centre for Truth and Reconciliation ("NCTR") served to continue

the commitment of collecting Indigenous perspectives and histories surrounding the residential school movement. By maintaining this body of research, the government manages to maintain efforts at meaningful reconciliation – so long as that body of research is managed and overseen by members of Canada's Indigenous communities.

The recent passage of bills C-8 and C-15 is certainly the most groundbreaking and promising legislative effort regarding Indigenous rights in North America, and the bills are also positive examples for countries founded on colonialism across the world. Though C-8 is largely a ceremonial gesture (including a recognition of Indigenous rights in the Oath of Citizenship), such a move cannot be understated. Had Canada only passed C-8 but not C-15, then the effects and positivity surrounding Bill C-8 alone would be lessened and likely met with critiques of all form and no substance. Again, Canada has made a significant effort to recognize Indigenous rights and place them in an important and status elevated (at least within the Oath of Citizenship) equal to that of a settler Canadian citizen. Though C-8 does not contain anything more substantial in a legal regard, the ceremonial inclusion of a clause concerning Indigenous rights does send a message to Indigenous peoples and to the broader world that the federal government does indeed prioritize making Indigenous rights and recognition of those rights an essential part of what it means to be a citizen of Canada.

However, the bulk of reconciliatory legislation comes in the form of Bill C-15, which adopts into law the standards set by the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").[153] What Section 35, Supreme Court case law, and previous legislative efforts lack, C-15 seems to make a legitimate effort to make up for. According to the government, the purpose of C-15 is "to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law."[154] By doing so, the government hopes that referencing UNDRIP as a framework can help lawmakers across the country "address injustices. . . [and] promote mutual respect and understanding."[155] The enactment of the declaration into law provides Canada with a "clear vision for the future" and ensures that all federal laws adhere closely to the rights and standards set out in UNDRIP.

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[153] Interestingly, when UNDRIP was overwhelmingly adopted by the UN in 2007, the votes were 143 for, 11 abstentions, and 4 against. The four countries to vote against its passage were Canada, the United States, Australia, and New Zealand. Press Release, General Assembly, General Assembly Adopts Declaration of Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sep. 13, 2007); Canada then "shed its objector status" and expressed support for UNDRIP in 2016. Veronica Martisius, *Bill C-15 & Implementing UNDRIP: What Should this Mean for the First Nations, Inuit and the Métis in Relationship to Canada?* B.C. CIV. LIBERTIES ASS'N (May 20, 2021), https://bccla.org/2021/05/bill-c-15-implementing-undrip-what-should-this-mean-for-the-first-nations-inuit-and-the-metis-in-relationship-to-canada/; the United States expressed support for UNDRIP in 2011, stating that the Declaration, "while not legally binding or a statement of current international law" has "both moral and political force." *Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples,* U.S. DEP'T STATE (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

[154] *Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act*, GOV'T CAN., https://www.justice.gc.ca/eng/declaration/about-apropos.html (last visited Aug. 12, 2022).

[155] *Id.*

Notably, however, C-15 does not directly enshrine UNDRIP into law, but instead establishes a framework for the implementation of the rights enumerated within. This means that a minister will be made responsible for preparing and creating a plan to achieve the objectives of UNDRIP "in consultation and cooperation with Indigenous peoples."[156] So while C-15 is certainly remarkable, it does not go as far as many would hope by directly enacting UNDRIP into law.[157] David Lametti, Canada's current Minister of Justice and Attorney General who introduced the bill in the House of Commons, said, "Bill C-15 is not intended to change Canadian law immediately. Rather, it is an attempt to establish a process that could make federal laws and policies consistent with UNDRIP."[158] Here, Canada is again running the risk of perpetuating colonial structures if the minister appointed to monitor the implementation of the bill is not Indigenous, and if Indigenous peoples are not sufficiently consulted and deferred to. Regardless, the effort to align Canadian law with what has been called the "minimum"[159] of standards for Indigenous rights represents an essential push forward towards meaningful recognition of inherent rights that have been violated for hundreds of years.

However, the people of Canada are divided on their perspectives of C-15. Proponents and supporters see the bill as a long-awaited opportunity for Canada to finally meet its objectives regarding Indigenous rights. One Indigenous scholar said that C-15 is a chance "to actually break with the colonial status quo," while also maintaining skepticism because of the bill's inherent colonial origins in federal government.[160] UNDRIP contains, perhaps most importantly, an inherent right to self-determination, a right that is taken for granted by white settlers and a right that has been stripped from Indigenous peoples in different ways for hundreds of years. Where the majority of Indigenous support for C-15 seems to come from is the history of UNDRIP itself, as it was uniquely driven and formed by Indigenous peoples from around the world.[161]

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156 Cameron French, *C-15: What You Need to Know about Law that Could Redefine Indigenous-Government Relations in Canada*, CTV NEWS (May 21, 2021), https://www.ctvnews.ca/politics/c-15-what-you-need-to-know-about-law-that-could-redefine-indigenous-government-relations-in-canada-1.5438215.

157 Martisius, *supra* note 153. For example, in 2009, Bolivia became the first country in the world to implement UNDRIP directly into its Constitution.

158 *Id.*

159 French, *supra* note 156.

160 "Like most Indigenous land defenders, I view anything the government does with skepticism. We have witnessed many Indigenous-led movements that spark resistance to colonialism be quelled by promises that wind up broken. Recommendations to improve and respect the inherent human rights of Indigenous Peoples — such as the Truth and Reconciliation Commission's Calls to Action or various Supreme Court decisions (albeit narrowly defined) — fail to be implemented." Katsi'tsakwas Ellen Gabriel, *Ellen Gabriel: Bill C-15 Is Chance 'To Actually Break with the Colonial Status Quo'*, RICOCHET (Apr. 12, 2021), https://ricochet.media/en/3593/ellen-gabriel-bill-c-15-is-chance-to-actually-break-with-the-colonial-status-quo.

161 "The Declaration represents a clear expression, for the 21st century, of what Indigenous Peoples have been fighting for all along: our right to live in peace and dignity, to overcome the impacts of colonization through exercise of our rights to self-determination, and to have our own Indigenous laws and traditions respected, instead of vilified." Gabriel, *supra* note 160.

Critics of C-15 seriously question whether the bill will have any substance. The Association of Iroquois and Allied Indians ("AIAI") issued a letter vehemently opposing the passage of the bill due to inadequate consultation with Indigenous peoples.[162] Stating that "Canada has not adequately engaged with Indigenous peoples," the Deputy Grand Chief of AIAI stated that "[m]eetings were capped, time was restricted, and engagement periods were not extended to make proper use of time and information."[163] The organization strongly opposed passing C-15 as is, citing the importance of "not having our rights dictated to us as [the Federal Government] see[s] fit rather than recognize our right to self-governance."[164] Other groups have pointed out rather large flaws in the lack of external oversight and international review by the United Nations,[165] and the bill's reliance on a racist premises that Canada has ownership of the land. Chief Donny Morris of Kitchenuhmaykoosib Inninuwug stated that the racist foundations of the bill "provide that our inherent rights to our Homelands, and the accompanying natural resources, are subservient to the Crown's presumed underlying title to our Homelands and natural resources."[166]

What will be interesting to watch unfold is how the Supreme Court reconciles the implementation of this legislation with their body of case law already interpreting Section 35 and the idea of "existing" Aboriginal rights. Terence Sakohianisaks Douglas, a lawyer who helped draft a letter in opposition of Bill C-15, said, "[t]aking these rights from the international perspective, where these are supposed to be universal human rights, and then putting them into the box of Section 35 is very much watered down, because they can still be manipulated. They can still be controlled by the government and the courts."[167] While *Sparrow* is still good law, the government need only pass the test set by the Court in order to violate Indigenous rights without violating Canadian law. Will C-15 change this standard and provide an accessible enough avenue for survivors of residential schools to obtain justice for violations of their inherent rights? Additionally, where land rights are concerned, will C-15 extend so far to protect Indigenous

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[162] *See* Ira Timothy, *AIAI Opposes a Canadian UNDRIP that Acts without Consent and Consultation*, ASS'N IROQUOIS & ALLIED INDIANS (Apr. 1, 2021), https://www.aiai.on.ca/aiai-opposes-a-canadian-undrip-that-acts-without-consent-and-consultation/; Treaty 8 Grand Chief Arthur Noskey, along with Treaty 6 and Treaty 7 Chiefs, opposed the Assembly of First Nations' (AFN) exclusive negotiations with the Canadian government, stating that the AFN is a lobbyist group and is overshadowing the right of each individual nation to consult on the implementation of UNDRIP. *See* Chris Stewart, *Grand Chief in Alberta Says AFN Shouldn't Be Consulting on UNDRIP Bill with Canada*, APTN NAT'L NEWS (Apr. 20, 2021), https://www.aptnnews.ca/national-news/grand-chief-in-alberta-says-afn-shouldnt-be-consulting-on-undrip-bill-with-canada/.

[163] Timothy, *supra* note 162.

[164] *Id.*

[165] *See* Russ Diabo, *UNDRIP Bill C-15 Deeply Flawed and Must Be Rejected Say Indigenous Networks and Land Defenders*, MEDIA CO-OP (Dec. 11, 2020), https://mediacoop.ca/story/undrip-bill-c-15-deeply-flawed-and-must-be-rejecte/37046.

[166] Logan Turner, *Kitchenuhmaykoosib Inninuwug Opposes Federal Government's Proposal to Implement UNDRIP*, CBC NEWS (Jan. 26, 2021), https://www.cbc.ca/news/canada/thunder-bay/ki-rejects-federal-undrip-bill-1.5887344.

[167] *Id.*

lands from economic development and the newest form of cultural control by means of resource colonialism?

