

ACCOUNTABILITY IN CHECHNYA—ADDRESSING INTERNAL MATTERS WITH LEGAL AND POLITICAL INTERNATIONAL NORMS

Welcome to Hell

—Signpost at the entrance to Grozny, Chechnya¹

INTRODUCTION

Coming on the heels of recent atrocities in Bosnia and Rwanda, the tragic images of the battle for the city of Grozny appeared all too familiar.² The dead literally lined the streets as Russian troops fought to overcome the secessionist forces of the breakaway republic of Chechnya.³ Unlike Bosnia or Rwanda, however, the international community has consistently characterized events in Chechnya as an internal matter of the Russian Federation.⁴ Despite expressing moral outrage at acts such as Russia's indiscriminate bombing of civilians, foreign governments tempered their criticism by recalling that Chechnya remained a part of the Russian Federation, and thus international norms governing inter-state conflicts did not apply.⁵ United Nations Secretary General Boutros-Boutros Ghali emphasized that "it is purely an inter-

¹ Michael Specter, *Hundreds Killed in Chechen Strife*, N.Y. TIMES, Jan. 9, 1995, at 1.

² See, e.g., Andrew Jay Cohen, *On the Trail of Genocide*, N.Y. TIMES, Sept. 7, 1994, at A23 (analyzing Rwandan atrocities and methods for holding individuals accountable); Fred Kaplan, *Despite Pledge, Chechen Capital is Bombed Again*, BOSTON GLOBE, Dec. 29, 1994, at 10 (discussing developments in Chechnya and role of media in publicizing it); Lucia Mouat, *UN Tackles Genocide in Europe and Africa*, CHRISTIAN SCI. MONITOR, Aug. 3, 1994, at 7 (discussing U.N. investigation of war crimes and genocide in Bosnia and Rwanda).

³ Michael Specter, *Russian War: Corpses and Wild Dogs*, N.Y. TIMES, Jan. 4, 1995, at 1.

⁴ In both Bosnia and Rwanda, the United Nations Security Council found a threat to international peace and security that justified international intervention. See, e.g., S.C. Res. 770, U.N. SCOR, U.N. Doc. S/INF/48 (1992) (in re Bosnia). With respect to Chechnya, however, foreign governments demonstrated a general unwillingness to label that crisis an international conflict or a threat to international peace and security. See, e.g., Patrick Bishop, *West Turns Blind Eye to Terror Tactics*, DAILY TEL. (London), Jan. 5, 1995, at 14, available in LEXIS, World Library, Curnws File (Europe and United States quick to reinforce Russian claim that Chechnya is an internal matter); George J. Church, *Russia: Death Trap*, TIME, Jan. 16, 1995, at 42 (U.S. and West European governments acknowledge without question Russia's right to hold its federation together); *State Department Briefing*, FED. NEWS SERV., Dec. 14, 1994, available in LEXIS, News Library, Curnws File (U.S. State Department views Chechnya as primarily internal Russian affair).

⁵ See, e.g., *Delors Warns Yeltsin on Chechnya and Europe Ties*, Reuters World Service, Jan. 14,

nal affair. And we are not allowed to enter an internal affair . . . unless the two protagonists to the dispute agree for our intervention."⁶

This distinction between internal and international affairs flows from the fundamental concept in international law of sovereign equality: i.e., all states possess plenary competence within their respective territories.⁷ Thus, states generally retain the freedom to act, unfettered by other states or international organizations in areas within their domestic jurisdiction.⁸ In the past, this rule consistently would lead a state to claim that issues involving its treatment of its own nationals constituted a matter exclusively within its domestic jurisdiction.⁹ Today, however, the absolute nature of this rule has eroded as international law¹⁰ now attempts to limit such plenary authority by imposing obligations on a state actor's internal conduct as a matter of international and municipal law.¹¹

1995, available in LEXIS, World Library, Curnws File (European Commission President Delors finds Russian behavior in Chechnya unacceptable but notes international law does not justify European Union intervention in what amounts to Russian internal matter); Steve Goldstein, *U.S. Calls Escalation a "Setback" Christopher Deplores Attack on Grozny*, PHILA. INQUIRER, Jan. 13, 1995, at A1 (U.S. Secretary of State Warren Christopher says United States doing everything it can to encourage Russians to bring killing to end, but still calls it Russia's internal affair for Russians and Chechens to work out); Taras Lairokhin, *Russia's Moves in Chechnya Lawful Yet Wrong, Denmark Says*, TASS (Moscow), Dec. 14, 1994, available in LEXIS, World Library, Curnws File (Danish government cites Russian use of force in Chechnya as wrong, although it finds no formal violation of international law as of yet).

⁶ *Larry King Live: Interview with Boutros-Boutros Ghali* (CNN television broadcast, Dec. 22, 1994), Transcript No. 1312 [hereinafter Ghali Interview], available in LEXIS, News Library, Curnws File.

⁷ See, e.g., U.N. CHARTER art. 2, ¶ 1 (United Nations "based on the principle of sovereign equality of all its members").

⁸ U.N. CHARTER art. 2, ¶ 7 (United Nations not authorized "to intervene in matters which are essentially within the domestic jurisdiction of any state," unless applying collective security enforcement measures); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration Concerning Friendly Relations*] (United Nations General Assembly resolution affirming "duty not to intervene in matters within the domestic jurisdiction of any State"); see also J.L. BRIERLY, *THE LAW OF NATIONS* 73-75 (1963).

⁹ See BRIERLY, *supra* note 8, at 291.

¹⁰ International Law may be defined as the body of rules and principles that bind states in their relations with one another. BRIERLY, *supra* note 8, at 1. The sources of international law that constrain state behavior are outlined in Article 38(1) of the International Court of Justice Statute: (a) treaties; (b) international custom, as evidence of general practice accepted as law; (c) general principles of law recognized by civilized nations; and (d) as a subsidiary means, judicial decisions and the teachings of the most highly qualified publicists. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, ¶ 1.

¹¹ See, e.g., CONST. OF THE RUSSIAN FEDERATION (Dec. 12, 1993) art. 15 ("Generally recognized principles and norms of international law and the international treaties of the Russian

Applying this framework to the Chechen context, it becomes apparent that even if the international community correctly labeled the Chechen conflict an "internal matter," a point open to debate, certain international norms involving the *jus in bello*, literally the "law in war," continue to apply.¹² In particular, the Russian Federation has ratified a number of treaties, including the 1949 Geneva Conventions and their 1977 Protocols, that establish certain sets of standards governing the use of force in conflicts of both an international *and* non-international character.¹³ As a party to these treaties, Russia thus accepted, as a matter of international and Russian law, a legal obligation to abide by their norms in applicable situations.¹⁴

Federation are a constituent part of [the Russian] legal system."); HANS KELSON, *PRINCIPLES OF INTERNATIONAL LAW* 191-202 (1959) (contending no matters exist that cannot be regulated by international law). *But see* BRIERLY, *supra* note 8, at 292-96 (discussing practical difficulties of using international legal norms to address a state's treatment of its own nationals).

¹² The *jus in bello* refers to the standards of conduct applicable within an ongoing armed conflict and should not be confused with the *jus ad bellum*, which denotes when states may legally resort to force. *See, e.g.*, EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 3-4 (1991). For a thorough discussion of the history and development of the *jus in bello* as applied to both international and internal armed conflicts, see generally FRITS KALSHOVEN, *INTERNATIONAL COMMITTEE OF THE RED CROSS, CONSTRAINTS ON THE WAGING OF WAR* 7-24 (1991). With respect to applying the *jus ad bellum* to Russian and Chechen justifications for their respective uses of force, such issues lie outside of the scope of this Note and must be reserved for further study. *See generally* IAN BROWNLEE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963) (providing detailed discussion of the *jus ad bellum*'s history and development).

¹³ *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Person in Time of War, August 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [collectively referred to hereinafter as "Geneva Conventions"]; Protocol Additional to the Geneva Convention of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II]; *see also* 15 HUM. RTS. L.J. 56, 62-63 (1994) (listing Russian ratifications to Geneva Conventions and both Protocols). Although customary international law also could constrain Russian conduct, the scope of this Note does not permit an inquiry into the applicability of such norms to Chechnya and must be reserved for future study.

¹⁴ *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 10, art. 38, ¶1(a) (listing treaties as a basic source of international law); Vienna Convention on the Law of Treaties, May 22, 1969, U.N. Doc. A/CONF. 39/27, art. 26 ("*pacta sunt servanda*—every treaty in force is binding upon the parties to it and must be performed by them in good faith"); *see also* CONST.

More difficult issues arise, however, when one shifts the focus from asking whether international law should apply to events in Chechnya to asking *who* has authority to determine *which* laws apply, and how to hold the parties accountable for any violations.¹⁵ In an arguably intra-state conflict such as the one in Chechnya, little likelihood exists that a state could bring a claim against either of the warring parties before an adjudicatory body such as the International Court of Justice (the "ICJ").¹⁶ With respect to issues of responsibility, the prospect of an internal investigation by the current Russian government raises serious questions of credibility, given its direct involvement in the fighting.¹⁷ Russia also possesses the United Nations Security Council (the "Security Council") veto power necessary to obstruct any United Nations attempt to erect either an international fact-finding body or a war crimes tribunal such as those created to hold individuals accountable for atrocities in Bosnia and Rwanda.¹⁸

OF THE RUSSIAN FEDERATION, *supra* note 11, art. 15 (incorporating international treaties into Russian legal system: "[i]f an international treaty of the Russian Federation establishes rules other than those stipulated by the law, the rules of the international treaty apply").

¹⁵ See, e.g., Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. INT'L L.J. 149, 158 (1993) (international legal order unable to discipline a state that refuses to enforce its obligation to punish war criminals within its jurisdiction).

¹⁶ The ICJ functions as the principal judicial organ for the United Nations and its member states. See U.N. CHARTER art. 92. Among the several problems facing any state trying to bring a claim before the ICJ in an intrastate conflict such as the one in Chechnya, the requirement of standing (i.e., applicants must show the Court that they possess a sufficient legal interest in the case) looms large. See, e.g., *Barcelona Traction, Light and Power Company, Ltd., Second Phase*, (Belg. v. Spain), 1970 I.C.J. 3 (holding that Belgium lacked standing to bring claim on behalf of Belgian shareholders in Canadian corporation that suffered injury as result of Spanish action). Any state claiming violations of the *jus in bello* in Chechnya would thus need to show not only evidence of violations, but also the grounds on which it had standing to bring these alleged violations before the ICJ, a difficult assertion given that states universally characterized events in Chechnya from the start as an internal Russian matter. For further discussion of the difficulties in enforcing international law in internal conflicts, see *infra* notes 257-69, and accompanying text.

¹⁷ To date, Russian authorities have shown only nominal interest in accusations of atrocities by their own forces, focusing instead on pursuing charges of "treason" against Chechen secessionists. See, e.g., *Chechen Leader Faces Russian Treason Charge*, WASH. POST, Feb. 2, 1995, at A24.