B. Analysis of U.S. Law

Upon reading the plain text of the U.S. Constitution, it is apparent that the Framers had no intention of considering Indigenous peoples as citizens of the newly formed government and were only concerned with proper representation for taxes and with acquiring land by means of coercion and force. There is nothing in the U.S. Constitution akin to Section 35 of Canada's Constitution, and the word "Indian" is only used three times. Moreover, the constitutional amendment process is extremely slow, and the hurdles are significant. As provided in Article V, any proposed amendment must first be proposed either by Congress with a two-thirds majority vote in both the House of Representatives and the Senate, or by a constitutional convention called for by two-thirds of the State legislatures.[168] Then, if the proposed amendment receives the requisite two-thirds vote from both houses of Congress, it must be ratified by three-fourths (thirty-eight of fifty) of the States.[169] The last time this process successfully occurred was in 1992, when the Twenty-Seventh Amendment was ratified, which dealt with congressional pay.[170] However, an amendment guaranteeing equal rights for Native Americans, as well as additional inherent rights, is extremely unlikely to be introduced, passed, and then ratified. After all, the U.S. has yet to ratify the Equal Rights Amendment, introduced in 1972, which would guarantee constitutional protection for women's rights, ensuring that "[e]quality of rights under the law" are not hindered by the United States or any State.[171]

Simply put, the U.S. is a nation that is extremely resistant to changing its Constitution, even for reasons like equality and restorative justice. Writer and Indigenous rights activist Roxanne Dunbar-Ortiz states, "[i]n other constitutional states, constitutions come and go, and they are never considered sacred in the manner patriotic U.S. citizens venerate theirs."[172] Dunbar-Ortiz points out that most U.S. citizens take great pride in "exceptionalism" and that historians and legal theorists categorize the U.S. as being a "nation of laws," making the argument that the Constitution, the writings of the Founding Fathers, and even Martin Luther King Jr.'s "I Have a Dream" speech are all "bundled into the covenant as sacred documents that express the U.S. state religion."[173] Indeed, it is difficult to find a nation elsewhere on Earth with quite the amount of patriotism that most

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168 U.S. CONST. art. V.

169 Office of the Federal Register, *Constitutional Amendment Process*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution (last visited Sep. 1, 2022).

170 *See Congressional Compensation*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvii/interps/165 (last visited Sep. 1, 2022).

171 Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

172 DUNBAR-ORTIZ, *supra* note 24, at 50.

173 *Id.*

American citizens promote, and though this sense of pride certainly can contribute positively to the fabric of the nation, the perception of the Constitution as a sacred document parallels dangerously with the "nation of immigrants" mantra. Interestingly, an essential piece of this sacred document's history is rarely exposed: the Constitution was significantly based off the existing government of the Haudenosaunee Indian Nation,[174] yet the "nation of immigrants" had to first be "cleansed" of its Indigenous inhabitants.[175] In the U.S., adding an amendment that fundamentally alters the core of the Constitution is in theory not impossible, but in practice, it is essentially unworkable.

Shortly after the founding of the U.S., the Supreme Court immediately concerned itself with laying a bedrock of land acquisition laws which would enable the U.S. to forcibly take Indigenous lands for years to come. The Supreme Court spent years crafting a very elaborate trap, thus empowering the U.S. government to assume original title to Indigenous lands, provide little to no legal recourse for the Tribes from whom they took the land, and then removing Indigenous peoples onto reservations, leaving them with inferior land and human rights status in the eyes of federal law. By enshrining the doctrine of discovery into law, the Supreme Court provided a legal excuse for theft of land, enabling settler colonial practices to devastate Indigenous communities in the name of divine conquering right. With their decision in *Johnson v. M'Intosh* in 1823, the Court with one fell swoop declared white settlers to have exclusive discovery rights, Native Americans to only have a "title of occupancy," and the federal government to have the unrestricted right to take Native land free of the just compensation required by the Fifth Amendment.[176] Because these cases have not yet been critically examined and dismantled, they provide a legal, moral, and even colloquial foundation for further settler colonial structures, such as pipelines across Indigenous lands,[177] destructive and devastating mining practices on Indigenous sacred sites,[178] and extensive logging projects in violation of Indigenous religions.[179]

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[174] *Influence on Democracy*, HAUDENOSAUNEE CONFEDERACY, https://www.haudenosauneeconfederacy.com/influence-on-democracy/ (last visited Sept. 9, 2022) (detailing how, among other things, the Haudenosaunee used systems of checks and balances and invented population-based representation in government).

[175] DUNBAR-ORTIZ, *supra* note 24.

[176] *Id.* at 199-201; Lyng, *supra* note 122, at 453 (stating that certain cases stand out from others, such as *Lyng*, decided in 1988, in which the Court declared that the federal government could log forested land against Indigenous religious beliefs because it was "after all, *its* land").

[177] *See, e.g.*, Steven Mufson, *Keystone Pipeline's Path Cuts across Native American Land, History*, WASH. POST (Jul. 21, 2014), https://www.woodwardnews.net/keystone-pipelines-path-cuts-across-native-american-land-history/article_1b56d969-293d-5f5a-a3c9-7c70bf5e53cc.html (detailing the Keystone XL pipeline and its path through Canada and the U.S., and across Indigenous lands).

[178] *See, e.g.*, Ernest Scheyder, *Native Americans Say U.S. Does Not Own Land It Is about to Give to Rio Tinto*, REUTERS (Jan. 14, 2021), https://www.reuters.com/article/us-usa-mining-resolution/native-americans-say-u-s-does-not-own-land-it-is-about-to-give-to-rio-tinto-idUSKBN29J2R9 (explaining Rio Tinto's mining project on the sacred land of the San Carlos Apache – Rio Tinto previously destroyed a 46,000-year-old sacred Aboriginal site in Western Australia).

[179] *See, e.g., G-O Road*, SACRED LAND FILM PROJECT, https://sacredland.org/g-o-road-united-states/ (last visited Sep. 9, 2022) (explaining the background of the *Lyng* case, where against Native religious principles, the Supreme Court found the necessity of taking sacred land outweighed religious freedom of the Tribe).

The Supreme Court has also consistently defined the relationship between Indigenous peoples and the federal government in the context of a ward and a guardian, which has further diminished already unequal rights of Indigenous peoples.[180] Tribal sovereignty has always been incredibly restricted, with cases like *Montana v. United States* and *Oliphant v. Suquamish Indian Tribe* adding to a long list of decisions that have gradually chipped away at the bounds of sovereignty.[181] Recently, in *Oklahoma v. Castro-Huerta*, the Supreme Court overturned a long-held understanding that individual states do not have the authority to prosecute non-Indians who commit crimes against Indians in Indian country.[182] By giving the States concurrent jurisdiction with the Federal Government over such crimes, the ruling all but eliminated Tribal sovereignty over crimes committed on their own lands.[183] Interestingly enough, this decision came only a few months after the Violence Against Women Act was reaffirmed, in which Congress firmly supported Tribal sovereignty and Tribal criminal jurisdiction.[184]

The disconnect between the Supreme Court and Congress is likely to continue for the foreseeable future. The current makeup of the Court is strongly conservative; there are six conservative Justices to three liberals. Moreover, the current Court has already established a bold reputation for itself, not hesitating in the least to strike down previous rulings on women's rights,[185] suggesting the retraction even more rulings on other civil rights,[186] and even retool and redefine the very meaning of *stare decisis*.[187] When viewing the trajectory of the Court in comparison to the standards set by UNDRIP, it is evident that the U.S. seems committed to undermining, rather than fortifying, Indigenous rights. Tribal sovereignty has long been respected by the State governments, but with the ruling in *Castro-Huerta*, that is at risk. Moreover, sovereignty is an extension of the crucial right to Indigenous self-determination. The consequences of restricting sovereignty will be felt far and wide. It will almost certainly exacerbate the problem of Missing and Murdered Indigenous Women and will significantly hinder individual Tribes' abilities to achieve justice for their own people. Regarding residential schools, the Supreme Court is an unsympathetic forum. Though Tribes

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[180] *See* Cherokee Nation, *supra* note 112; *see also* Worcester v. Georgia, *supra* note 113.

[181] Montana v. United States, *supra* note 120 (holding that the Crow Tribe could not exclude by regulation non-Indians from fishing and hunting on reservation lands held in fee by non-Indians); Oliphant, *supra* note 119 (holding that Tribes cannot have criminal jurisdiction over non-Indians who commit crimes within reservation boundaries).

[182] Oklahoma v. Castro-Huerta, No. 21-429, slip op. 597 (U.S. June 29, 2022).

[183] "Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's." Oklahoma v. Castro-Huerta, *supra* note 182, at 2 (U.S. June 29, 2022), (Gorsuch, J., dissenting); "But this declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom" *Id.* at 12; *see also NARF/NCAI Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma,* NATIVE AM. RTS. FUND, (July 7, 2022), https://www.narf.org/castro-huerta-v-oklahoma-scotus-ruling/.

[184] *Id.*

[185] Dobbs v. Jackson Women's Health, No. 19-1392, slip op. 597 (U.S. June 24, 2022).

[186] *Id.* (Thomas, J., concurring).

[187] *Id.* (Roberts, J., concurring).

have taken matters into their own hands previously, calling for testimonies and maintaining many of their own records, it is highly unlikely that they will receive any support in the way of Supreme Court law.

The two Joint Resolutions passed by the Senate, first in 1992 and later in 2009 during the Obama Administration, served as grand gestures for peacemaking and recognition of the unique status of Indigenous peoples in the U.S. In reality, however, they carried little to no weight regarding legal reparations or meaningful reconciliation. An apology with no attempt at justice or rectifying moral wrongs is no apology at all, it is merely meant to placate, distract, and waste valuable time. Moreover, both resolutions are made even more hollow by the lack of consultation or care for Indigenous opinions and input.

However, with the appointment of the current Secretary of the Interior, Deborah Haaland (the first Indigenous person to serve as a cabinet secretary), perhaps the U.S. will see some meaningful progress towards reparations for Indigenous rights' violations in residential schools. Haaland created the aforementioned Federal Boarding School Initiative on June 22, 2021, which was to "undertake an investigation of the loss of human life and lasting consequences of the Federal Indian boarding school system."[188] Important goals of the Initiative included: identifying boarding schools and the names and Tribal identities of Indian children placed in the schools; identifying locations of burial sites of remains of Indian children located at or near school facilities and; incorporating Tribal and individual viewpoints, including those of descendants, on the experiences in, and impacts of, the Federal Indian boarding school system.[189] The final report of the initial investigation was issued in May of 2022 and totaled 106 pages. The Executive Summary states in part:

> The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including but not limited to the following: (1) renaming Indian children from Indian to English names; (2) cutting hair of Indian children; (3) discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices; and (4) organizing Indian and Native Hawaiian children into units to perform military drills.[190]

The Department also identified 33 marked burial sites, 6 unmarked burial sites, and 14 marked and unmarked burial sites present at a school location, as well as stated that the number is expected to increase as the investigation continues.[191] Approximately 500 deaths were attributable directly to the boarding

[188] U.S. Dep't of Interior, Federal Indian Boarding School Initiative Investigative Report, at 3, (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [hereinafter DOI Report].

[189] *Id.*

[190] *Id.* at 7.

[191] *Id.* at 8.

schools, and that number is also expected to increase.[192] It contains the methodology used by the Department in gathering information, an historical overview of U.S. law and policy regarding Indian territorial dispossession and Indian assimilation, a history of the boarding schools and their various nuances, a list of all identified boarding schools, the legacy impact of the boarding school system, and several findings and conclusions.[193]

The Report was deliberately explicit when summarizing the history of Indian education policy, a necessity that has long been missing from U.S. history and government documents. For example, it states:

> Beginning with President Washington, the stated policy of the Federal Government was to replace the Indian's culture with our own. This was considered "advisable" as the cheapest and safest way of subduing the Indians, of providing a safe habitat for the country's white inhabitants, of helping the whites acquire desirable land, and of changing the Indian's economy so that he would be content with less land. Education was a weapon by which these goals were to be accomplished.[194]

The Report further illuminates how the United States viewed education as the most effective tool for conquering the Indigenous Peoples:

> Past experience goes far to prove that it is cheaper to educate our wards than make war on them, or let them grow up in ignorance, to say nothing of the humanity of the act, or the results attained. Federal records document that the United States considered the Federal Indian boarding school system a central part of its Indian assimilation policy. The Department has described the role of Indian assimilation policy coupled with Indian land dispossession policy as follows: "The essential feature of the Government's great educational program for the Indians is the abolition of the old tribal relations and the treatment of every Indian as an individual. The basis of this individualization is the breaking up of tribal lands into allotments to the individuals of the tribe. This step is fundamental to the present Indian policy of the Government. Until their lands are allotted, the Government is merely marking time in dealing with any groups of Indians."[195]

The findings of the Investigation demonstrate the lasting impact of settler colonialism on the Indigenous peoples of the present-day United States. Generations of Native Americans "went on to attend" the schools, "leading to an intergenerational pattern of cultural and familial disruption under direct and indirect support by the United States."[196] Additionally, the "twin Federal policy

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[192] DOI Report, *supra* note 188, at 9. This number is expected to increase to the thousands or tens of thousands.

[193] *Id.*

[194] *Id.* at 21.

[195] *Id.* at 37.

[196] *Id.* at 90.

of Indian territorial dispossession and Indian assimilation through Indian education" extended far beyond the boarding school system; this policy included over one thousand other Federal and non-Federal institutions, such as asylums and orphanages.[197] One of the more condemning findings of the Investigation was that funding for the boarding school system included those funds obtained from Tribal trust accounts managed by the United States for the benefit of Indians.[198]

Importantly, the Report states that thus far, the Federal Government has not provided any forum or opportunity for survivors or descendants to voluntarily detail their experiences in the Federal boarding school system.[199] The Report concludes that further review is necessary to "determine the reach and impact of the violence and trauma inflicted on Indian children" and that the policy of Indian assimilation contributed to the loss of: "(1) life; (2) physical and mental health; (3) territories and wealth; (4) Tribal and family relations; and (5) use of Tribal languages."[200] Finally, the Report recommends the completion of the full investigation, identification of all surviving boarding school attendees, documentation of experiences, development of a records repository, engagement of other Federal agencies to support the investigation, advancement of Native language revitalization, promotion of Indian health research, and recognition of the generations of affected children with a Federal memorial.[201]

Reactions to the Report were largely positive, though many noted that there is still much work to be done. First Vice President of the National Congress of American Indians ("NCAI") Mark Macarro acknowledged the Report as a signal of progress, stating that boarding schools are "not an issue of the past as the stark reality of generational trauma lives on today. . . there is still much truth, justice, and reconciliation needed in our communities."[202] Others note that the Report only "scratches the surface on the schools" and question the role that religious institutions played.[203] Some have criticized the Report for not completely detailing how the children died or who was responsible, and many agree that "the report is a good first step, but more work is needed."[204] "The children aren't home," and until they are, we will not "get to the bottom of it."[205]

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197 DOI Report, *supra* note 188, at 91-92.

198 *Id.* at 92.

199 *Id.*

200 *Id.* at 94.

201 *Id.* at 95-99.

202 *U.S. Department of the Interior Releases Historic Report on Federal Indian Boarding Schools*, NAT'L CONG. AM. INDIANS, (May 11, 2022), https://www.ncai.org/news/articles/2022/05/11/u-s-department-of-the-interior-releases-historic-report-on-federal-indian-boarding-schools.

203 Krystal Nurse, *Anishinaabe Welcome, Question Boarding School Investigation by Department of Interior*, LANSING ST. J. (June 16, 2022), https://www.lansingstatejournal.com/story/news/local/2022/06/16/anishinaabe-mixed-dept-interiors-boarding-school-findings-haaland-native-american/7613667001/.

204 Kimmy Scherer, *DOI Report Details Disgraceful Unconstitutional Federal Indian Boarding School History*, W. RIVER EAGLE (May 19, 2022), https://www.westrivereagle.com/articles/doi-report-details-disgraceful-unconstitutional-federal-indian-boarding-school-history/.

205 *Id.*

Finally, the Executive Branch could offer more relief than it previously has. Though funds from the Consolidated Appropriations Act will continue through fiscal year 2023 at the President's request, maintaining funding for the Federal Boarding School Initiative,[206] the President, as the head of the Executive, has other powers at his disposal that could alleviate, or at least acknowledge and apologize for, the Federal boarding schools. For example, the President could issue a formal, standalone apology, or even designate a Remembrance Day or national monument in memory of the Native American children lost.

V. Proposal

A. Lessons from Comparison

Employing comparison in the international legal landscape can be incredibly beneficial because of its ability to allow researchers to view the legal treatment of similar situations in different cultural and historical contexts. "Comparisons are required in order to understand what the essential conditions may be of whatever we are trying to understand,"[207] meaning that if we can isolate the specifics of what causes a certain law to be created, we are more likely to be able to successfully replicate parts or all of that law in other countries. In the context of residential schools in Canada and the U.S., both countries could benefit greatly from an in-depth comparative study and analysis of the development, enactment, implementation, and ultimate effects of the body of law surrounding residential schools. Moreover, a comparative approach leaves open the possibility to apply findings and methodology to other countries with a history of settler colonialism and violence against Indigenous peoples, such as Australia and New Zealand. The following subsections contain suggestions for Canada and the U.S. in turn, and by viewing these proposals in comparative fashion, any similarities or differences between the two nations can be more easily identified, and larger trends can be analyzed together.

B. Proposal for Canada

The swiftest and most promising method for effecting change at the federal level is of course through the legislature. Until very recently, Indigenous peoples have largely been trapped in the court system, litigation their only option for recourse on a case-by-case basis, fought slowly in a system structured by colonialism and with uncertain outcomes. However, C-15 may represent a real opportunity to alter that course by providing specific guidance to lawmakers regarding the bare minimum of respect for Indigenous rights. It is a remarkable piece of legislation that places Canada at the forefront of a global effort to finally make reparations for the atrocities done to Indigenous peoples by means of colonialism. Yet, with all its trailblazing promise, C-15 must be implemented carefully and mindfully if it is to not fall in line with the colonial history of Canada. Many

[206] DOI Report, *supra* note 188, at 95.

[207] CHARLES WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 163 (1970).

fear that it is yet another empty promise, a new bill full of aspirations and hopes that serve only to pacify activists and cover up insidious colonial projects like resource development.

If Canada is to break with the past, it should ensure that as suggested by the AIAI, the implementation of C-15 is overseen externally and internationally, likely by the United Nations. The nature of settler colonialism suggests that in a system of oppressors and oppressed, the oppressors will never willingly change a status quo that so heavily benefits only them. For Canada, this means that the reconciliation efforts for residential schools must continue to be overseen and led by Indigenous peoples, and the minister in charge of implementing C-15 must be Indigenous. It is illogical to trust the system that created current injustices to properly rectify them with no external, neutral oversight or internal, Indigenous directives wholly independent from the government.

C. Proposal for the U.S.

At minimum, the U.S. would make meaningful and sincere steps towards reconciliation and reparations by reissuing an apology for the wrongs done by boarding schools, this time without burying it in an unrelated bill and with far greater media attention. However, the best path for the U.S. to take is to follow Deborah Haaland's recommendations regarding establishing the Truth and Healing Commission ("THC"). It is imperative that the collection of information, stories, and histories of Indigenous Peoples affected by the residential school system begins as soon as possible. Additionally, by creating a commission which operates very deliberately outside the sphere of direct government control, the U.S. would be able to better ensure that the THC is following the Indigenous agenda and not continuing down the well-established path of colonial control. However, the bill is proving difficult to pass into law, having failed in 2020 and then been reintroduced in 2021. The survivors of boarding schools are growing older, and with each survivor's story lost, the U.S. falls further from reconciliation.

In the meantime, Haaland has attempted to take matters into her own hands by creating the DOI investigation of the boarding schools. While this effort is certainly necessary, it must be approached cautiously because the entirety of the investigation will occur within a branch of the federal government. Though an Indigenous woman is leading the investigation, she will likely be somewhat restrained by structures built into the government by colonial ideals, and such an investigation will have its limits. Passing the THC and creating the organization is the single most important step the U.S. can take. Without the establishment of a long-term commitment to investigation and documentation, the U.S. risks the loss of hundreds or even thousands of first-hand accounts, alternate and more accurate versions of American and Indigenous history, and an opportunity to achieve justice for countless Indigenous people.

Additionally, because the U.S. seems to be following suit after Canada's creation of the TRC, the U.S. can certainly use its northern neighbor as a comparative study. For example, in Canada, the creation of the NCTR directly following the TRC enabled all the records collected during the research mandate to be pre-

served at a university for public access. This is essential to retaining and passing on the cultures that were targeted by the residential school cultural genocide. The U.S. can further look to the implementation of UNDRIP via Bill C-15 as a long-term goal, while also learning some valuable lessons from the criticisms of Indigenous peoples in Canada. If the U.S. were to ever undertake passing such legislation, it would be very well served by looking to the retrospective opinions of Indigenous peoples, as well as the effectiveness of C-15's implementation.