¹⁸ The Security Council established both the Commission of Experts and the *ad hoc* International Criminal Tribunal to investigate genocide and war crimes in Bosnia and Rwanda. See, e.g., S.C. Res. 808, U.N. SCOR, U.N. Doc. S/25704 (1993) (establishing tribunal to prosecute violations of international humanitarian law in former Yugoslavia); M. Cherif Bassiouni, *U.N. Commission of Experts Established Pursuant to Security Council Resolution 780*, 88 AM. J. INT'L L. 784-805 (1994) (describing findings of Commission of Experts in former Yugoslavia). Moreover, despite the important precedent these bodies established with respect to creating international forums to address violations of international norms, these *ad hoc* organs continue to face numerous structural and procedural difficulties in practice. See, e.g., Andrew Jay Cohen, *On the Trail of Genocide*, N.Y. TIMES, Sept. 7, 1994, at A23; Stephanie Grant, *Yugoslavia-Human Rights:*

Given this difficulty in implementing *legally* binding international rules of conduct, must one therefore conclude that all international standards lack authority to constrict state behavior in civil conflicts like that in Chechnya?¹⁹ The recent application of the *politically* binding international norms of the Organization for Security and Cooperation in Europe ("the OSCE") in Chechnya suggest otherwise.²⁰ Although not legally bound by international law, the Russian Federation recognized the applicability of OSCE principles to its conduct in the war in Chechnya.²¹ More significantly, it also agreed to permit the OSCE's political mechanisms, which seek to ensure implementation of OSCE norms, a role in resolving the conflict.²²

This Note examines the applicability of both legal and political international norms to the civil conflict in Chechnya and argues that, to the extent each set of norms establishes similar moral principles, the political OSCE model currently appears better suited to address violations of such principles in the intrastate context.²³ Both OSCE

War Crimes Court Faces Many Dilemmas, Inter-Press Service, Nov. 8, 1994, available in LEXIS, World Library, Curnws File.

¹⁹ This is not to suggest, as Kelson did, that where no specifically identified sanctions flow from a violation (i.e., for Kelson, war and reprisals), no "law" exists. See HANS KELSON, *THE PURE THEORY OF LAW* 320 (1967); Rubin *supra* note 15, at 159 n.19. Simply because the *jus in bello* fails to identify a universal authority to enforce compliance does not relieve the international rules of their normative value, nor does it necessarily mean that enforcement cannot occur in other contexts (i.e., states remain free to apply moral or political sanctions when they determine another state has violated international norms). See Rubin, *supra* note 15, at 159. Rather, the question is asked to suggest that where international legal norms lack positive law enforcement mechanisms, other international norms (i.e., moral or political ones), which include forums or mechanisms for enforcement, may serve as an effective complement in constraining state behavior to an agreed-upon set of rules.

²⁰ See, e.g., William Drozdiak, *Russia Gives U.S. Pledges on Chechnya Aid, Voting*, WASH. POST, Jan. 19, 1995, at A15 (Russia agrees to cooperate with OSCE's peace mission to Chechnya); Goldstein, *supra* note 5, at A1 (Russian delegate to OSCE joined in unanimous vote condemning Russian violations of human rights and international humanitarian law in Chechnya while also recognizing importance of maintaining Russia's territorial integrity); Norman Kempster, *U.S. Finds Ways to Criticize Russian Acts in Chechnya*, L.A. TIMES, Jan. 12, 1995, at A9 (U.S. accuses Russia of violating standards it accepted as part of OSCE process).

²¹ OSCE Chairman-in-Office on Gyarmati's Moscow Mission, MTI Econews (Hungary), Jan. 11, 1995, available in LEXIS, World Library, Curnws File (Russian leaders agree that settlement of Chechen crisis should be carried out in conformity with basic principles of OSCE).

²² See OSCE Delegation to Visit Chechnya within Days, Reuters World Service, Jan. 18, 1995, available in LEXIS, World Library, Curnws File (OSCE mission to travel to Chechnya to examine observation of OSCE agreements there, especially on human rights); see also Chrystia Freeland and John Thornhill, *Russia to Allow Human Rights Team in Chechnya*, FIN. TIMES (London), Jan. 11, 1995, at 22 (Russia agrees to allow OSCE mission to assess human rights violations and humanitarian needs in Chechnya in move away from Russia's insistence that crisis is internal matter).

²³ See *infra* notes 340-42 and accompanying text.

norms and international law attempt to affix international standards onto a state's internal behavior. The OSCE model, however, possesses both a forum and several mechanisms for encouraging the implementation of these norms—tools that are conspicuously absent in the context of international law.²⁴ Thus, this Note concludes that so long as states continue to face obstacles in applying international legal standards to civil wars, the OSCE provides a supplementary method for establishing more effective standards to govern internal conflicts like the one in Chechnya. Section I of this Note reviews the roots of the Chechen conflict, the methods used by the warring factions, and the international reaction to the conflict.²⁵ Section II examines the status of the Chechen conflict under international law, the standards that exist to constrain the methods of warfare used there, and the mechanisms available to interpret and enforce these standards.²⁶ Section III investigates the status of OSCE norms under international law, the applicability of relevant OSCE norms to the facts of the Chechen conflict, and the moral and political enforcement mechanisms provided by the OSCE process to address the implementation of its norms.²⁷ Finally, Section IV compares the efficacy of these legal and political normative models in addressing the methods by which parties use force in internal armed conflicts.²⁸

I. THE CHECHEN CONFLICT

A. Background

Chechnya lies in the Northern Caucasus region of the Russian Federation, with a mostly Muslim population of approximately 1.2 million.²⁹ Historically, Chechens regard their northern Russian neighbors with suspicion and hostility.³⁰ Russia's initial attempts to colonize the wide strip of territory between itself and newly acquired Georgia in the early nineteenth century sparked a conflict with the inde-

²⁴ See *infra* notes 257–69 and accompanying text.

²⁵ See *infra* notes 29–118 and accompanying text.

²⁶ See *infra* notes 119–272 and accompanying text.

²⁷ See *infra* notes 273–331 and accompanying text.

²⁸ See *infra* notes 332–43 and accompanying text.

²⁹ Steven Erlanger, *Get Back on Track, U.S. Tells Moscow; Grozny Resists Fierce Assault by Russian Forces*, INT'L HERALD TRIB., Jan. 16, 1995, available in LEXIS, World Library, Curnws File.

³⁰ *Rebel Chechnya—A Thorn in Russia's Flesh*, Reuters World Service, Dec. 1, 1994, available in LEXIS, World Library, Curnws File.

pendent Chechen tribes already residing there.³¹ The ensuing war lasted more than forty-seven years, from 1817 until 1864, when czarist forces finally brought Chechnya into the Russian empire.³²

Under the Soviet regime, the Chechens fared little better, suffering official persecution for their clan systems and Islamic religion.³³ Thus, when German troops reached Grozny in 1943, Chechen separatists launched an unsuccessful rebellion against Stalin.³⁴ In response, in 1944 Stalin deported more than half the Chechen population to Siberia and Kazakhstan.³⁵ Approximately 200,000 people perished during these years of exile, which lasted until 1957.³⁶ History seemed to repeat itself in 1991, when conservative Communist Party officials launched an abortive coup against the Soviet government, and the leaders of the Chechen-Ingush autonomous republic rushed to support it.³⁷ A temporary council, with Russian Federation President Boris Yeltsin's tacit approval, subsequently replaced the discredited Chechen leadership.³⁸

B. *The Road to War*

In September of 1991, the return to Chechnya of Dzhokhar Dudayev, a former Soviet general, to lead the popular "National Patriot" party paved the way for the current conflict.³⁹ As the Soviet Union began to split apart, Dudayev led a coup in October 1991 under the banner of independence from Russia, to which the Chechen republic technically still belonged under the Soviet Constitution.⁴⁰ After taking over the Chechen KGB headquarters, the Interior Ministry, the airport

³¹ *Id.*

³² Specter, *supra* note 3, at 1. Some 400,000 Chechens died during that conflict. See Richard Lyons, *Explosive Mix in Chechnya: History, Hatred and Oil*, N.Y. TIMES, Dec. 14, 1994, at A14.

³³ *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30.

³⁴ *Id.*

³⁵ Inga Saffron, *Gangster Style Reigns in Breakaway State—Lawlessness a Matter of National Pride in Chechnya*, DALLAS MORNING NEWS, Nov. 30, 1994, at A35.

³⁶ *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; *Chronology of Russian-Chechen Crisis*, Reuters World Service, Feb. 16, 1995, available in LEXIS, World Library, Curnws File.

⁴⁰ Vladimir Yemelyanenko, *Russia-Chechnya: A Forced Love Affair*, MOSCOW NEWS, Nov. 18, 1992, available in LEXIS, World Library, Allwld File. Accounts on the level of violence used in overthrowing the temporary council government vary. Compare *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30 (characterizing Dudayev's October 1991 revolt as a "bloody mutiny") with Yemelyanenko, *supra* (characterizing coup as only bloodless revolution in Caucasus after collapse of Soviet Union).

and the parliament, Dudayev went on to hold and win Chechnya's first presidential election.⁴¹ "President" Dudayev then officially declared Chechnya's independence from Russia.⁴²

Russian President Boris Yeltsin refused to recognize the Chechen secession, declaring it illegal and instituting a state of emergency, which the new Chechen Parliament promptly refused to enforce.⁴³ In November of 1991, Yeltsin sent 650 troops to Grozny, the Chechen capital, to reimpose Russian rule.⁴⁴ When Chechen fighters blocked the airport and prevented Russian troops from reaching Grozny, however, Russian forces withdrew outside of Chechnya's borders.⁴⁵ Given all the other problems associated with the Soviet Union's dissolution, the Russian Federation could do little in the next three years to enforce directly its sovereignty, contenting itself with economic, transport and diplomatic blockades of the tiny republic.⁴⁶ Nevertheless, Moscow continued to take Chechnya's defiance seriously, not only because of economic concerns—Russia stood to lose access to both its oil pipeline (a part of which runs through Chechnya) and the republic's own oil resources—but also because of the dangerous precedent a successful Chechen secession would set for Russia's authority over other ethnic groups and regions.⁴⁷

For its part, Chechnya continued to insist upon its independence from Moscow, including its refusal to sign the 1992 Federation Treaty,

⁴¹ Compare Yemelyanenko, *supra* note 40 (asserting election results "inevitable") with Church, *supra* note 4, at 42 (describing elections as "crooked").

⁴² Alessandra Stanley, *Russia Backs Group Fighting Secession in South*, N.Y. TIMES, Aug. 4, 1994, at A9.

⁴³ Jeff Berliner, *Breakaway Chechen Republic Wracked by Protests in Southern Russia*, UPI, Apr. 1, 1992, available in LEXIS, World Library, Allwld File.

⁴⁴ *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30.

⁴⁵ *Id.*; see also Berliner, *supra* note 43; Stanley, *supra* note 42, at 9.

⁴⁶ See *Press Briefing by Russian Federation Foreign Ministry*, Official Kremlin Int'l News Broadcast, Oct. 26, 1993, available in LEXIS, World Library, Curnws File (Foreign Ministry refuses to discuss Chechnya because Foreign Ministry does not comment on internal political developments inside Russian Federation); see also Anne Garrels, *All Things Considered: Moscow Denies Involvement in War in Chechnya* (NPR radio broadcast, Nov. 29, 1994), Transcript No. 1681-9, available in LEXIS, World Library, Curnws File; Alessandra Stanley, *Russian Troops on Full Alert in the Caucasus*, N.Y. TIMES, Sept. 6, 1994, at A9; Yemelyanenko, *supra* note 40. Although it appears Russia and Chechnya tried several times to resolve their differences diplomatically, these efforts were of no avail. See Sharip Asuyev, *Results of Talks Between Russia and Chechnya in Grozny*, TASS, Jan. 14, 1993, available in LEXIS, World Library, Allwld File (Chechen and Russian representatives recognize "vital necessity and possibility of settling bilateral relations by exclusively peaceful, political means"); *Chechen Presidential Advisor Arrives in Moscow*, BBC Summary of World Broadcasts, Sept. 19, 1994, from Interfax, Sept. 16, 1994, available in LEXIS, World Library, Curnws File (Dudayev's advisor in Moscow for talks, the existence of which Russian Foreign Ministry denies).