D. Proposals for Legal Education and Law Schools

History has shown that the most effective bringer of change is not the government, but often the people themselves, participating in grassroots movements and banding together to defend their rights. However, in the case of residential schools, more can and should be done by allies, especially allies in the legal field, that has not yet occurred. For example, in the U.S., American Indian Law is not tested on the bar exam, nor is it an ABA-required course for any law school in the country. The third sovereign of the nation, who existed before any semblance of the U.S. government did, is entirely swept under the rug in the education of every single law student. The hegemony of settler knowledge has effectively excluded Native Americans from American legal education. In Canada, where courses in Aboriginal Law are far more common due to a TRC mandate,[208] questions have been raised as to whether these courses can be properly taught in English, or how to organize such a complex and multifaceted topic into just one class.[209] The risk of committing a misstep and further alienating Indigenous voices from the classroom runs high. And in both nations, elevation of Indigenous perspectives in law schools is crucial; to teach a class in Indigenous law from the perspective of the U.S. or Canadian legal system only serves the purpose of furthering settler colonial domination over Indigenous cultures and traditions. Similarly, to teach property law without also teaching the genocidal practices that accompanied "legal" land theft only perpetuates current settler hegemony in legal knowledge. These are the seemingly small, yet absolutely essential, things that law students, law professors, and legal professionals need to interrogate every day. While we wait for the federal governments to address their pasts, those of us in the legal profession should take matters into our own hands and practice culturally responsive teaching and learning in a conscious and deliberate manner.

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[208] "We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism." Mandate 28, TRUTH AND RECONCILIATION COMMISSION OF CANADA: CALLS TO ACTION, TRUTH & RECONCILIATION COMM'N CAN., at 3 (2015), https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf.

[209] *See* John Borrows, *Heroes, Tricksters, Monsters and Caretakers: Indigenous Law and Legal Education*, 64 MCGILL L. J. (2016), https://lawjournal.mcgill.ca/article/heroes-tricksters-monsters-and-caretakers-indigenous-law-and-legal-education/.

VI. Conclusion

Have the U.S. and Canada made efforts to promote reparations for residential schools? Yes, but the degree to which they are successful can only be answered by Indigenous peoples themselves. However, it is worth gathering the histories and legal treatments of these attempted cultural genocides together in a comparative fashion in order to better understand them, and in turn, be able to better see the way forward. Additionally, extensive research should be done to collect current perspectives, opinions, and needs of Indigenous peoples, particularly in the U.S. For hundreds of years, the dominant tellers of the story have been the settlers. Both nations should change the way they talk about the past, and they must change the way they record the present. A body of research should be further grown and utilized from respecting the Indigenous right to self-determination rather than from what the colonizers have determined Indigenous Peoples to be. In the context of residential schools, this means that both nations must adequately address the past as well as the present and future. The U.S. must create the Truth and Healing Commission in order to collect and preserve the histories of residential school survivors, Canada must be rigid in its commitment to Indigenous involvement and leadership in the implementation of C-15. Both nations should also look to each other and themselves critically in an effort to see the perpetuation of colonial structures by means of land and environmental control.

Residential and boarding schools are but one component in a massive, settler colonial machine. When their history is examined in detail, it is evident that they played an essential role in larger policies of Indigenous assimilation and attempted cultural genocide. The scope of necessary acknowledgement, reconciliation, and reparations may seem impossibly broad, but by examining each piece of the colonial regimes in a fully transparent manner, both nations have the chance to make meaningful progress. This starts with full disclosure of every policy and every law aimed at removing or assimilating the continent's Indigenous inhabitants in order to make way for the alleged saviors. The United States and Canada have both spent hundreds of years intentionally obscuring and destroying much of Indigenous history, and residential schools are only one piece of a much larger story. To reach any meaningful reconciliation, every government initiative must acknowledge its position of white settler privilege and defer to Indigenous leadership. In Canada, this means staying the course and remaining committed to the goals of the TRC and NCTR, while also intentionally privileging Indigenous voices in the narrative. In the U.S., this means finally conducting comprehensive research regarding boarding schools, including the gathering of firsthand accounts, and promoting Indigenous guidance along the way. Finally, in the broader context of the law in North America, reconciliation and reparations will not easily succeed without getting legal education right; the issues facing Indigenous communities must be centered, and the ways in which the law perpetuates these issues must be critically examined.

VICTIMS OF VIOLENCE: THE CYCLICAL MILITARY TAKEOVER OF THE MYANMAR GOVERNMENT

Kajal Patel*

ABSTRACT

Myanmar has a long history of military coup d'état. In February of 2021, the Myanmar military took over the government. The military's existing presence in everyday government and Myanmar's 2008 Constitution provides the military the ability to do so. Since the government takeover, violence against citizens has escalated and is legally justified. Additionally, Myanmar has a long history of violence against Rohingya Muslims. Therefore, the recent takeover made this ethnic minority group more susceptible to being ongoing victims of violence. This comment argues that China could end the 2021 military takeover and has incentive to do so. Furthermore, this comment notes that a constitutional amendment is required to remove the military's stronghold on the government and to make reparations to the Rohingya Muslims.

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I. Introduction

The government of Myanmar has a cyclical tendency to rotate between military rule and makeshift democracy. The military coup d'état in 1962 created a strong military presence in Myanmar's everyday government.[1] Since then, military coups have prevented Myanmar from becoming a true democracy. While the 2008 Constitution gave Myanmar's citizens hope of democratic government, the Constitution simply became a means for the military to retain its power in the government.[2] On February 1, 2021, the military conducted a coup and assumed

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[1] Amy Gunia, *How Myanmar's Fragile Push for Democracy Collapsed in a Military Coup*, TIME.COM (Feb. 1, 2021, 6:13 AM), https://time.com/5934896/myanmar-aung-san-suu-kyi-detained-coup/.

[2] Maryam S. Khan, *The Constitution of Myanmar: A Contextual Analysis*, 54 L. & SOC'Y REV. 527, 528 (2020) (reviewing MELISSA CROUCH, THE CONSTITUTION OF MYANMAR: A CONTEXTUAL ANALYSIS (2019)); Tarun Timalsina, *Democratic Backsliding: The Coup in Myanmar*, HARV. POL. REV. (July 2, 2021), https://harvardpolitics.com/democratic-backsliding/.

control of the country following the opposition party, National League for Democracy ("NLD")'s landslide victory in the 2020 election.[3]

Myanmar also has a history of violence towards minority ethnic groups. Specifically, Myanmar has subjected the Rohingya, a Muslim ethnic minority group, to violent atrocities since the country's independence.[4] As background, the Rohingya account for about one-third of the population.[5] The government has denied Rohingya citizenship, subjected them to discriminatory policies, and considered them outsiders.[6] In 2017, the escalated violence, including rape, murder, and arson, towards Rohingya Muslims further displaced the population, forcing many to flee.[7] Many Rohingya sought refuge in Bangladesh, as well as Indonesia, Malaysia, and Thailand.[8] Especially now after the 2021 military coup, there seems to be no hope for safe return to Myanmar.[9]

The 2008 Constitution is the source of the military's power and stronghold over the government.[10] To ensure the safety of and give Rohingya their rights, the military must give up their power to elected officials through a constitutional amendment. This comment begins by focusing on Myanmar's history. More specifically, it explores how Myanmar's government has operated since gaining independence from British colonial rule and how the military gained its influential power in the civil operations of the government. The history section looks into the history of Rohingya, focusing on the atrocities at the hands of the military. This comment then analyzes Myanmar's 2008 Constitution, through which the military has retained significant power and is able to recoup the government time and time again. Afterwards, it discusses the February 2021 military coup and the changes made in laws which impact human rights of each Myanmar citizen. This comment then proposes that pressure and sanctions imposed by China will likely compel the Myanmar military to end the coup and give back the government to its elected officials.

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[3] Rebecca Ratcliffe, *Myanmar Army Takes Power in Coup as Aung San Suu Kyi Detained*, THE GUARDIAN (Feb. 1, 2021, 5:07 AM), https://www.theguardian.com/world/2021/feb/01/aung-san-suu-kyi-and-other-figures-detained-in-myanmar-raids-says-ruling-party.

[4] Engy Abdelkader, *The History of the Persecution of Myanmar's Rohingya,* CONVERSATION (Sept. 20, 2017, 8:15 PM), https://theconversation.com/the-history-of-the-persecution-of-myanmars-rohingya-84040.

[5] Eleanor Albert & Lindsay Maizland, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELS. (Jan. 23, 2020, 7:00 AM), https://www.cfr.org/backgrounder/rohingya-crisis.

[6] Abdelkader, *supra* note 4.

[7] *Myanmar Rohingya: What You Need to Know about the Crisis*, BBC NEWS (Jan. 23, 2020), https://www.bbc.com/news/world-asia-41566561; *Instability in Myanmar*, COUNCIL ON FOREIGN RELS. (May 12, 2022), https://www.cfr.org/global-conflict-tracker/conflict/rohingya-crisis-myanmar.

[8] Patrick Greenwalt, *Factsheet Rohingya Refugees*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (Oct. 2020), https://www.justice.gov/eoir/page/file/1327591/download.

[9] *Instability in Myanmar*, *supra* note 7.

[10] *See generally* CONST. OF THE REPUBLIC OF THE UNION OF MYAN. (2008).

II. Background

Myanmar has suffered from repressive military rule since it gained independence from British colonial rule in 1948.[11] Originally known as the Union of Burma, the newly independent Myanmar began as a parliamentary democracy.[12] However, the short-lived democracy ended in 1962, when General U Ne Win, Chief of Staff of the Burma Defense Forces, led a military coup and took control of the government.[13] Under General Win's rule, the nation lived under martial law as the military solidified its control over all parts of the government.[14] Moving to year 1974, General Win instituted a new Constitution based on isolationist policy and a socialist economic program that aimed to nationalize Burma's major enterprises.[15] The rapidly deteriorating economic situation resulted in a black-market economy.[16] By 1988, Myanmar was filled with widespread corruption, shifts in economic policy, and food shortages, which resulted in a huge student-led protest.[17] The military responded to the protest by killing at least three thousand protestors and displacing thousands more.[18] Although General Win resigned after the massacre, he continued to remain active as another military junta took power.[19] In 1989, the new military junta renamed the country "the Union of Myanmar" and Yangon became the new capital.[20] The Junta explained that "Myanmar" was more inclusive in comparison to "Burma," which represented the colonial era that favored the Burman ethnic majority.[21] In 1991, the military junta refused to transfer power to the NLD, who were favored in the national election.[22]

In 2008, as a result of international pressure and motivated by the desire to build foreign relations following the Saffron Revolution, the ruling military junta drafted a new Constitution.[23] Under the Constitution, the military retained wide-

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[11] Lindsay Maizland, *Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict*, Council on Foreign Rels. (Jan. 31, 2022, 11:00 AM), https://www.cfr.org/backgrounder/myanmar-history-coup-military-rule-ethnic-conflict-rohingya.

[12] *Id.*

[13] *1962 Military Coup in Burma*, Glob. Sec., https://www.globalsecurity.org/military/world/war/myanmar1.htm (last updated June 30, 2021); *see also* Emily Ray & Tyler Giannini, *Beyond the Coup in Myanmar: Echoes of the Past, Crises of the Moment, Visions of the Future*, Just Sec. (Apr. 26, 2021), https://www.justsecurity.org/75826/beyond-the-coup-in-myanmar-echoes-of-the-past-crises-of-the-moment-visions-of-the-future/.

[14] Ray & Giannini, *supra* note 13.

[15] Maizland, *supra* note 11.

[16] *Id.*

[17] *Id.*; Ray & Giannini, *supra* note 13.

[18] Maizland, *supra* note 11; Ray & Giannini, *supra* note 13.

[19] Maizland, *supra* note 11.

[20] *Id.*

[21] *Id.*

[22] Audrey Tan, *Myanmar's Transitional Justice: Addressing a Country's Past in a Time of Change*, 85 S. Cal. L. Rev. 1643, 1646 (2012).

[23] Maizland, *supra* note 11.

spread powers even under civilian rule.[24] For instance, the Constitution contained provisions such as a requirement that 25 percent of members of the parliament in both chambers must be army officers appointed by the military Commander-in-Chief.[25] Additionally, the Constitution gave the Commander-in-Chief a decisive say in the appointment of the President, Vice-Presidents, and certain key cabinet positions, such as Home Affairs, Border Affairs and Defense.[26] Therefore, those positions are usually filled by active military personnel.[27] Because of this provision, the military's proxy party, the Union Solidarity and Development Party ("USDP") maintained seats in the powerful Defense, Home Affairs, and Border Affairs Ministries.[28]

The Constitution also stipulated that during a state of emergency, which is declared by the President, the legislative, executive, and judicial powers of the Union are transferred to the Commander-in-Chief of the Defense Services.[29] Furthermore, through Article 445 of the Constitution, members of the former military government were given immunity for any act committed in the execution of duty.[30] In the adjudication of military justice, the Commander-in-Chief's decision is final and conclusive.[31] Also important to note, amendments of key provisions of the Constitution require the support of over 75 percent of parliament.[32] This means that without the support of the military members in parliament, changes to the Constitution are impossible.

Throughout the recent decades of its so-called independence, Myanmar has struggled with military rule and an internal civil war.[33] The 2010 election, won by the USDP, was backed by the military Tatmadaw, and dominated by ex-military personnel.[34] For a brief period afterwards, in 2011, the military junta dissolved, and a civilian parliament was established for a transitional period.[35] Under appointed President Thein Sein, a former general and prime minister and member of the USDP, a series of reforms took place, including granting amnesty to political prisoners, relaxing media censorship, and implementing economic policies to encourage foreign investment.[36] In 2015, Myanmar held its first na-

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[24] Maizland, *supra* note 11.

[25] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. IV, art. 109 (2008).

[26] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. I, art. 6, 60, 61 (2008).

[27] *Id.*; Maizland, *supra* note 11.

[28] Maizland, *supra* note 11.

[29] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. XI, art. 418(a) (2008).

[30] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. XVI, art. 445 (2008).

[31] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. VII, art. 343 (2008).

[32] CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. XII, art. 436(a) (2008).

[33] Felix Heiduk, *Civil War in Myanmar: A Further Escalation of Violence Looms on the Horizon*, STIFTUNG WISSENSCHAFT UND POLITIK (May 2021), https://www.swp-berlin.org/publications/products/comments/2021C35_Mya nmar.pdf.

[34] Lee Jones, *Explaining Myanmar's Regime Transition; The Periphery is Central*, 21 DEMOCRATIZATION 780, 781 n. 5 (2014).

[35] Maizland, *supra* note 11.

[36] *Id.*; Jones, *supra* note 34.

tionwide multiparty election.[37] The NLD party won the election, securing a majority in the upper and lower houses of parliament.[38] This gave hope to many citizens that a new transition in government would take place.[39] Many believed this to be the turning point that would lead the country away from a military rule to a democracy.[40] However, the military army force Tatmadaw continued to have dominance within the government as a result of the provisions requiring appointments in the parliament made by the military Commander-in-Chief.[41] Through the Constitution, the military retained the ability to take over the country during a state emergency, and were enabled to set up a National Defense and Security Council under Article 201 during a crisis with military representatives.[42]

In 2005, the NLD, led by Aung San Suu Kyi, won majorities in both chambers of the parliament.[43] The NLD is a Burmese political party founded in 1988, formed in the aftermath of a series of protests in favor of democracy.[44] The party won a substantial parliamentary majority in the 1990 Burmese general election, which the ruling military junta refused to recognize.[45] In 2011, the party won a landslide victory in Burma's Union Election.[46] According to the Council of Asian Liberals and Democrats, the party advocates a non-violent movement towards multi-party democracy, and supports human rights, the rule of law, and national reconciliation.[47] In 2015, Myanmar witnessed its first substantial free and peaceful election.[48] Despite the talk about ethnic peace and unity in the country, Suu Kyi adopted a pragmatic approach and did not choose a Muslim or Rohingya candidate for the NLD party.[49] In fact, the political and military discrimination against the Rohingya continued to be deeply entrenched in Myanmar.[50] Even after Suu Kyi won the election, she remained silent as hundreds of Rohingya were forced to flee due to military crackdown in October of 2016.[51]

On August 25th, 2017, the Arakan Rohingya Salvation Army ("ARSA"), a Rohingya militant group, attacked thirty police posts and an army base on the

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37 Maizland, *supra* note 11.

38 *Id.*

39 Hanna Ingber, *Before Elections in Myanmar, Citizens Express Desire for Change*, N.Y. TIMES (Nov. 7, 2015), https://www.nytimes.com/2015/11/08/world/asia/myanmar-elections.html.

40 Maizland, *supra* note 11.

41 *Id.*

42 Amit Rajan & Kaveri, *Myanmar Polls: Here's Why the Rohingya Have No Reason to Celebrate Suu Kyi's Victory*, THE WIRE (Nov. 19, 2020), https://thewire.in/south-asia/myanmar-election-aung-san-rohingyas-military.

43 Maizland, *supra* note 11.

44 *National League of Democracy*, COUNCIL ASIAN LIBERALS & DEMOCRATS, http://cald.org/members/observer-parties/national-league-for-democracy/ (last visited Dec. 2, 2022).

45 *Id.*

46 *Id.*

47 *Id.*

48 Rajan & Kaveri, *supra* note 42.

49 *Id.*

50 *Id.*

51 *Id.*

northern side of the Rakhine state.[52] Soon after, soldiers responded by burning the home of around three thousand Rohingya, gang raping women and girls, and displacing approximately thirty thousand ethnic Rakhine Buddhists and Hindus.[53] The military indiscriminately killed civilians.[54] Since August of 2017, more than 656,000 Rohingya have fled Myanmar into Bangladesh.[55] In the aftermath of this ethnic cleansing and genocide, Suu Kyi sided with the military, and ARSA was declared a terrorist organization.[56] The ARSA attack was used to justify the military's violent behavior toward the Rohingya.[57] As such, Suu Kyi, acting as State Councilor, rejected the claim that ethnic cleansing of the Rohingya occurred and supported the military against the human right violations alleged in the International Court of Justice in December of 2019.[58]

In the recent 2020 election, the NLD conveyed three main election agendas in its thirty-four-page election manifesto.[59] The first two agendas addressed the ethnic concerns, and the goal was to achieve internal peace and a constitution that ensured a genuine democratic federal union.[60] While Suu Kyi proposed amendments to limit the role of the military through a Constitutional amendment, this proved to be unsuccessful.[61]

As mentioned, the Constitution is the key which maintains the military state in Myanmar.[62] Through the Constitution, Myanmar's armed forces organized the "military's role in governance, embedded the ideology of the military state in the national discourse, and consolidated the centralized political structure of the state."[63] In 2008, the country transitioned to a limited form of a democracy, the NLD, led by Aung San Suu Kyi, who filled the majority of the seats. Despite this transition to democracy, no national measures to address the massive human rights abuses were taken.[64] There were no criminal prosecutions, no reparations to the victims, nor acceptance that a human rights violation occurred."[65]

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52 Rajan & Kaveri, *supra* note 42.

53 *Id.*

54 Jeffrey Hallock, *Surge in Violence against Myanmar's Rohingya Spurs World's Fastest-Growing Refugee Crisis*, MIGRATION POL'Y INST. (Dec. 19, 2017), https://www.migrationpolicy.org/article/top-10-2017-issue-2-surge-violence-against-myanmars-rohingya-spurs-worlds-fastest-growing-refugee-crisis.

55 Rajan & Kaveri, *supra* note 42.

56 *Id.*

57 Hallock, *supra* note 54.

58 Indu Saxena, *Myanmar's Military Coup: Security Trouble in Southeast Asia*, AIR UNIV. J. INDO-PAC. AFF. (Aug. 26, 2021), https://www.airuniversity.af.edu/JIPA/Display/Article/2747554/myanmars-military-coup-security-trouble-in-southeast-asia/.

59 Rajan & Kaveri, *supra* note 42.

60 *Id.*

61 *Id.*

62 MELISSA CROUCH, THE CONSTITUTION OF MYANMAR: A CONTEXTUAL ANALYSIS 3 (Oxford Hart Publishing 2019).

63 Khan, *supra* note 2.

64 Catherine Renshaw, *Myanmar's Genocide and the Legacy of Forgetting*, 48 GA. J. INT'L & COMP. L. 425, 432-33 (2020).

65 *Id.* at 433.