⁴⁷ See, e.g., Lyons, *supra* note 32, at 14; Michael Specter, *Russian Forces Move Into Rebel Region*, N.Y. TIMES, Dec. 12, 1994, at 1. The Russian Interior Minister Viktor Yerin later commented in

which laid out the distribution of authority between the Russian Federal Government and its constituent parts.⁴⁸ Meanwhile, the economic and diplomatic isolation—no country ever formally recognized Chechnya's independence⁴⁹—took its toll in Chechnya as increasing internal opposition emerged to challenge Dudayev personally.⁵⁰ On August 2, 1994, the opposition group "Provisional Council" announced its intention to overthrow Dudayev and normalize relations with Moscow.⁵¹ This emerging internal conflict within Chechnya led Russia to back away from asserting an interest in direct intervention in Chechen affairs. Instead, it focused efforts on supporting the internal opposition to Dudayev with money and weapons.⁵² Publicly, Russia also cited the escalating violence and state of lawlessness in Chechnya to explain its increase in troop deployments to the Chechen border.⁵³

response to domestic criticism of the Russian intervention in Chechnya: "What our not so far-sighted politicians are forgetting is that the success of this operation—and we are confident that it will be successful—will give assurance to many other regions of Russia that we shall not let them get into the state in which Chechnya has found itself." *Russia: Grachev, Yerin and Stepashin Hold Press Conference in Mozdok*, BBC Monitoring Service, Dec. 31, 1994, from Ostankino Channel 1, Dec. 29, 1994 (text of press report), available in LEXIS, World Library, Curnws File.

⁴⁸ Gennady M. Danilenko, *The New Russian Federalism*, 1 NEW EURO. L. REV. 367, 380 (1993). Tatarstan also refused to sign the treaty, but has since negotiated a separate agreement with Russia, acknowledging its membership in the Russian Federation while retaining a certain level of autonomy. See *id.* at 382; Shafiga Daulet, *Tatarstan's Separate Peace*, CHRISTIAN SCI. MONITOR, Dec. 23, 1994, at 18.

⁴⁹ Yemelyanenko, *supra* note 40 (noting Saudi Arabia and Kuwait offered to establish diplomatic relations with Muslim Chechnya, but Dudayev turned down offers, insisting Russia must recognize Chechnya first).

⁵⁰ See, e.g., Berliner, *supra* note 43 (describing seizure of radio and television station in protests against Dudayev in April 1992 that led to death of at least five people); Yemelyanenko, *supra* note 40 (finding that some Chechens oppose Dudayev personally, but none support reestablishing federal relations with Russia).

⁵¹ *Key Events Leading to Chechen Showdown*, Agence France Presse, Nov. 26, 1994, available in LEXIS, World Library, Curnws File. The situation became further complicated when several days later, on August 8, Khasbulatov, the former Russian Supreme Soviet Speaker who organized the 1993 uprising against Yeltsin, returned to Chechnya to lead an anti-Dudayev movement. *Id.* By September 1994, the various opposition groups announced that they stood united in their aim to overthrow Dudayev by force. *Id.*

⁵² See Chechnya; *Russia Will Not Send Troops to Chechnya, Minister Tells Chechen Delegation*, BBC Summary of World Broadcasts, Aug. 31, 1994, available in LEXIS, World Library, Curnws File (Russian Minister of Nationalities and Deputy Prime Minister both insist Russia will not intervene directly in Chechen crisis); see also *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30 (Russia made no secret of its backing anti-Dudayev Provisional Council); Sebastian Smith, *Moscow's Hidden Hand Gives Chechen President Hard Shove*, Agence France Presse, Nov. 26, 1994, available in LEXIS, World Library, Curnws File (Moscow crippled Chechnya with economic blockade while supplying federal funds to Provisional Council); Stanley, *Russia Backs Group Fighting Secession*, *supra* note 42, at A9 (Russian government openly backed opposition movement).

⁵³ Lawrence Sheets, *Tiny Chechnya Spits Defiance at "Lying" Russia*, Reuters World Service, Dec. 7, 1994, available in LEXIS, World Library, Curnws File. A powerful Chechen mafia now

On October 21, 1994, the Chechen opposition officially asked President Yeltsin for assistance because of the consistent string of defeats suffered by their forces.⁵⁴ Although Russia denied providing anything more than moral and financial support, Dudayev and his government accused Russia of conducting an undeclared war, using Russian troops and equipment in Chechnya.⁵⁵ Fighting escalated in November 1994 when opposition forces, including some forty helicopter gunships bearing Russian markings, unsuccessfully attempted to capture Dudayev's government positions near Grozny.⁵⁶ The crisis came to a head when Dudayev claimed that Chechen fighters captured seventy Russian soldiers in the failed attack, and then threatened to execute them as "mercenaries" unless Russia took responsibility for its participation in the hostilities.⁵⁷ If Russia did admit it sent the soldiers, however, Dudayev insisted that he would treat them "in conformity with the Constitution of Chechnya and international law."⁵⁸

Although Russia eventually admitted its forces participated in the failed attack,⁵⁹ President Yeltsin took the opportunity to shift tactics, giving both sides (the opposition and Dudayev) two days to disarm their forces or face the introduction of a state of emergency and the possible arrival of Russian troops.⁶⁰ Talks to defuse the conflict broke

operates throughout post-Soviet Russia, which has led to Russian stereotypes of Chechens as criminals, thugs and terrorists. See Saffron, *supra* note 35, at A35; Yemelyanenko, *supra* note 40. The Russian government relied on these images along with the increasing rate of hijackings and terrorist activities in the Caucasus region to build its case against a separate Chechnya. See Arkady Popov, *The Threat of Chechnya*, MOSCOW TIMES, Oct. 21, 1994, available in LEXIS, World Library, Curnws File; *Press Conference with the Chairman of the Chechen Parliament*, Official Kremlin Int'l News Broadcast, Nov. 30, 1994, available in LEXIS, World Library, Curnws File (discussing Russian prejudice against Chechens).

⁵⁴ See *Key Events Leading to Chechen Showdown*, *supra* note 51.

⁵⁵ See *Press Conference with the Chairman of the Chechen Parliament*, *supra* note 53 (Chechen leader accuses Russians of having sent troops to Chechnya and conducting an undeclared war against it); see also Garrels, *supra* note 46 (Russia denies any involvement in Chechen civil unrest); Smith, *supra* note 52 (Dudayev accuses Russia of sending soldiers and special services to overthrow him).

⁵⁶ See *Key Events Leading to Chechen Showdown*, *supra* note 51; *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30.

⁵⁷ Lawrence Sheets, *Chechnya Hints it May Execute "Russian Mercenaries"*, Reuters World Service, Nov. 28, 1994, available in LEXIS, World Library, Curnws File (quoting Dudayev—"if Russia does not recognize these soldiers as prisoners of war they will be tried by the laws of shariat (Islamic rule)").

⁵⁸ *Chechnya—Duma Delegation Ends Chechnya Visit—2 POWs Released*, BBC Summary of World Broadcasts, Dec. 5, 1994, available in LEXIS, World Library, Curnws File (quoting Dudayev).

⁵⁹ See Specter, *Russian Forces Move into Rebel Region*, *supra* note 47, at A1.

⁶⁰ See *Rebel Chechnya—A Thorn in Russia's Flesh*, *supra* note 30; see also Michael Specter, *Yeltsin Threatens Action on Warring Secessionist Area*, N.Y. TIMES, Nov. 30, 1994, at A3 (Yeltsin emphasizes that "Chechnya is a republic within the Russian Federation . . . we have no moral right to stand aside and watch this bloodshed").

down when Russia issued new demands that Chechnya also embrace the federal system it had rejected three years earlier.⁶¹ Finally, on December 11, 1994, President Yeltsin formally announced that he had ordered Russian troops to move into the Chechen republic to protect both Russia's territorial integrity and its citizens' safety in Chechnya.⁶² Yeltsin noted that the action would conform to the constitution and laws of the Russian Federation, emphasizing his orders that "all officials charged with the responsibility of restoring constitutional order in the Chechen republic not . . . use violence against civilians [but] . . . take them under protection."⁶³

Full-scale war erupted soon thereafter, as hundreds of Russian tanks rolled into Chechnya.⁶⁴ Russian warplanes began bombing Grozny and surrounding villages, while tens of thousands of fresh Russian recruits confronted fierce Chechen resistance in their advance into Chechnya.⁶⁵ Dudayev reacted by putting out a general call to arms.⁶⁶ Thousands of Chechen volunteers responded, pouring into the city from the countryside, centering their defense on the symbolic presidential palace in northern Grozny.⁶⁷

In the weeks that followed, Russian planes and artillery heavily shelled Grozny and other Chechen cities, punishing not only the secessionist fighters but also the many civilian residents.⁶⁸ Russian bombers, ordered to target strategic sites such as Grozny's television tower, rail terminal, presidential palace and military installations, instead struck residential buildings, the main hospital, and even an orphanage.⁶⁹ Tens of thousands of civilians died as a result.⁷⁰ Outside

⁶¹ Sheets, *supra* note 53.

⁶² *Text of Yeltsin's Address on Chechnya*, Reuters World Service, Dec. 11, 1994 (translation by TASS News Agency), available in LEXIS, World Library, Curnws File.

⁶³ *Id.*

⁶⁴ Specter, *supra* note 47, at 1.

⁶⁵ See Steven Erlanger, *Troops Clash in Chechnya as Peace Efforts Falter*, N.Y. TIMES, Dec. 19, 1994, at A1.

⁶⁶ *Dudayev—No More Playing Peacemakers, POWs to be Dealt with by War Laws*, BBC Monitoring Service, Dec. 16, 1994, available in LEXIS, World Library, Curnws File (Dudayev insisted supporters have "no alternative but to defend themselves against Russian troops").

⁶⁷ Michael Specter, *Russian Troops and Secessionists Battle Fiercely*, N.Y. TIMES, Jan. 2, 1995, at 1.

⁶⁸ See, e.g., Michael Specter, *Russians Bombard Chechen Capital from Land and Air*, N.Y. TIMES, Dec. 20, 1994, at A1.

⁶⁹ See, e.g., *Chechens Suffer Under Continued Russian Assault*, (CNN television broadcast, Jan. 16, 1995), Transcript No. 755-1, available in LEXIS, World Library, Curnws File; Michael Gordon, *US Warns Russia: Stop Attacking Chechen Civilians*, N.Y. TIMES, Dec. 30, 1994, at A12; Bruce W. Nelan, *Why it All Went So Very Wrong*, TIME, Jan. 16, 1995, at 50-51; Specter, *supra* note 1, at A1 (describing shelling of Grozny's main hospital).

⁷⁰ See Nelan, *supra* note 69, at 50-51. In figures released by the Russian Federation's Human Rights Commissioner, Sergei Kovalyov, an estimated 24,400 civilians died in the fighting in

Grozny, Russian planes used similar tactics, strafing and bombing the main highway filled with fleeing refugees as well as attacking open air markets in the cities of Augun, Shali and Chechen Aul.⁷¹

Domestic and international opposition to the bombings escalated as the number of civilian casualties increased.⁷² Twice Yeltsin promised to halt or avoid bombing civilians, and both times bombardments resumed within hours after his pronouncements.⁷³ Later, Russian Security Council Secretary Oleg Lobov clarified the orders, noting that President Yeltsin had only ordered an end to aerial bombardments, not artillery shelling.⁷⁴ Russian Foreign Minister Andrey Kozyrev publicly insisted that Russia's use of force to restore law and order in Chechnya met Russia's international legal obligations.⁷⁵ As for the Chechens, their conduct also harmed the civilian population because they relied on civilians and civilian shelters to shield themselves from Russian attacks.⁷⁶ In addition, Chechens held captured Russian soldiers inside the Chechen Presidential Palace while Russian forces attacked.⁷⁷

Chechnya between November 25, 1994, and January 25, 1995, including 3,700 children under the age of 15. Telephone Interview with Eric Engleman, Moscow Correspondent, Monitor Radio (Feb. 22, 1995).

⁷¹ See, e.g., Specter, *supra* note 3, at A1; Erlanger, *supra* note 29.

⁷² See, e.g., Alessandra Stanley, *Russians Say Rebel Center is Encircled; Protests Rise*, N.Y. TIMES, Dec. 24, 1995, at 4 (Lower House of Russian Parliament voted overwhelmingly to appeal to Yeltsin to order a halt to fighting and to resume talks with Chechen leaders); Alessandra Stanley, *Russian General Halts His Tanks As Qualms over Rebellion Grow*, N.Y. TIMES, Dec. 17, 1994, at 1 (Maj. Gen. Babichev halted his advance and told weeping Chechen women "it is forbidden to use the army against peaceful civilians. It is forbidden to shoot at the people"). For a general discussion of the international reaction to events in Chechnya, see *infra* notes 84-118, and accompanying text.

⁷³ See, e.g., Kaplan, *supra* note 2, at 10 (relating to Yeltsin's December 27 promise to avoid bombing civilians); Alessandra Stanley, *Yeltsin Orders End to Bombing of Rebel City*, N.Y. TIMES, Jan. 5, 1995, at A1 (relating to Yeltsin's second announced order to halt bombing of Grozny).

⁷⁴ *Security Council Secretary Oleg Lobov Interviewed on Chechnya*, BBC Summary of World Broadcasts, Jan. 16, 1995 from Russia TV Channel, Jan. 14, 1995, available in LEXIS, World Library, Curnws File.

⁷⁵ See *Kozyrev Defends Legality of Chechen Action Under International Law*, BBC Summary of World Broadcasts, Dec. 14, 1994, from Interfax, Dec. 12, 1994, available in LEXIS, World Library, Curnws File.

⁷⁶ See *Human Rights Body Rebukes Both Sides in Chechnya*, Reuters World Service, Jan. 19, 1995, available in, LEXIS, World Library, Curnws File (concluding that Chechens stored ammunition in civilian centers, including an apartment building housing civilians that exploded when fired upon, as well as finding evidence that Chechen forces occasionally shot and killed civilians without taking time to identify them as non-combatants). Russian military leaders made more specific accusations, charging Chechens with using "women, children and old people as human shields, especially when they have to break out of an encirclement." *Press Conference with Head of Public Relations for the FSK, Alexander Mikhailov and Head of Public Relations for the Interior Ministry, Vladimir Vorozhtsov*, Official Kremlin Int'l News Broadcast, Jan. 11, 1995, available in LEXIS, World Library, Curnws File (comments of Mikhailov).

⁷⁷ See Alessandra Stanley, *Chechen Palace, Symbol to Rebels, Falls to Russians*, N.Y. TIMES, Jan. 20, 1995, at A1 (describing Chechen evacuation of Russian prisoners from Presidential Palace when they left that building to Russian forces).

When Russian forces finally moved into the city of Grozny, tanks and infantry forces sprayed mortar and rocket fire at the remaining buildings and, occasionally, at the civilians themselves.⁷⁸ After more than five weeks of relentless bombing, shelling and rocket attacks, Russian troops finally smashed the symbol of Chechen resistance by capturing the Presidential Palace, prompting Yeltsin to announce that the military stage of the conflict had ended.⁷⁹ The announcement proved premature, however, as it took another three weeks of intense fighting before Russian troops finally forced Chechen secessionists to withdraw from Grozny.⁸⁰ The Chechens, moreover, vowed to continue their struggle, taking to the hills and villages south of Grozny.⁸¹ Subsequent attempts to reach a permanent cease-fire agreement failed, leaving little room for a political solution to the crisis.⁸² Russian forces continued to bomb and shell villages suspected of sheltering Chechen fighters, while Chechen forces employed guerrilla tactics, including snipers and nighttime hit-and-run attacks, to harass Russian positions.⁸³

C. *International Reaction to the Chechen Conflict*

Throughout the Chechen crisis, the international community consistently regarded Chechnya as an internal Russian matter, emphasizing Russia's legitimate interest in maintaining the security of its borders.⁸⁴ Still, as the number of civilian deaths became known, few states endorsed the *means* the Russian government adopted to enforce its territorial integrity.⁸⁵ In particular, Western nations expressed deep

⁷⁸ See Fred Hiatt, *Moscow Warns West on Criticism over Chechnya*, WASH. POST, Jan. 13, 1995, at A26 (Human Rights Watch report concluded Russians demonstrated consistent pattern of firing on civilians).

⁷⁹ Stanley, *supra* note 77, at A1.

⁸⁰ Khalid Askerov, *Chechens Decide to Pull Military HQ from Grozny*, Reuters World Service, Feb. 8, 1995, available in LEXIS, World Library, Curnws File.

⁸¹ Steven Erlanger, *A Famous Victory*, N.Y. TIMES, Feb. 10, 1995, at A8.

⁸² See, e.g., *Chronology of Russian-Chechen Crisis*, *supra* note 39 (shaky 48 hour cease-fire declared Feb. 13, 1995).

⁸³ See Erlanger, *A Famous Victory*, *supra* note 81; Steven Erlanger, *Yeltsin to Allow a European Rights Mission in Chechnya*, N.Y. TIMES, Mar. 10, 1995, at A10.

⁸⁴ See *supra* notes 4-5 and accompanying text; see also Tony Barber, *Russia: Muslims Angered by Moscow's Attack*, THE INDEPENDENT, Dec. 21, 1994, at 7, available in LEXIS, World Library, Curnws File (Muslim nations such as Turkey and Iran express concern with violence in Chechnya, noting overriding principle of territorial integrity); Gordon, *supra* note 69, at 12 (United States recognizes Chechnya as Russian internal affair despite United States concern with civilian casualties); Alessandra Stanley, *Bombing of Rebel City Lets Up, But not Attacks on Yeltsin*, N.Y. TIMES, Jan. 6, 1995, at A1 (German Chancellor Helmut Kohl expresses concern with Russian behavior in Chechnya but continues to recognize it as internal Russian matter).

⁸⁵ See, e.g., Jane Perlez, *East Europeans Reacting Nervously to Russian Fighting*, N.Y. TIMES, Jan. 5, 1995, at A9 (Polish President Lech Walesa accuses Russia of overstepping the bounds of legitimately defending the state in its actions in Chechnya); Craig R. Whitney, *Europeans Offer to*

concern when bombardments of Chechen cities apparently continued the day after President Yeltsin had promised to halt air raids that could harm civilians.⁸⁶ The United States specifically reminded Russia of its international legal obligations toward civilians under the Geneva Conventions.⁸⁷

As the fighting in Chechnya escalated, so did criticism of Russian methods used there. The European Commission in Brussels announced it would delay an interim trade treaty signed with Russia in December as a way of emphasizing Europe's concern with the killing of civilians.⁸⁸ France warned that Moscow's actions weakened its chances of joining the Council of Europe.⁸⁹ As for the Muslim nations, the fifty-one states of the Organization of the Islamic Conference called on Moscow to end its attack on Chechnya and accused it of breaking international law by indiscriminately using force against its own civilians.⁹⁰ The international organization Human Rights Watch reported that both Russian and Chechen forces had gravely violated a number of humanitarian laws and called on Russian authorities to punish publicly those responsible.⁹¹ In particular, the group concluded that Russian intervention in Chechnya involved a "consistent pattern of bombing, shelling and firing on civilians grossly violat[ing] its humanitarian legal obligations."⁹²

The public condemnation of Russian, and to a lesser extent Chechen, actions in Chechnya did not, however, do much to weaken

Help Russians Seek Peace in Secessionist War, N.Y. TIMES, Jan. 4, 1995, at A6 (Sweden, Denmark and Norway criticize Russia's handling of Chechen affair).

⁸⁶ See, e.g., Gordon, *supra* note 69, at 12 (United States State Department deeply disturbed by bombing of Grozny less than 24 hours after Yeltsin ordered an end to air strikes that could lead to civilian fatalities); Alessandra Stanley, *Russia Delivers Mixed Signals on its Military Campaign*, N.Y. TIMES, Dec. 30, 1994, at A12 (French Foreign Minister accuses Yeltsin of breaking his promise to halt air raids).

⁸⁷ Gordon, *supra* note 69, at 12. A later U.S. government study reiterated this concern, accusing Russia of violating international agreements by attacking civilians during its invasion of Chechnya. Steven Greenhouse, *U.S. Human Rights Study Turns Heat on Russia*, INT'L HERALD TRIB., Feb. 2, 1995, available in LEXIS, World Library, Curnws File.

⁸⁸ Stanley, *supra* note 84, at 1; see also *EU Freezes Economic Accord with Russia over Chechnya*, Agence France Presse, Jan. 19, 1995, available in LEXIS, World Library, Curnws File.

⁸⁹ Ramesh Jaura, *Europe-Russia: Bonn, Paris Urge Yeltsin to End Chechnya War*, Inter Presse Service, Jan. 9, 1995, available in LEXIS, World Library, Curnws File.

⁹⁰ See Nicholas Doughty, *West Fuels Moslem Ire Over Chechnya*, Reuters World Service, Jan. 10, 1995, available in LEXIS, World Library, Curnws File.

⁹¹ *Human Rights Body Rebukes Both Sides in Chechnya*, *supra* note 76.

⁹² *Id.* Russian forces also were accused of severely mistreating captured Chechen fighters and civilians. See, e.g., *supra* note 83 (Amnesty International alleges Russian mistreatment of Chechen prisoners); Steve Levine, *Russians Accused of Atrocities Chechens Charge Troops Beat, Kill Civilian Prisoners*, WASH. POST, Jan. 30, 1995, at A1 (accuses Russians of shooting, suffocating and beating

Russia's legally recognized claim to a right to enforce its territorial integrity.⁹³ Most states recognized that without direct involvement by the United Nations Security Council, no opportunity existed for the international community to intervene directly to ensure Russia's internal compliance with its international legal obligations.⁹⁴ Without the means for enforcing international law in Chechnya, states eventually turned to a political body—the Organization of Security and Cooperation in Europe, formerly referred to as the Conference on Security and Cooperation in Europe (the "CSCE")⁹⁵—as a means of addressing the hostilities in Chechnya in a united manner.⁹⁶

Western nations, including Germany, France and the United States, all pointed out that in the week before ordering troops into Chechnya, President Yeltsin agreed at the CSCE meeting in Budapest to commit Russia to the principle that "if recourse to force cannot be avoided in performing internal security missions, each participating state will ensure that its use must be commensurate with the needs for enforcement . . . *the armed forces will take due care to avoid injury to*

captured Chechen civilians); *Russian Forces Violating Rights in Chechnya—Report*, Reuters World Service, Feb. 27, 1995, available in LEXIS, World Library, Curnws File (Human Rights Watch-10 day field investigation concludes "undisciplined Russian soldiers attack civilians, systematically loot civilian property and rob individual civilians"). Russian forces further blocked attempts by the International Committee of the Red Cross (the "ICRC") to visit detainees or obtain a list of those held prisoner. *Id.*

⁹³ See, e.g., Barber, *supra* note 84 (Muslim nations recognize potential effect of ignoring principle of territorial integrity in Chechnya and having that stance used against themselves in future); Gordon, *supra* note 69, at 12 (despite tragic treatment of civilians, United States continues to recognize Chechnya as Russian internal affair).