However, this could be a politically influenced decision for not acting in favor of human rights. That is, the military controlled the transition and through the Constitution, still had the ability to destabilize the political situation and take over the government once more.[66] Even the United Nations, along with key members of the international community, including the United States and Great Britain, supported the pursuit of demi-democratization without accounting for the human rights violations.[67] In the early years of the transition, the United Nations Special Rapporteur on the Human Rights Situation suspended the call for establishing a UN Commission of Inquiry into crimes against humanity carried out by the military.[68]

Despite the transition to a so-called democratic government, it provided little change for the Rohingya.[69] For instance, the 1983 Citizenship law was neither amended nor did the NLD field a single Muslim candidate.[70] Despite the efforts of opposition groups and Western countries, the military junta remained strong and resisted all domestic and international pressures to undertake meaningful political reform.[71]

After gaining independence in 1949, the Myanmar government set up its first form of national identification and issued registration cards to all citizens, including the Rohingya.[72] In the three general elections held between 1951 and 1960, all citizens including the Rohingya had the right to vote.[73] Voters even elected a Rohingya as member of the Parliament.[74] In 1974, the Myanmar's military-run government passed the Emergency Immigration Act, which required all citizens to carry an identity card.[75] However, the Rohingya nationals were not deemed eligible.[76] In 1978, the military-run government launched Operation Naga Min, where the government registered and verified the status of citizens and people viewed as foreigners.[77] During Operation Naga Min, soldiers assaulted and ter-

66 Renshaw, *supra* note 64, at 433.

67 *Id.*

68 Reports calling for the Commission of Inquiry include: UN Human Rights Council, Tomas Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar). Progress Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar, P122, U.N. Doc. A/HRC/13/48 (Mar. 10, 2010).

69 Renshaw, *supra* note 64, at 434.

70 *Id.*

71 Kyaw Yin Hlaing, *Setting the Rules of Survival: Why the Burmese Military Regime Survives in an Age of Democratization*, 22 PAC. REV., 271-291, 272 (2009).

72 *Burma's Path to Genocide Timeline: A Chronology of Key Events in Burma's History with an Emphasis on Those Impacting the Rohingya,* U.S. HOLOCAUST MEM'L MUSEUM, https://exhibitions.ushmm.org/burmas-path-to-genocide/timeline (last visited Dec. 2, 2022) [hereinafter *Timeline*].

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

rorized the Rohingya. Throughout the Rakhine State, they destroyed Rohingya's homes and property.[78]

Further, in 1982, the Parliament passed a citizenship law, which intentionally excluded Rohingya from being recognized as Myanmar citizens.[79] Additionally, during the Clean and Beautiful Nation 1991 Operation, soldiers executed, raped and assaulted the Rohingya as well as destroyed their homes and properties, while Myanmar citizens continued to protest for democratic reforms.[80] The government even created a special border security force to harass and persecute Rohingya.[81] This violence and inequitable treatment was followed by more State-sanctioned violence against the Rohingya in June 2012.[82] In April of 2014, the government excluded the Rohingya from the first national census conduct in thirty years.[83]

In October of 2016, the military launched a clearance operation. In this operation, the military killed people, raped women, and destroyed Rohingya villages as a response to the small group of Rohingya men who attacked several Burmese police posts in the Rakhine States.[84] The next big event occurred on August of 2017.[85] The government launched a disproportionate attack on the entire Rohingya population after Muslim insurgents of ARSA attacked thirty police posts and an army base.[86] The commanding officer ordered: "shoot all you see and all you hear."[87] The military destroyed about twenty Rohingya villages and more than 700,000 Rohingya fled.[88] It is estimated that over nine thousand Rohingya were killed.[89] Allegedly, the military not only opened fire on fleeing civilians, but they "planted landmines near border crossing used by the Rohingya to flee to Bangladesh."[90] This military attack was "a textbook example of ethnic cleansing."[91]

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[78] *Burma's Path to Genocide, Chapter 2: Targeted*, U.S. HOLOCAUST MEM'L MUSEUM, https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-2/targeted (last visited Dec. 2, 2022).

[79] *Timeline*, *supra* note 72.

[80] *Driving out Foreigners, Chapter 2: Targeted*, U.S. HOLOCAUST MEM'L MUSEUM, https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-2/driving-out-foreigners (last visited Dec. 2, 2022).

[81] *Timeline*, *supra* note 72.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Reuters Staff, *Timeline: Three Years on, a Look at the Rohingya Crisis*, REUTERS (Aug. 30, 2020), https://www.reuters.com/article/myanmar-rohingya-timeline-idINKBN25H08E.

[86] *Timeline*, *supra* note 72.

[87] Hannah Beech et al., *'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter: Video Testimony from Two Soldiers Supports Widespread Accusation that Myanmar's Military Tried to Eradicate the Ethnic Minority in a Genocidal Campaign*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html.

[88] *Id.*; *Timeline*, *supra* note 72.

[89] *Timeline*, *supra* note 72.

[90] Albert & Maizland, *supra* note 5.

[91] Reuters Staff, *supra* note 85.

III. Discussion

On February 1, 2021, when the newly elected Parliament was supposed to be sworn in, the military junta took over the government.[92] The military-nominated Vice President U Myint Swe declared a state of emergency for one year after the military detained the elected president and other NLD-member senior government officials.[93] The military also seized control of telecommunications, suspended telephones and internet access in major cities, cancelled flights, and shut down stock markets and banks.[94] The military justified the coup by quoting the Constitution provision, which allows the military to take control of the government in a state of emergency.[95] The state of emergency was the November 2020 election results, which the military maintained were fraudulent and thereby legitimized its actions.[96] In the November 2020 election, the NLD won, securing 396 out of 479 Parliamentary seats, in contrast to the 33 seats won by the USDP, the military's proxy party.[97] The election results posed a threat to the military's influence in the government. In response, the USDP claimed that early voting showed evidence of widespread violation of laws and procedures, and therefore, invalidated the election results.[98] After the coup, the military formed a new cabinet with former or current military generals.[99]

Under this military-controlled government, Senior General Min Aung Hlaing is currently serving as the head of government.[100] NLD leader, Aung San Suu Kyu, and elected president, U Win Myint, were charged with "obscure" criminal violations.[101] Since the coup, the military junta has changed laws in a way that allows the military to act as they want, without repercussions. According to Special Rapporteur Tom Andrews, since the power grab, the junta has "murdered more than 1,100 people, arbitrarily detained more than 8,000, and forcibly displaced more than 230,000 civilians."[102]

One of the new provisions in law makes it a crime to use unconstitutional means to overthrow the Myanmar government under Article 121 of the Myanmar

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92 U.N. Human Rights Office of the High Commissioner, South-East Asia Regional Office, Myanmar in Crisis: Human Rights Situation, February 2021, OHCHR Myanmar Team (Feb. 11, 2021), https://bangkok.ohchr.org/5902-2/ [hereinafter Myanmar in Crisis]; Jack V. Hoover et al., *Military Coup in Burma Draws International Condemnation and Pressure*, 115 AM. J. INT'L L. 558, 558 (2021).

93 Raja & Tann Asia, *State of Emergency in Myanmar- Six Months On*, LEXOLOGY (Aug. 21, 2021), https://www.lexology.com/library/detail.aspx?g=6fd46085-424b-49ac-9c08-8bfa4272f996.

94 Hoover, *supra* note 92, at 560.

95 Myanmar in Crisis, *supra* note 92.

96 *Id.*

97 Hoover, *supra* note 92, at 559.

98 *Id.*

99 *Id.*

100 *Id.* at 558.

101 *Id.* at 559.

102 *Myanmar: UN Expert Says Current International Efforts Failing, Urges 'Change of Course'*, U.N. NEWS (Sept. 22, 2021), https://news.un.org/en/story/2021/09/1100752 [hereinafter *Myanmar: UN Expert Says*].

Penal Code, which defines high treason.[103] Another change was to Article 124A, which allows for "a 20 year prison sentence for anyone seeking to bring into hatred or contempt or excite disaffection toward the government, which now prohibits contempt toward the Myanmar Military, or Tatmadaw, and its personnel."[104] One of the new provisions created, Article 124C, states that sabotage or obstruction of the Defense Services or other law enforcement authorities engaged in preserving the stability is punishable by up to twenty years.[105] Additionally, Article 124D carries a seven year prison sentence for anyone who hinders any Defense Services personnel or government worker from carrying out their duties.[106] "It specifically criminalizes any effort to hinder, disturb, damage the motivation, discipline or health of government workers."[107] A new clause added to Article 505A, targets "anyone who causes fear to a group of citizens or to the public or who speaks false news or agitates a criminal against a government employee."[108]

These new provisions are seemingly "aimed at arming the new ruling junta with a legal veiling for the crackdown on the Civil Disobedience Movement."[109] The junta-controlled military forces have killed protestors, murdered civilians in their homes, and have beaten and tortured people to death while in detention with the use of weapons such as bombs, rocket-propelled grenades, and automatic weapons.[110] The revisions of the Penal Code also enabled the new government rulers to criminalize peaceful protests.[111] The military began using lethal force against protestors in mid-February and has since escalated its use of force.[112] In addition to new provisions to the Penal Code, the military junta has suspended sections of the Law Protecting the Privacy and Security of Citizens, which was enacted in 2017.[113] This removes basic protections guaranteed to Myanmar citizens, such as the right to be free from arbitrary detention and the right to be free from warrantless surveillance, search and seizure.[114]

Looking at the consequences of the coup, the military takeover does not look good for Rohingya life in Myanmar. The same commanders who oversaw the genocide committed by the military junta against the Rohingya population in

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[103] Sebastian Strangio, *Myanmar Junta Arms Itself with Repressive New Laws*, THE DIPLOMAT (Feb. 15, 2021), https://thediplomat.com/2021/02/myanmar-junta-arms-itself-with-repressive-new-laws/.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Myanmar: UN Expert Says*, *supra* note 102.

[111] *Myanmar: Post-Coup Legal Changes Erode Human Rights: Reverse Junta's Revisions to Penal Code, Other Laws*, HUM. RTS. WATCH (Mar. 2, 2021, 8:00 AM), https://www.hrw.org/news/2021/03/02/myanmar-post-coup-legal-changes-erode-human-rights# [hereinafter *Myanmar: Post-Coup Legal Changes*].