⁹⁴ Outside of cases involving a Security Council enforcement action, the United Nations Charter does not authorize states to "intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. CHARTER art. 2, ¶ 7; see also Ghali Interview, *supra* note 6 (comments of United Nations' Boutros-Boutros Ghali concluding United Nations can do nothing to constrain methods used in fighting in Chechnya).

⁹⁵ Born out of the Final Act of the Conference on Security and Cooperation in Europe held in Helsinki in 1975, the CSCE served as a common meeting ground for all European nations as well as the United States and Canada (including NATO, Warsaw Pact, and non-aligned states). See, e.g., ARIE BLOED, *Introduction to FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS* 1, 2-3 (1990); Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AM. J. INT'L L. 242 (1976). Based on 10 basic principles guiding relations between states, the OSCE developed into an organization where member states sought to reach agreement on principles and standards of conduct that each state then agreed to implement not only between itself and other states, but often also with respect to its own territory. See Bloed, *supra*, at 5-6; *Human Rights—The Helsinki Process*, 84 AM. SOC'Y INT'L & COMP. L. 113, 122-23 (1990) (comments of former U.S. Ambassador to CSCE John Maresca). The actual agreements of the OSCE relevant to the Chechen conflict as well as their status as international political (but not legal) obligations are discussed below. See *infra* Section III and accompanying text.

⁹⁶ See Nicholas Dougherty, *European Security Body Faces Test Over Chechnya*, Reuters World Service, Jan. 5, 1995, available in LEXIS, World Library, Curnws File; *Foreign Ministers Await*

civilians or their property."⁹⁷ The OSCE Member states intended this politically binding "Code of Conduct" to mark a major change in the way states conducted military activities.⁹⁸ OSCE member states alleged that the Russian use of force in Chechnya clearly violated this political commitment.⁹⁹

Given such apparent violations, member states demanded that Russia adhere to its OSCE obligations and allow an OSCE mission to travel to Chechnya to observe the level of commitment to the organization's agreements.¹⁰⁰ The OSCE Parliamentary Chair Willy Wimmer further urged Russia to "stop fighting a war against its own people."¹⁰¹ Despite continuing to assert that Chechnya remained an internal affair, Russia eventually agreed in principle to an OSCE role in monitoring the conflict.¹⁰² A January 9, 1995, meeting between Russian Minister of Justice Valentin Kovalyov and OSCE representative Istavan Gyarmati ironed out the OSCE role: both sides agreed on the need to enforce the observation of international standards, while also recognizing that separatism could not be allowed to encroach on Russia's territorial integrity.¹⁰³ As a result of these conferences, the OSCE issued a unanimous declaration, *including* the Russian delegate's vote, condemning

Outcome of OSCE Mission, Agence Europe, Jan. 24, 1995, available in LEXIS, World Library, Curnws File (European Union supports using OSCE as a means of addressing Chechen conflict).

⁹⁷ Doughty, *supra* note 96 (quoting Budapest Document) (emphasis added); see also Bishop, *supra* note 4. Ironically, at the same meeting, Yeltsin fought for an expanded, more powerful CSCE to diffuse the possibility of an expanding NATO alliance. See John Lloyd & Bruce Clark, *Russia, U.S. Square off Over Security: Differing Views about Expanding Role of CSCE*, FIN. TIMES, Nov. 28, 1994, at 2, available in LEXIS, World Library, Curnws File. Yeltsin warned that an enlarged NATO threatened Russia, recalling that "Europe has not freed itself from the heritage of the Cold War [and] is in danger of plunging into a Cold Peace." See Gordon Barthos, *Russia Takes Centre Stage in Emerging Europe*, TORONTO STAR, Dec. 9, 1994, at A29, available in LEXIS, World Library, Curnws File.

⁹⁸ See Marc Rogers, *CSCE Summit Struggles with Future Security*, JANE'S DEF. WEEKLY, Dec. 17, 1994, available in LEXIS, World Library, Curnws File.

⁹⁹ See, e.g., Doughty, *supra* note 96. In addition to accusations involving the OSCE Code of Conduct, German Defense Minister Volker Reuhe called attention to Russian violations of other OSCE agreements—specifically, the 1992 and 1994 Vienna Documents on Confidence and Security Building, which required Russia to notify all OSCE states of its troop movements larger than 9,000 soldiers and invite observers to force movements of more than 13,000. See, e.g., Jaura, *supra* note 89; Whitney, *supra* note 85, at A6. Although the Russian incursion in Chechnya involved well over 40,000 troops, the OSCE never received the requisite notification. Nelan, *supra* note 69, at 50.

¹⁰⁰ See, e.g., Kempster, *supra* note 20, at A9; John Goshko, *OSCE Role in Chechnya Possible—Russians Open for Aid in Ending Bloodshed*, CHRISTOPHER SAYS, WASH. POST, Jan. 6, 1995, at A26.

¹⁰¹ Jaura, *supra* note 89.

¹⁰² See Goshko, *supra* note 100, at A26.

¹⁰³ *Justice Minister and OSCE Envoy Discuss Chechen Conflict*, TASS, Jan. 9, 1995, available in LEXIS, World Library, Curnws File.

Russian violations of human rights and international humanitarian law in Chechnya but expressly recognizing Russia's territorial integrity.¹⁰⁴

Although Russia expressed initial reluctance toward the idea of an actual OSCE mission to Chechnya during the conflict itself, Russian Foreign Minister Kozyrev eventually acceded to Gyarmati's request for permission to send an OSCE mission to Chechnya.¹⁰⁵ Russia's Chairman of the State Duma Committee for International Affairs subsequently acknowledged that Russia had an obligation to comply with the OSCE Code of Conduct, and thus an OSCE mission to Russia would be legal as a matter of Russian law.¹⁰⁶ This marked the first time that Russia allowed an international organization to play a role in what it regarded as a purely internal matter.¹⁰⁷

The first OSCE trip to Chechnya lasted three days, during which the OSCE delegation, guided by Russian forces, observed conditions in Grozny.¹⁰⁸ Even with Russian forces in complete control of the scope of the OSCE mission, the OSCE delegation nevertheless declared the situation "catastrophic" and "unacceptable in terms of European norms."¹⁰⁹ The OSCE mission concluded that Russia's intervention in Chechnya involved a "disproportionate and indiscriminate" use of force, specifically condemning Russian bombing runs on populated areas of Chechnya.¹¹⁰ In response to these OSCE findings, the Russian Federation finally admitted that its forces had committed human rights

¹⁰⁴ See Goldstein, *supra* note 5; Jane Perlez, *Struggle in Russia: In Europe, Russia Agrees to Accept Fact Finding Mission*, N.Y. TIMES, Jan. 14, 1995, at 6.

¹⁰⁵ See, e.g., Freeland and Thornhill, *supra* note 22, at 22; Hiatt, *supra* note 78, at A26; OSCE Delegation to Visit Chechnya Within Days, *supra* note 22; Perlez, *supra* note 104, at 6.

¹⁰⁶ Russian Reaction: Duma Official Supports Deploying OSCE Observers in Chechnya, BBC Monitoring Service, Jan. 19, 1995, from Interfax, Jan. 17, 1995, available in LEXIS, World Library, Curnws File.

¹⁰⁷ See Chrystia Freeland, *Russia's Rights Monitor Denied Chechen Trip*, FIN. TIMES, Jan. 28, 1995, at 2, available in LEXIS, World Library, Curnws File.

¹⁰⁸ Richard Boudreaux, *Russia Faulted for Excesses in Chechnya*, L.A. TIMES, Jan. 31, 1995, at A4.

¹⁰⁹ Boudreaux, *supra* note 108, at 4; OSCE Decries Chechen War as "Catastrophe," UPI, Jan. 30, 1995, available in WESTLAW, Int-News Database. The extent to which the Russian military controlled the scope of the OSCE mission became clear when it refused to allow Sergei Kovalyov, Russia's controversial Human Rights Commissioner who opposed Russia's use of force in Chechnya, to accompany the OSCE delegation. OSCE Tour of Chechnya was a Farce, MOSCOW TIMES, Feb. 1, 1995, available in LEXIS, World Library, Curnws File (criticizing OSCE mission for being too conciliatory to Russian military); see also Freeland, *supra* note 107, at 2.

¹¹⁰ Boudreaux, *supra* note 108, at 4. The OSCE mission also criticized Chechen conduct for violating international norms. OSCE Tour of Chechnya was a Farce, *supra* note 109. The OSCE mission did not, however, find any evidence to confirm accusations that Russian forces were mistreating Chechen prisoners during its visit to a Russian detention center. Boudreaux, *supra* note 108, at 4.

violations in Chechnya, but it insisted that the Dudayev regime had perpetrated numerous atrocities of its own.¹¹¹

After a second, brief OSCE mission to Chechnya also condemned Russian troops' "disproportionate use of force," the OSCE, with the support of its member states, began to press for a more substantial role in resolving the conflict.¹¹² OSCE Chairman Laszlo Kovacs initiated discussions with President Yeltsin on the possibilities for a permanent OSCE mission to Chechnya that could try to restore the rule of law as well as investigate, prosecute, and bring to justice human rights claims.¹¹³ In addition, the OSCE offered its services to help broker a peace settlement.¹¹⁴

On March 10, 1995, President Yeltsin agreed in principle to allow a human rights mission from the OSCE to maintain a presence in Chechnya.¹¹⁵ Russian Foreign Minister Kozyrev affirmed this commitment by assuring European politicians that Russia would accept a long-term mission of OSCE international mediators to the Chechen war zone.¹¹⁶ Currently, this OSCE mission still lacks a clear mandate, and it remains unclear how effective its efforts can be in the absence of a durable cease-fire.¹¹⁷ Nevertheless, the Russian Federation now has clearly committed itself both to recognizing the applicability of OSCE norms to the fighting in Chechnya and to accepting a role for an OSCE mission to assist in the implementation and enforcement of such norms.¹¹⁸

¹¹¹ See *Press Conference with Russian Federation Justice Minister Valentin Kovalyov on the Results of the OSCE Session*, Official Kremlin Int'l News Broadcasts, Feb. 6, 1995, available in LEXIS, World Library, Curnws File ("We cannot deny the circumstance that in the course of the [Russian] operation to disarm unlawful [Chechen] armed formations the fundamental right of persons to life was violated. This cannot be denied because stray bullets, stray shrapnel claimed the lives of peaceful totally innocent people.").

¹¹² Steve Pagani, *OSCE Hopes to Set Up Permanent Mission in Chechnya*, Reuters World Service, Mar. 2, 1995, available in LEXIS, World Library, Curnws File; see also Erlanger, *supra* note 83, at 10 (both European Union and United States pressured Yeltsin to accept a role for the OSCE in resolving Chechen crisis).

¹¹³ See Pagani, *supra* note 112.

¹¹⁴ See *OSCE Offers to Help Broker Chechnya Peace*, Reuters World Service, Mar. 7, 1995, available in LEXIS, World Library, Curnws File.

¹¹⁵ Erlanger, *supra* note 83, at A10.

¹¹⁶ John Thornhill, *Kozyrev Pledge on Mediators for Chechnya*, FIN. TIMES, Mar. 10, 1995, at 2, available in LEXIS, World Library, Curnws File.

¹¹⁷ *Id.*

¹¹⁸ See Freeland, *supra* note 107, at 2; see also *Russian Reaction: Duma Official Supports Deploying OSCE Observers in Chechnya*, *supra* note 106.

II. THE TRADITIONAL MODEL: INTERNATIONAL LAW AND THE CHECHEN CONFLICT

A. *The Status of the Chechen Conflict Under International Law*

In delineating which international legal norms apply to an armed conflict, international law maintains a distinction between conflicts of international and non-international characters.¹¹⁹ In practice, this has meant a fairly specific set of norms apply to those armed conflicts labeled "international," leaving a far more ambiguous set of principles to govern those armed conflicts not of an international character.¹²⁰ Thus, Article 2, common to all four Geneva Conventions, limits their numerous protections to conflicts *between* contracting parties or powers (i.e., states) with the sole exception of those norms listed in Common Article 3, which cover "armed conflict[s] not of an international character."¹²¹ The 1977 Protocols to the Geneva Conventions (the "Protocols") affirm this distinction. Protocol I enumerates a large number of supplementary norms relating to the protection of victims of international armed conflicts, while Protocol II addresses the more limited

¹¹⁹ See, e.g., KALSHOVEN, *supra* note 12, at 26-27; Richard Baxter, *Ius in Bello Interno: The Present and Future Law*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 518, 518 (J.N. Moore ed., 1974). Although the Geneva Conventions and their Protocols firmly maintain this distinction, a certain irony exists in that many of the substantive norms that these treaties indicate apply only in an international conflict derive from the seminal work *The Lieber Code of 1863*, which outlined the laws of war applicable in a non-international context—the U.S. Civil War. See, e.g., KALSHOVEN, *supra* note 12, at 11-12; George D. Haimbaugh, Jr., *Humanitarian Law: The Lincoln-Lieber Initiative*, 13 GA. J. INT'L & COMP. L. 245, 245-46 (1983).

¹²⁰ See, e.g., KALSHOVEN, *supra* note 12, at 26-27; HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 42-48 (1990) (acknowledges existence of minimal protections in non-international conflicts, but notes they fall far short of those available in international conflicts). Both sets of norms require as a precondition the existence of an "armed conflict" (i.e., as opposed to riots, protests, maneuvers, etc.). See ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 12-13 (Roberts & Guelff eds. 1982).

¹²¹ See Geneva Conventions, *supra* note 13, arts. 2, 3. Common Article 2 provides: [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Id.

protection afforded victims of non-international armed conflicts.¹²² Protocol I, Article 1(4) does, however, significantly extend the definition of an "international" conflict to include wars of national liberation involving a case of decolonization, alien occupation or self-determination.¹²³ Still, an analysis of which rules apply to armed conflicts such as Chechnya begins with a question of which label—international or non-international—attaches to the conflict as a matter of international law.¹²⁴

1. Chechnya as an International Conflict?¹²⁵

An examination of the scope of both the Geneva Conventions (as defined by Common Article 2) and Protocol I reveals two separate situations in which their rules apply to armed struggles involving a single contracting state.¹²⁶ First, by ratifying the Geneva Conventions, a state agrees to apply the Conventions' standards in armed conflicts with a Power not a party to the Conventions if the latter accepts and

¹²² See Protocol I, *supra* note 13, art. 1(3) (defining its scope of application to accord with those situations referred to in Common Article 2 of the Geneva Conventions); Protocol II, *supra* note 13, art. 1 (defining its scope of application to develop and supplement Common Article 3 of Geneva Conventions).

¹²³ See Protocol I, *supra* note 13, art. 1(4). This expansion of the definition has engendered continuous controversy and is cited as one of the primary reasons for the United States' failure to ratify Protocol I. See, e.g., KWAKWA, *supra* note 12, at 49; see also *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 912 (1987); Hans-Peter Gasser, *Some Legal Issues Concerning Ratification of the 1977 Geneva Protocols*, in *ARMED CONFLICT AND THE NEW LAW* 94-95 (1989); Theodore Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678 (1994).

¹²⁴ See, e.g., KALSHOVEN, *supra* note 12, at 26-27; KWAKWA, *supra*, note 12, at 43; Alfred P. Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 INT'L & COMP. L.Q. 472, 474-75 (1972).

¹²⁵ Cf. Rubin, *supra* note 124, at 474-75 (finding it useful to analyze applicability of the Geneva Convention's Common Article 2 to internal rebellions before looking to Common Article 3). In particular, if the Chechen situation constitutes an "international" conflict within the scope of the Geneva Conventions and Protocol I, both Russian and Chechen forces would therefore become obligated to adhere to some 400 standards of conduct, such as the humane treatment of prisoners of war, Geneva Convention III, *supra* note 13, art. 13, the evacuation of such prisoners of war from combat zones as soon as possible after their capture, Geneva Convention III, *supra* note 13, art. 19, and distinguishing at all times between the civilian population and combatants and protecting the former from indiscriminate attacks, Protocol I, *supra* note 13, arts. 48, 51(4). Moreover, the norms for international conflicts also provide (in theory) for collective and individual responsibility in the event of any violations of their standards. See KALSHOVEN, *supra* note 12, at 64-69.

¹²⁶ See Geneva Conventions, *supra* note 13, art. 2; Protocol I, *supra* note 13, art. 1(4). In the case of Chechnya, only the Russian Federation qualifies as a contracting state, having signed and ratified the Geneva Conventions as well as both Protocols. See *supra* note 13 and accompanying text. Thus, none of the other grounds for invoking the Geneva Conventions under Common Article 2—e.g., cases of declared war or other armed conflicts between contracting parties and

applies its provisions.¹²⁷ Second, in ratifying Protocol I, a state also consents to apply the Conventions and Protocol I to certain wars of national liberation.¹²⁸ In either case, both sides to the conflict—the contracting state (i.e., Russia) and the non-contracting belligerent (i.e., Chechen secessionists)—would become legally bound to adhere to the laws of war for an “international” conflict in their struggle.¹²⁹

Under Common Article 2 of the Geneva Conventions, a “Power” not a party to the Conventions can bind a contracting state to the Conventions’ standards if it also accepts and applies the Conventions’ provisions itself.¹³⁰ For the war in Chechnya to qualify as an international conflict under this test, therefore, it must meet two conditions.¹³¹ First, the secessionist Chechens must constitute a “Power.”¹³² Second, this Chechen “Power” must then accept and apply the Conventions’ provisions.¹³³ Both verbal acts of acceptance and a factual application of the Conventions’ provisions appear necessary to fulfill the second condition.¹³⁴ The *travaux préparatoires* of the Geneva Conventions and

cases of a state’s partial or total occupation of a contracting party’s territory—appear to apply to Chechnya. See Geneva Conventions, *supra* note 13, art. 2.

¹²⁷ See Geneva Conventions, *supra* note 13, art. 2 (“Although one of the Powers in conflict may not be a party to the present Convention[s], the Powers who are parties thereto shall . . . be bound by the Convention in relation to said Power, if the latter accepts and applies the provisions thereof.”). By ratifying Protocol I, a state agrees to extend its application as well to cases where a non-contracting party accepts and applies its provisions. See Protocol I, *supra* note 13, arts. 1(3), 96(2) (Protocol binds signatories in same manner as referred to in Common Article 2 of the Geneva Conventions).

¹²⁸ See Protocol I, *supra* note 13, arts. 1(4), 96(3).

¹²⁹ The Russian Federation’s legal obligation in these cases derives from its treaty commitments as a party to the Geneva Conventions and Protocol I. See *supra* notes 13–14 and accompanying text. Locating the source of the secessionist Chechen government’s legal obligation to adhere to these treaties, however, proves more difficult because Chechnya did not (and probably could not) ratify the Conventions and Protocol I. See KALSHOVEN, *supra* note 12, at 74. Both the Conventions and Protocol I attempt to address this difficulty by limiting their applicability to conflicts involving non-contracting parties where that party formally accepts and applies these treaties. See Geneva Conventions, *supra* note 13, art. 2 (non-contracting Power must accept and apply Conventions in order to bind a contracting state); Protocol I, *supra* note 13, art. 96(3) (those insurgent groups meeting definition of Article 1(4) must formally submit a declaration indicating intention to apply Geneva Conventions and Protocol I to Swiss Government in order to bind a contracting state). Thus, these situations require a commitment on the part of both sides before the Conventions and Protocol I will serve as the standards for conduct.

¹³⁰ Geneva Conventions, *supra* note 13, art. 2.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*; Rubin, *supra* note 124, at 474, 478. The same test would presumably apply in the case of Protocol I, where a Party not bound by the Convention can bring it into force vis-a-vis a contracting Party by accepting and applying its provisions. See Protocol I, *supra* note 13, art. 96(2) (using same language as found in Common Article 2, but replacing the term “Power” with “Parties”).

¹³⁴ See Geneva Conventions, *supra* note 13, art. 2; Rubin, *supra* note 124, at 478.

Protocol I, moreover, both indicate that a "Power" generally refers only to states, although it also could refer to a civil war if the established government recognizes a state of belligerency.¹³⁵ Where a state refuses to recognize a state of belligerency, however, the issue of defining a "Power" will revolve around an entity's claim to statehood.¹³⁶

Two schools of thought exist in international law with respect to when an entity constitutes a state: the constitutive view and the declarative view.¹³⁷ The constitutive theory contends that an entity does not become a state until other states recognize it as such.¹³⁸ Under this view, recognition functions as the *constitutive* act, determining as a matter of law the entity's claim to the rights and obligations of statehood.¹³⁹ The declarative view, on the other hand, holds that entities become states under international law, not by recognition, but by possession of certain objective criteria: (i) a permanent population, (ii) a defined territory, (iii) a government, and (iv) the capacity to enter into relations with other states.¹⁴⁰ Rather than relying on the discretionary,

¹³⁵ KWAKWA, *supra* note 12, at 48 & nn.21-23 and accompanying text (citing relevant portions of treaties' legislative history or "*travaux préparatoires*" and outlining possibility of using belligerent status to qualify as a "Power"). Traditionally, the recognition of belligerency involved a process by which established states recognized the existence of a civil war for the purposes of applying the laws of war between the incumbent government and insurgents as well as the law of neutrality between the parties to the conflict and third states. See, e.g., Dietrich Shindler, *State of War, Belligerency, Armed Conflict*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 3 (A. Cassese ed., 1979). Since World War II, however, states generally have shown a reluctance to recognize the belligerent status of insurgents in civil wars. *Id.* at 5. The Russian Federation's attitude in Chechnya comports with this recent trend. Throughout the conflict, the Russian government has insisted that President Dudayev and his government are common criminals whom it will try, if captured, according to Russian criminal law. See *Chechen Leader Faces Russian Treason Charge*, *supra* note 17 (Russian government formally charges Chechen President Dudayev with treason).

¹³⁶ See KWAKWA, *supra* note 12, at 48.

¹³⁷ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 16-25 (1979); see also BRIERLY, *supra* note 8, at 138-39; BRIGGS, *THE LAW OF NATIONS* 113-17 (1952); M.K. Malone, Comment, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 86 TEMP. INT'L & COMP. L.J. 81, 91-92 (1992).

¹³⁸ See, e.g., H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 51 (1948) ("[R]ecognition, when given in fulfillment of a legal duty . . . is a momentous, decisive and indispensable function of ascertaining and declaring the existence of the requisite elements of statehood with a constitutive effect for the commencement of the international rights and duties of the community in question."); Hans Kelson, *Recognition in International Law—Theoretical Observations*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 592-93 (Leo Gross ed., 1969) ("state exists legally only in its relations to other states . . . the legal act of recognition has a specifically constitutive character").

¹³⁹ See LAUTERPACHT, *supra* note 138, at 51; Kelson, *supra* note 138, at 593.