[112] Hoover, *supra* note 92, at 560.

[113] *Myanmar: Post-Coup Legal Changes*, *supra* note 111.

[114] *Id.*

2017 are the same ones overseeing the military junta.[115] The new laws shielding the military and the commanders overseeing the military junta from accountability have put over 600,000 Rohingya in danger.[116] Additionally, in an interview with Chinese-Language Phoenix television, Myanmar's junta leader Min Aung Hlaing, who headed the army in 2017 as about 700,000 Rohingya fled the country, reiterated that the military junta did not recognize Rohingya is one of its ethnic groups:[117]

> Major General Zaw Min Tun, spokesman for the ruling military council has said, "[w]e will abide by laws that do not supersede the Constitution. Many laws have to be taken into consideration in executing political process. We will not do anything that is not in accord with the law. . . Police and other security personnel are carrying out their responsibilities in accordance with their manuals."[118]

Under the new provisions and additions to previously existing laws, violent military actions are legalized, thereby justifying the military's actions.[119] This further puts the Rohingya at risk of violent atrocities. These laws also suppress human right defenders, activists, journalists, and protestors.[120] The restrictions placed on telecommunications laws legalized the military's ability to intercept all communications such as text messages and the use of social media.[121] Also, the addition to section 505(a) of the Code of Criminal Procedure enables the military to arrest anyone who speaks against the coup or the military and subject them to imprisonment.[122]

Since the military takeover, citizens have been subject to unwarranted searches and seizures that were previously deemed unlawful.[123] Citizens have been arbitrarily detained and held by the military or police for unspecified lengths of time without reason or charge.[124] The military and police seem to be free to act in any way they want without fear of government sanctions. Many of the elected representatives and civil society leaders were hunted by the military in the name of law enforcement.[125] The military used brute force against protestors and sexually

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115 *Myanmar: UN Expert Says*, *supra* note 102.

116 *Id.*

117 Matthew Tostevin, *Myanmar Junta Leader Casts Doubt on Return of Rohingya*, REUTERS (May 24, 2021, 5:17 AM), https://www.reuters.com/world/asia-pacific/myanmar-junta-leader-casts-doubt-return-rohingya-2021-05-24/.

118 Pwint Htun, *Beyond the Coup in Myanmar: "In Accordance with the Law"- How the Military Perverts Rule of Law to Oppress Civilians*, JUST SEC. (Apr. 28, 2021), https://www.justsecurity.org/75904/beyond-the-coup-in-myanmar-in-accordance-with-the-law-how-the-military-perverts-rule-of-law-to-oppress-civilians/.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

abused women.[126] Journalists were arrested and independent media had their licenses revoked for reporting these human rights violations in the "name of keeping peace."[127] In the control of this military government, the laws are fluid in that they are utilized to legalize and justify the military's violent and unjustifiable actions instead of upholding what is just and right.

IV. Analysis

The analysis begins by briefly summarizing how the 2008 Constitution gave the military the ability to take over the government as well as the ability to amend and create new laws to help address the state of emergency. Then, it discusses the 2021 coup's impact on Myanmar, followed by a brief exploration on how international pressure has not yet compelled the military to give up control or reinstate elected officials back into the government. Lastly, the analysis concludes by discussing what the 2021 coup means for the welfare of the Rohingya in Myanmar.

Before the military coup in February of 2021, the military retained its control in the Myanmar government through the 2008 Constitution.[128] The Constitutional provision allows the President to declare a state of emergency and transfer legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defense Service, thereby enabling the military to take over the government and justify the coup as legal.[129] After the 2021 military coup, the military-controlled government amended and created new laws, which shielded the military from being held accountable for its actions.[130] The military-controlled government took away its citizens' basic human rights by changing legal provisions, thus giving the military more power.[131] For instance, provisions were enacted to enable and justify the use of violence when dealing with protestors.[132]

The 2008 Constitution, written by Myanmar's military government, was supposed to represent the country's establishment of a democratic government.[133] Instead, it maintained military control over Myanmar.[134] This retention of power through the Constitution disabled Myanmar's chance to have a true democracy

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126 Htun, *supra* note 118.

127 *Id.*

128 CONST. OF THE REPUBLIC OF THE UNION OF MYAN., ch. XI, art. 410, 418 (2008); Yin Hlaing, *supra* note 71.

129 *Id.*

130 *Myanmar: Post-Coup Legal Changes*, *supra* note 111; *see generally Myanmar Amends Legislation on the Privacy and Security of Citizens Amid State of Emergency*, TILLEKE & GIBBINS (Feb. 23, 2021), https://www.tilleke.com/insights/myanmar-amends-legislation-on-the-privacy-and-security-of-citizens-amid-state-of-emergency/.

131 *Myanmar: Post-Coup Legal Changes*, *supra* note 111.

132 Russell Goldman, *Myanmar's Coup, Explained*, N.Y. TIMES (Nov. 29, 2021), https://www.nytimes.com/article/myanmar-news-protests-coup.html; *see also* Htun, *supra* note 118.

133 *The Vote to Nowhere: The May 2008 Constitutional Referendum in Burma*, HUM. RTS. WATCH (Apr. 30, 2008), https://www.hrw.org/report/2008/04/30/vote-nowhere/may-2008-constitutional-referendum-burma [hereinafter *The Vote to Nowhere*].

134 *Id.*

because the military in essence always has the ability to obstruct any meaningful changes and block any transformation it does not agree with.[135] As it currently stands, it is unlikely to have a civilian democratic government when the military has retained such power and control.

When the 2008 Constitution was drafted, the State Peace and Development Council refused to allow any meaningful public discussion and debate of the draft constitution.[136] It had arrested those who expressed opposition to its contents.[137] Even journalists who wrote in opposition were imprisoned and convicted on charges, such as engaging in anti-government propaganda and publishing information that makes people lose respect for the government.[138] People were not allowed to engage in peaceful protests and were instead detained for their participation in such protests.[139] Furthermore, the Constitution itself, as written, demonstrates that the document's purpose is to continue military dominance and to deny political parties the right to govern freely.[140] An example of this is the requirement that one-quarter of the seats in both houses of the parliament be filled by military officers, which does not limit military officers from running for other open seats of the parliament.[141] The Constitution also requires more than three-quarters of the votes of the parliament to make any amendments in the Constitution.[142] Consequently, the military essentially holds an effective veto power by holding one-quarter of those seats.[143]

As such, "[a] future peaceful Myanmar can only be based on both an entirely different conception of its national identify, free of the ethnonationalist narratives of the past, and a transformed political economy."[144] Since the coup, over nine hundred people have been killed and nearly five thousand people have been arrested.[145] The military cracked down mercilessly on civilians with the use of lethal force.[146] Soldiers fired indiscriminately in residential neighborhoods, setting off grenades, breaking doors and hauling people away.[147] Myanmar's history of denying human rights such as basic freedom of expressions[148] does not make this military use of force surprising. Recently, changes in legal provisions have

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135 *The Vote to Nowhere*, *supra* note 133, at 2.

136 *Id.* at 3.

137 *Id.*

138 *Id.*

139 *Id.*

140 Yin Hlaing, *supra* note 71; Crouch, *supra* note 62, at 3.

141 Yin Hlaing, *supra* note 71, at 289.

142 Kimana Zulueta-Fülscher, *Looking Back at the Myanmar Constitution Amendment Process*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (Aug. 4, 2020), https://www.idea.int/news-media/news/looking-back-myanmar-constitution-amendment-process.

143 Yin Hlaing, *supra* note 71, at 290.

144 Thant Myint-U, *Myanmar's Coming Revolution: What Will Emerge from Collapse?*, 100 FOREIGN AFFS. 132, 133 (2021).

145 *Id.* at 132.

146 *Id.* at 140.

147 *Id.*

148 *The Vote to Nowhere*, *supra* note 133.

led to arbitrary arrests and detainment and intimidation of the political opposition and general populace, creating widespread repression and fear.[149]

It is difficult to have a democracy when there is fear of retaliation and takeover. Looking at the military government's escalated response to the protestors and the general public, these incidents will only continue until the next short-lived civilian government. Since the military coup, many protestors have turned to armed insurrections.[150] The result: more violence. While the armed insurrections can lead to a shift in government rule, the power of the Myanmar military makes that result unlikely.[151] The military has no problem reacting with violence.[152] Unless the military-controlled government is concerned about its economic condition or its relationship with international countries, who oppose their action, the violence seems ongoing.[153]

This makes China a key player in restoring a civilian government in Myanmar, which is to be discussed below. So far, international pressure from many countries has had no significant impact on Myanmar, nor does it compel the military to give back control to the elected candidates.[154] It seems that the only way Myanmar is going to be a true democracy is to limit the military's powers. A transition towards a democracy is a hopeful outcome only if the military is disabled from seizing control of the government whenever it wants. Despite the citizen's protests and outcry against the military's coup, the military-controlled government has not budged.[155] Without limiting the military's power and influence in the government, Myanmar is on the verge of becoming a failed state[156] as it continues to rotate between military rule and a make-shift government.[157] China is the only country that is so deeply involved in Myanmar's economy.[158]

With an over seventy years diplomatic relationship, China has domestic and foreign policy interest in Myanmar.[159] China has many infrastructure investments in Myanmar, such as the "China-Myanmar Economic Corridor," which is an infrastructure route aimed to connect the Indian Ocean oil trade to the Yunnan

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[149] *The Vote to Nowhere*, *supra* note 133.

[150] Myint-U, *supra* note 144, at 141.

[151] *Id.*

[152] Goldman, *supra* note 132.

[153] Myint-U, *supra* note 144, at 142.

[154] Jason Tower & Priscilla A. Capp, *Myanmar: China, the Coup and the Future*, U.S. INST. PEACE (June 8, 2021), https://www.usip.org/publications/2021/06/myanmar-china-coup-and-future; *Myanmar: UN Expert Says*, *supra* note 102.

[155] Hannah Beech, *Inside Myanmar's Army: 'They See Protesters as Criminals'*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/03/28/world/asia/myanmar-army-protests.html.

[156] Sumathi Bala, *Myanmar Is on the Brink of Becoming a 'Failed State,' Says Expert from Think Tank*, CNBC (Mar. 29, 2021), https://www.cnbc.com/2021/03/30/myanmar-is-on-the-brink-of-becoming-a-failed-state-says-expert-from-think-tank.html; Myint-U, *supra* note 144, at 142.