¹⁴⁰ See, e.g., BRIGGS, *supra* note 137, at 116 (concluding act of recognition not constitutive; its principal juridical function is state's acknowledgment of full status of hitherto indeterminate community, making possible regularization of relations between them); BRIERLY, *supra* note 8, at 139 (finding that grant of recognition is not a constitutive, but a declaratory act; states may exist without being recognized); CRAWFORD, *supra* note 137, at 24 (concluding that international

political nature of recognition, the declarative view's criteria attach the label "state" based on a question of "effectiveness"—an entity's ability to exercise authority with respect to persons and property within the territory claimed (i.e., effective government) as well as to exercise authority with respect to other international persons (i.e., effective independence).¹⁴¹ Under the declarative view, therefore, recognition merely *declares* the willingness of the recognizing state to treat the recognized entity as if it possessed international rights and obligations.¹⁴²

Applying these theories to Chechnya, the question of its status as a state turns on which theory governs. Under the constitutive view, Chechnya clearly does not qualify for statehood: despite three years of self-declared independence from the Russian Federation, no country has ever recognized it as a state.¹⁴³ Under the declarative view, however, Chechnya possesses a more credible claim. From its declaration of independence in December 1991, until Russian troops invaded on December 11, 1994, Chechnya possessed a permanent population, living within defined borders, governed by President Dudayev and his administration.¹⁴⁴ The fact that President Dudayev's government declined offers of recognition from Kuwait and Saudi Arabia, furthermore, indicates an apparent *capacity* to enter into foreign relations.¹⁴⁵

status of the state as a subject of international law is independent of recognition); *see also* Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100 [hereinafter Montevideo Convention] (listing criteria for statehood). Although the Montevideo Convention involved only American states, it has come to represent the standard formulation of the basic criteria for statehood. *See* CRAWFORD, *supra* note 137, at 36. James Crawford has argued, however, that in the modern context, the fourth criterion (capacity to enter into foreign relations) actually should refer to the broader principle of independence. *Id.* at 48.

¹⁴¹ *See* CRAWFORD, *supra* note 137, at 36, 42 n.54. Recent state practice, however, indicates that effectiveness may act only as the dominant, rather than sole, criterion for statehood; other factors such as an entity's claim to self-determination also can weigh in the analysis. *See id.* at 84-85. Thus, in the case of Rhodesia, despite effective control over a defined population and area, Rhodesia failed to qualify as a state because of its government's non-democratic nature. Malone, *supra* note 137, at 87-88. *See* the discussion of characterizing Chechnya as a war of national liberation, *infra*, for consideration of Chechnya's own claims to self-determination.

¹⁴² Malone, *supra* note 137, at 91.

¹⁴³ *See supra* note 40 and accompanying text (citing fact that no state ever recognized Chechnya's independence from Russia).

¹⁴⁴ *See supra* notes 39-58 and accompanying text; *see also* James P. Gallagher, *Mention of Chechens is Enough to Make Blood Curdle*, CHI. TRIB., Sept. 21, 1994, at 7 (discussing placement of Russian troops stationed along Chechen border); Mark Trevelyan, *Russia Pulls Troops from Rebel Southern Region*, Reuters World Service, Nov. 11, 1992, available in LEXIS, World Library, Curruws File (Russians pull back troops from Chechen border after threats by President Dudayev to use force if Russians entered Chechnya).

¹⁴⁵ *See supra* note 49.

Although Dudayev's authority did not go uncontested inside Chechnya, none of the opposition groups ever posed a serious threat to his government's effective control over the republic or its population.¹⁴⁶ The fact that Russian forces later needed to take such extreme measures to reassert their control over Chechnya reinforces the argument that Chechnya possessed an effective government, independent of Russian control.¹⁴⁷ Based on the declarative view, therefore, legitimate grounds exist for characterizing Chechnya as a state.¹⁴⁸

Upon considering which of these outcomes actually will apply to the issue of Chechnya's status as a "Power" under the Geneva Conventions, however, it becomes apparent that the constitutive view will control.¹⁴⁹ One simply cannot ignore the effect of the international community's universal refusal to recognize Chechnya throughout its three-year bid for independence.¹⁵⁰ Without some such recognition by at least a part of the international community, Chechnya has no standing to contend it qualifies as a state.¹⁵¹ Regardless of the extent to which Chechnya can prove it met the declarative view's objective criteria, no grounds exist in international law to compel states to accept such proof.¹⁵² The difficulty in enforcing the declarative view in this context lies in its presumption that decisionmakers exist, independent of states, who have the authority to disassociate the legal criteria for statehood from the political acts of recognition.¹⁵³ In analyzing the Chechen situation, however, only states possess a capacity to apply the legal label

¹⁴⁶ See *supra* notes 50–56 and accompanying text.

¹⁴⁷ See, e.g., *supra* notes 64–71, 78–81 (describing level of force used by Russians to take Grozny).

¹⁴⁸ See Montevideo Convention, *supra* note 140.

¹⁴⁹ See Rubin, *supra* note 124, at 475.

¹⁵⁰ See *supra* notes 49–50 and accompanying text.

¹⁵¹ See *supra* note 84 and accompanying text (international community universally characterized Chechnya as part of Russian Federation).

¹⁵² See BRIGGS, *supra* note 137, at 115–16 (concluding evidence offered by Lauterpacht and others demonstrates, contrary to their assertions, that states have no legal duty to recognize an entity as a state); Rubin, *supra* note 124, at 476 (governments under no compulsion to acknowledge that its antagonist in conflict is a "Power" within meaning of Geneva Conventions). But see LAUTERPACHT, *supra* note 138, at 25 (claiming evidence supports finding that states have legal duty to recognize entity as a state whenever the requisite conditions of fact exist).

¹⁵³ See CRAWFORD, *supra* note 137, at 20. In many cases before courts, international tribunals or arbitrators, this presumption is fully satisfied. In one of the most famous examples, the *Tinoco Arbitration*, Chief Justice Taft used his authority as arbitrator to reason that where a nation based its recognition policy not on inquiries into a state's effective control over territory, but rather on its illegitimacy or irregularity of origin, objective evidence should outweigh such policies. See 18 AM. J. INT'L L. 147, 154 (1924). Other examples of the adoption of a declarative view of recognition involve similar situations where decisionmakers, possessing the necessary authority, analyze determinations of an entity's claim to statehood independent of the question of recognition.

"state," and that determination takes the form of recognition.¹⁵⁴ Nothing in the Geneva Conventions provides any basis for finding otherwise—states continue to retain the authority to decide whether to grant unrecognized entities the status of statehood in the specific context of armed conflicts.¹⁵⁵ One can conclude, therefore, that without recognition, Chechnya does not qualify as a state, and without statehood, it cannot constitute a "Power" for the purposes of invoking Article 2 of the Geneva Conventions.¹⁵⁶

Even assuming that Chechnya somehow qualified as a recognized "Power," it would still need to meet the second requirement of Article 2 by demonstrating its acceptance and application of the Conventions' provisions.¹⁵⁷ As for the required acts of acceptance, President Dudayev twice committed Chechnya to abide by international law in its treatment of captured Russian soldiers.¹⁵⁸ Both statements, however, involved only Chechnya's treatment of captured soldiers, and neither referred specifically to the Geneva Conventions.¹⁵⁹ It becomes difficult to conclude, therefore, that these statements alone could serve as sufficient evidence that Chechnya agreed to accept all the humanitarian norms laid out in the four Geneva Conventions. In terms of its conduct, moreover, it appears that even in its treatment of captured soldiers, Chechnya did not actually conform to the rules for international conflicts relating to prisoners of war because it used Russian troops as shields during the battle for Grozny's Presidential Palace.¹⁶⁰ As a result, Chechnya lacks sufficient proof to demonstrate either an acceptance or actual application of the standards enumerated in the

¹⁵⁴ These determinations can be distinguished, in turn, from state practice involving "unofficial" relations with unrecognized states. See BRIGGS, *supra* note 137, at 115. In such cases, states' interactions with unrecognized entities do not rise to a level equivalent to interstate relations—subject to all the perquisites of statehood—but rather remain limited to a scope of interaction dictated by the policy interests of the nonrecognizing state. See Rubin, *supra* note 124, at 474–75.

¹⁵⁵ See Rubin, *supra* note 124, at 475.

¹⁵⁶ See *supra* notes 130–36 and accompanying text.

¹⁵⁷ See Geneva Conventions, *supra* note 13, art. 2.

¹⁵⁸ See *Chechnya—Duma Ends Delegation Visit*, *supra* note 58, and accompanying text (Dudayev insisting he would treat captured Russian soldiers in conformity with international law); see also *Dudayev—No More Playing Peacemakers, POWs to be Dealt with by War Laws*, *supra* note 66 (Dudayev declaring captives would be dealt with according to the laws of wartime).

¹⁵⁹ See *supra* note 158.

¹⁶⁰ See Stanley, *supra* note 77 (Chechens kept Russian prisoners in Presidential Palace until its surrender). Such action most likely violated Geneva Convention III, Article 19, which requires that as soon as possible after capture, soldiers should be removed from the combat zone. Geneva Convention III, *supra* note 13, art. 19. Other reports indicate that Chechen forces also violated the laws of war by using Chechen civilians and civilian objects as protection from Russian attack. See, e.g., *Human Rights Body Rebukes Both Sides in Chechnya*, *supra* note 76.

four Geneva Conventions.¹⁶¹ This fact, coupled with the reality that Chechnya most likely cannot qualify as a "Power," compels the conclusion that the laws governing an international armed conflict could not be invoked in Chechnya on the basis of the Geneva Conventions' Common Article 2.¹⁶²

If the fighting in Chechnya constitutes a war of national liberation, however, one could still consider it an international armed conflict under the terms of Protocol I.¹⁶³ Article 1(4) of Protocol I modifies the definition of international conflicts for contracting parties to include wars of national liberation, which involve:

[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁶⁴

This definition, when considered in conjunction with the *travaux préparatoires*, clearly does not extend the label "international armed conflict" to all intra-state struggles.¹⁶⁵ In particular, Article 1(4) requires the satisfaction of two conditions: first, there must be a people possessing a right to self-determination; and second, on the basis of that right this group must be engaged in an armed conflict against colonial domination, alien occupation, or a racist regime.¹⁶⁶ Assuming the existence of an "armed conflict," the determination of what constitutes a war of national liberation essentially involves the question of who has a right to self-determination.¹⁶⁷

¹⁶¹ See *supra* notes 133-34 and accompanying text.

¹⁶² See *supra* notes 156, 161 and accompanying text.

¹⁶³ See *supra* note 128 and accompanying text. This section considers only the relevance of Protocol I and its definition of a war of national liberation to Chechnya in light of the Russian Federation's accession to that treaty, and refrains from considering its propriety as a viable principle of international humanitarian law.

¹⁶⁴ See Protocol I, *supra* note 13, art. 1(4).

¹⁶⁵ KALSHOVEN, *supra* note 12, at 73-74. The drafters of Article 1(4) intended it to cover contemporary issues of decolonization, alien occupation and racist regimes, particularly the situations in Portugal, Israel and South Africa. See WILSON, *supra* note 120, at 168. Nevertheless, despite the tentative resolution of those issues today, the wording of Article 1(4) permits further analysis of its applicability to secessionist struggles such as that in Chechnya. See *id.*

¹⁶⁶ See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 53-54 (1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; see also KWAKWA, *supra* note 12, at 52; WILSON, *supra* note 120, at 166-67.

¹⁶⁷ See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 54-55 (Article 1(4)'s

Article 1(4) refers to a right to self-determination as defined in the U.N. Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.¹⁶⁸ Both documents take a restrictive approach to the issue, reflecting the practice of both states and the United Nations, limiting the right to self-determination to the context of decolonization.¹⁶⁹ The U.N. Charter contains only two broad references to self-determination, neither of which establish any right to self-determination.¹⁷⁰ The Declaration on Friendly Relations does expressly recognize a right to self-determination, but restricts that right on the basis of territory: only those peoples living in non-contiguous, separate territorial units (e.g., colonies, non self-governing territories, mandates, trust territories, etc.) possess a right to self-determination.¹⁷¹ The Declaration on Friendly Relations does not, however, extend this right to minority groups living

listed motives for the armed conflict—colonial domination, alien occupation and a racist regime—cover all possible circumstances in which peoples are struggling for the exercise of their right to self-determination); WILSON, *supra* note 120, at 166–67 (definition of “peoples” for purposes of Article 1(4) application involves questions of right to self-determination); Gasser, *supra* note 123, at 95 (application of Article 1(4) confined to narrow concept of right of self-determination by a people).