[157] Maizland, *supra* note 11.

[158] Tower & Capp, *supra* note 154.

[159] Lucas Myers, *The China-Myanmar Economic Corridor and China's Determination to See It through*, WILSON CTR.: ASIA DISPATCHES (May 26, 2020), https://www.wilsoncenter.org/blog-post/china-myanmar-economic-corridor-and-chinas-determination-see-it-through.

Province.[160] Not only has China constructed a natural gas and oil pipeline, but China has also dominated Myanmar's electricity sector through many hydropower and coal projects.[161] Furthermore, China is Myanmar's largest trading partner.[162] Myanmar imports large quantity of goods such as machinery, metal products, vehicles, and telecommunication equipment from China.[163] Myanmar exports needed goods such as refined tin, rare earth metal, oil, and gas, to China.[164] As a result, China occupies the largest share in both Myanmar's exports and imports.[165] According to Sumanth Samsani, as of 2021, China's investment forms 28 percent of Myanmar's Gross Domestic Product.[166]

What does this mean for the Rohingya? Since gaining independence from Britain, Rohingya Muslims have been denied citizenship[167] and have been subjected to violence at the hands of the military.[168] Since 2016 and 2017, over 700,000 Rohingya Muslims fled.[169] The same military generals who inflicted violence upon the Rohingya now control the government.[170] Considering the indiscriminate treatment of Myanmar's citizens in lieu of this coup with violence and the changes in legal provisions, the Rohingya continue to face a threat of violence. Since the coup, many crimes against humanity have occurred such as murder, enforced disappearance, torture, rape and other sexual violence, severe deprivation of liberty, and other inhuman acts.[171] Now, even if Rohingya Muslims are considered citizens, which is very unlikely, they would still be in fear of violence.[172] The new legal provisions give the military a lot of discretion to utilize violence and arrest citizens at its whim.[173] These changes in the law do not benefit the Rohingya, and they would continue to live in fear and suffer violent atrocities as they did before the coup.

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160 Myers, *supra* note 159.

161 Sumanth Samsani, *Understanding the Relations between Myanmar and China*, OBSERVER RSCH. FOUND. (Apr. 26, 2021), https://www.orfonline.org/expert-speak/understanding-the-relations-between-myanmar-and-china/.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 Amal de Chickera, *Stateless and Persecuted: What Next for the Rohingya?*, MIGRATION POL'Y (Mar. 18, 2021), https://www.migrationpolicy.org/article/stateless-persecuted-rohingya.

168 *MSF: At Least 6,700 Rohingya Killed during Attacks in Myanmar*, DRS. WITHOUT BORDERS (Dec. 14, 2017), https://www.doctorswithoutborders.org/what-we-do/news-stories/research/msf-least-6700-rohingya-killed-during-attacks-myanmar; Gaston Federico Blasi, *Rohingyas' Exodus Continues to Oblivion*, 20 IND. INT'L & COMP. L. REV. 163 (2020).

169 Myint-U, *supra* note 144, at 134.

170 Jen Kirby, *What Myanmar's Coup Could Mean for the Rohingya and Other Persecuted Minorities*, VOX (Feb. 2, 2021), https://www.vox.com/22260213/myanmar-coup-rohingya-genocide.

171 *More Than a Thousand Killed in Myanmar as Repression of Activists Continues Unabated*, CIVICUS (Aug. 26, 2021), https://monitor.civicus.org/updates/2021/08/26/more-thousand-killed-myanmar-repression-activists-continues-unabated/.

172 Julhas Alam, *Rohingya Refugees Fear Returning to Myanmar After Coup*, AP NEWS (Feb. 2, 2021), https://apnews.com/article/rohingya-myanmar-coup-9506980524e748baf577a085ae0f4d30.

173 *Myanmar: Post-Coup Legal Changes*, *supra* note 111.

V. Proposal

Considering Myanmar's history of military governance and its resistance to democratic reform, sanctions by international nations will most likely not have a significant impact unless China imposes sanctions on Myanmar too.[174] To become a true democracy, the military must give up their extensive control in the government. This can be achieved by amending the Myanmar Constitution. The 2008 Constitution contains many provision that enable the military to retain its power,[175] as explored above. The military used Constitutional provisions to legally justify its coup.[176] It alleged that the fraudulent 2020 elections gave cause to declare a state of emergency.[177]

The obstacle in amending the Constitution and limiting the military's vast power is that currently the military has no incentive to give up its power. The 2008 Constitution was written by military leaders to maintain power in the government while alluding to the people as a transition into democracy. While Myanmar held elections and its people believed the Constitution to be the beginning of a democracy,[178] it was anything but that. The military still controls the country.[179] Many provisions in the Constitution were dedicated to help the military keep its influence and control in the government.[180] However, it is probably undoubted that the military should not have such control of the Myanmar government. What life under a miliary government looks like is very evident through its actions following the coup. At this point, even if civilian unrest forces the military to give back the government to its elected officials, which is highly unlikely, it is not going to undo the atrocities suffered by the Rohingya Muslim and Myanmar citizens. Nor would it guarantee that the military will stand aside and allow the elected officials to run the government or not stunt another coup when faced with opposition.

Thus far, the ruling military has resisted the international pressure to relinquish power.[181] While the United States and its European allies continue to impose economic sanctions, the military has continued to stronghold the country's government.[182] In response, China has refused to impose an arms embargo or sanction the military junta[183] and instead supports the military regime.[184] How-

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[174] Van Tran, *To Understand Post-Coup Myanmar, Look to Its History of Popular Resistance- Not Sanctions*, BROOKINGS (Feb. 9, 2021), https://www.brookings.edu/blog/order-from-chaos/2021/02/09/to-understand-post-coup-myanmar-look-to-its-history-of-popular-resistance-not-sanctions/.

[175] *The Vote to Nowhere*, *supra* note 133.

[176] Myanmar in Crisis, *supra* note 92.

[177] *Id.*

[178] Yin Hlaing, *supra* note 71, at 272; Crouch, *supra* note 62, at 3.

[179] Tran, *supra* note 174.

[180] Yin Hlaing, *supra* note 71, at 272.

[181] Colum Lynch, *Myanmar Pressure Campaign Stalls at the United Nations*, FOREIGN POL'Y (June 4, 2021), https://foreignpolicy.com/2021/06/04/myanmar-sanctions-campaign-united-nations-stalls/.

[182] *Id.*

[183] *Id.*

[184] Saxena, *supra* note 58.

ever, China may be the key necessary to end this military control. Myanmar relies on China for diplomatic support, arms, weapons, trade, and commerce.[185] The military junta needs only China's support to maintain its rule over the country.[186] If China backs the UN Security Council's demand for a transition to an elected civilian government, the international pressure on Myanmar will likely be more meaningful.[187] "Myanmar has more to lose should the relationship sour: a protector in the Security Council, support from a large neighbor amid international isolation, a key economic partner and a source of investment."[188] Additionally, not only should international pressure push for a transition to an elected civilian government, it should encourage reform on Myanmar's human right abuses,[189] specifically the human right abuses suffered by the Rohingya.

The question is then how to force China to impose economic sanctions and pressure on the military junta to stop the violence, and then restore Myanmar to some semblance of a civilian government and address the human right violations. Recently, China blocked a UN Security Council statement condemning the military coup.[190] China maintained that sanctions or international pressure would only make things worse in Myanmar.[191] However, China stands to economically benefit from Myanmar's alienation.[192] Therefore, China's stance could be biased by such gains. A method to gain China's cooperation could be to apply international pressure and impose sanctions on China until it joins the UN Security Council and withdraws its support of the military junta.[193] In turn, China does stands to benefit from an elected civilian government. It is more likely that China would work better and have a more positive relationship with the NLD government than it currently does with the military leaders.[194] Before the coup, the NLD cultivated a friendly relationship with Beijing.[195] Further, the military coup has destabilizing impact on major Chinese-backed projects.[196] Therefore, if China withdraws its support, the military junta may be more likely to restore the civilian government. With time, reduction of the military's influence in the government, and constitutional amendments, there is an opportunity for Myanmar to be a true

185 Saxena, *supra* note 58; Myint-U, *supra* note 144, at 134.

186 Myint-U, *supra* note 144, at 133.

187 *Id.* at 144.

188 *China's Myanmar Dilemma,* INT'L CRISIS GRP. (Sept. 14, 2009), https://www.crisisgroup.org/asia/north-east-asia/china/china-s-myanmar-dilemma.

189 *Id.*

190 *Myanmar Coup: China Blocks UN Condemnation as Protest Grows*, BBC NEWS (Feb. 3, 2021), https://www.bbc.com/news/world-asia-55913947

191 *Id.*

192 *Myanmar Coup*, *supra* note 190.

193 Simon Tisdal, *A Child Screams in Myanmar. . . and China Pretends Not to Hear*, THE GUARDIAN (Mar. 14, 2021), https://www.theguardian.com/commentisfree/2021/mar/14/a-child-screams-in-myanmar-and-china-pretends-not-to-hear.

194 Timothy McLaughlin, *China Is the Myanmar Coup's 'Biggest Loser'*, THE ATLANTIC (Feb. 22, 2021), https://www.theatlantic.com/international/archive/2021/02/what-myanmars-coup-means-china/618101/.

195 *Id.*

196 *Id.*

democracy. After that time, it can work to address the country's violent history towards the Rohingya.

VI. Conclusion

Myanmar's path to true democracy is a long road ahead, as is reparations towards the Rohingya. As it currently stands, Myanmar is on the verge of becoming a failed state.[197] Unless the military permanently relinquishes its control in the government, it may only be a question of when the military will end the state of emergency and when the military will take over the government in another coup. Therefore, international pressure on China to sanction Myanmar's military for their actions could help Myanmar citizens.[198] Myanmar's military junta's reliance on China makes China more influential than countries in the west.[199] A transition to a true democracy will likely only occur if the military loses its stronghold on the government through a constitutional amendment. Additionally, an elected civilian government without the military influence will likely be the only chance to make reparations to the Rohingya and finally end the long history of violence of Myanmar.

[197] Bala, *supra* note 156.

[198] Myint-U, *supra* note 144, at 144.

[199] Tisdal, *supra* note 193.