¹⁶⁸ See Protocol I, *supra* note 13, art. 1(4); see also KWAKWA, *supra* note 12, at 53.

¹⁶⁹ See U.N. CHARTER arts. 1, 55; *Declaration Concerning Friendly Relations*, *supra* note 8. The literature on the linkage of self-determination to decolonization is vast. See, e.g., KWAKWA, *supra* note 12, at 53; Guyora Binder, *The Case for Self-Determination*, 20 STAN. J. INT'L L. 223 (1994); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. (forthcoming 1995); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

¹⁷⁰ See U.N. CHARTER arts. 1, 55 (both articles affirm interest in “principle of equal rights and self-determination of peoples”); WILSON, *supra* note 120, at 59.

¹⁷¹ See *Declaration Concerning Friendly Relations*, *supra* note 8 (“[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has a duty to respect this right . . .”). The Declaration defines this right to self-determination on a territorial basis, specifically emphasizing the separate status of colonies and non-self-governing territories while simultaneously recognizing the inviolability of the territorial integrity of existing, representative states. See *id.* Other U.N. documents and state practice have adopted a similar approach, such that a people's right to self-determination now requires a connection to a defined space of territory, separated from an already sovereign state. See, e.g., WILSON, *supra* note 120, at 88 (concluding that trust territories, mandates, non-self-governing territories and geographically distinct territories possess right to self-determination); Hanauer, *supra* note 169 (in addition to being ethnically or culturally distinct, people possessing right to self-determination must also possess connection to defined territory, which is not organized within already sovereign state); Hannum, *supra* note 169, at 32–33 (only situations where European Power dominated non-contiguous territory in which a majority of population was indigenous or non-metropolitan, has that territory been considered to have absolute right of self-determination). This United Nations grant of a territorially-based right to self-determination in the decolonization context should not be confused, however, with United States President Woodrow Wilson's *principle* of self-determination, the applicability of which depended upon the existence of a distinct ethnic-linguistic nationality. See Hannum, *supra* note 169, at 32.

within an established state possessing a representative government because of the principle of *uti posseditis juris*—the notion that the territorial integrity of existing states must be maintained.¹⁷²

Given Article 1(4)'s narrow definition, therefore, it becomes apparent that no credible basis exists for labeling the Chechen conflict a war of national liberation within the meaning of Protocol I.¹⁷³ Despite the existence of an ongoing armed conflict and the fact that Russia historically colonized Chechnya, the Chechen separatists nevertheless lack the essential right to self-determination.¹⁷⁴ Chechnya clearly lies within the recognized borders of the Russian Federation and thus does not possess the non-contiguous, separate character necessary for exercising a right to self-determination.¹⁷⁵ If anything, Chechnya's attempted secession involves the type of situation expressly excluded from the scope of this right to self-determination because of the supervening right of existing states to maintain their territorial integrity.¹⁷⁶ Without this right to self-determination, moreover, no foundation exists to claim that the fighting in Chechnya constitutes an international armed conflict as a war of national liberation within the meaning of Protocol I, Article 1(4).¹⁷⁷

¹⁷² See *Declaration Concerning Friendly Relations*, *supra* note 8 (declaration does not authorize actions which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states which possess a representative government); see also Hanauer, *supra* note 169; Christian J. Garrio, *Bosnia and the Limits of International Law*, 34 SANTA CLARA L. REV. 1039, 1066-67 (1994) (principle of territorial sovereignty places limits on right of self-determination, subjugating latter principle to the former); WILSON, *supra* note 120, at 166 (Declaration Concerning Friendly Relations excludes from its application those living in sovereign and independent states possessing a representative government). The reasoning behind this distinction lies in the fact that if any minority group (there are more than 100 within the Russian Federation alone) could secede from an existing state based on a right to self-determination, it would seriously destabilize the international political order. See KWAKWA, *supra* note 12, at 54 (citing catastrophic results in Africa if each of the 2000 ethnic groups possessed the right to establish a separate state).

¹⁷³ See Protocol I, *supra* note 13, art. 1(4).

¹⁷⁴ See *id.*; *supra* notes 31-32 (describing Russia's 19th century conquest and colonization of Chechnya).

¹⁷⁵ See *supra* note 171 and accompanying text.

¹⁷⁶ See *supra* note 172 and accompanying text (no right to self-determination where it would violate an existing, independent state's territorial integrity or political unity).

¹⁷⁷ Several other basic problems exist with regard to considering the Chechen conflict a war of national liberation. First, the issue of recognition, already discussed with respect to Chechnya's claim to statehood, remains prominent. See *supra* notes 149-56 and accompanying text. Even if one could argue that Chechnya fulfills the criteria for a war of national liberation, unless states, particularly Russia, recognize that status, serious difficulties exist with respect to the practical application of the Geneva Conventions or Protocol I on the basis of Article 1(4). See *id.*; see also KWAKWA, *supra* note 12, at 56-57 (acknowledging problem of autointerpretation under Article 1(4) in that few states will admit willingly that they are racist regimes or that they exercise colonial or alien domination). Second, assuming states recognize that the Chechen conflict falls within

On the basis of this analysis, one can conclude that the fighting in Chechnya does not constitute an international armed conflict. Chechnya lacks the necessary status as either a "Power" under Common Article 2 or a "war of national liberation" under Protocol I, Article 1(4) to invoke the larger set of humanitarian provisions provided by the Geneva Conventions and Protocol I.¹⁷⁸ This conclusion does not mean, however, that *no* rules of international law apply to the fighting in Chechnya.¹⁷⁹ Both Protocol II and Common Article 3 of the Geneva Conventions establish international legal standards of conduct for non-international armed conflicts.¹⁸⁰

2. Chechnya as a Non-International Armed Conflict

In non-international armed conflicts, two different sets of standards apply depending on the intensity and nature of the fighting.¹⁸¹ Common Article 3 stretches broadly, covering all those who are victims of internal armed conflicts.¹⁸² Its general principles apply without restrictions to "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."¹⁸³ Unlike rules governing international armed conflicts, moreover, Common Article 3 does not require a declaration of accep-

the scope of Article 1(4), the rules governing international armed conflicts still will not automatically apply. Article 96(3) of Protocol I requires that for the Geneva Conventions and Protocol I to come into force between the warring parties, not only must the specific criteria for a war of national liberation exist, but also the insurgent group must address a unilateral declaration to the treaties' depository (Switzerland) stating that it undertakes to apply the Conventions and Protocol I to the conflict. See Protocol I, *supra* note 13, art. 96(3); see also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1089; KALSHOVEN, *supra* note 12, at 73-74. No evidence exists to show that the secessionist Chechen government ever submitted such a declaration.

¹⁷⁸ See Geneva Conventions, *supra* note 13, art. 2; Protocol I, *supra* note 13, art. 1(4).

¹⁷⁹ See, e.g., Protocol II, *supra* note 13; Geneva Conventions, *supra* note 13, art. 3.

¹⁸⁰ See Protocol II, *supra* note 13; Geneva Conventions, *supra*, note 13, art. 3.

¹⁸¹ David P. Forsythe, *The Legal Management of Internal War: The 1977 Protocol of Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272, 286 (1978). Both documents require at a minimum the existence of an "armed conflict." See Geneva Conventions, *supra* note 13, art. 3; Protocol II, *supra* note 13, art. 1(1); see also James E. Bond, *Internal Conflict and Article Three of the Geneva Conventions*, 48 DENV. L.J. 263, 270 (1971) (concluding that Article 3 incorporates belligerencies and civil wars, but not riots and insurrections); Rubin, *supra* note 124, at 484. Although the definition of an armed conflict remains somewhat ambiguous, Protocol II, Article 1(2) clarifies its meaning by providing that: "[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II, *supra* note 13, art. 1(2).

¹⁸² Baxter, *supra* note 119, at 520. But see Rubin, *supra* note 124, at 483 (asserting text of Common Article 3 seems to exclude protection in skirmishes at sea or in neighboring territory).

¹⁸³ Geneva Conventions, *supra* note 13, art. 3.

tance by a non-contracting party. Both sides become bound by Article 3 once the criteria for its application exist.¹⁸⁴

Protocol II's twenty-eight provisions, on the other hand, cover a narrower band of non-international armed conflicts.¹⁸⁵ Under Article 1(1), Protocol II applies only to those Common Article 3 conflicts where dissident armed forces (i) function under a responsible (i.e., organized) command, (ii) control a part of the State's territory, (iii) conduct military operations of a sustained and concerted character, and (iv) possess an ability to implement Protocol II.¹⁸⁶ These requirements effectively exclude from the scope of Protocol II a variety of underground guerrilla movements.¹⁸⁷ The minimum level at which the provisions of Protocol II apply thus involves a more sustained, intense armed conflict than the level of fighting necessary to implicate Common Article 3.¹⁸⁸

Like the question of statehood discussed *supra*, however, whether a conflict rises to the level required by Article 3 of the Geneva Conventions (or to the even higher level of Protocol II) ultimately will depend on the issue of recognition.¹⁸⁹ With no outside binding authority competent to determine when the criteria for a non-international armed conflict exist, a State remains free to label its internal struggles as it sees fit.¹⁹⁰ This power of recognition does not, however, go so far

¹⁸⁴ See *id.* Although this conclusion poses few problems for a Contracting State which expressly acceded to this provision, the basis on which insurgent groups are bound by this provision proves more difficult to discern. See, e.g., Baxter, *supra* note 119, at 527-28 (noting difficulty in binding insurgents to conventional rules on non-international conflicts, and positing that rebels can be bound to these standards on theory that treaty binds all citizens of that State).

¹⁸⁵ See, e.g., KALSHOVEN, *supra* note 12, at 138.

¹⁸⁶ See Protocol II, *supra* note 13, art. 1; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1352-53. Protocol II, Article 1(1) provides in full:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol II, *supra* note 13, art. 1(1).

¹⁸⁷ See KALSHOVEN, *supra* note 12, at 138. Guerrilla movements excluded by Protocol II would thus include those using various "hit-and-run" tactics, those operating without a territorial base, and those that lack a sufficient governmental structure to apply the Protocol's provisions. See *id.*

¹⁸⁸ COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1348. Once a Protocol II situation exists, however, both the norms of Protocol II and those of Common Article 3 govern the conflict in question. *Id.* at 1350.

¹⁸⁹ See Baxter, *supra* note 119, at 523.

¹⁹⁰ See KALSHOVEN, *supra* note 12, at 137-38; see also THEODORE MERON, HUMAN RIGHTS IN

as to permit Contracting States to ignore completely their international legal obligations.¹⁹¹ At a certain point, the existence of an ongoing international armed conflict becomes difficult for a State to deny.¹⁹² In such situations, both States and insurgent groups often become willing to acknowledge the applicability of the principles of Common Article 3 to their conflict, and pledge to act accordingly.¹⁹³

In analyzing the applicability of both Common Article 3 and Protocol II to Chechnya, it becomes apparent from the severity of the fighting that this struggle falls within the last category of situations, where one cannot deny the existence of an ongoing armed conflict.¹⁹⁴ At a minimum, the principles of Common Article 3 apply, given that the fighting took place within the territory of a contracting state (Russia) and that the struggle's intensity rose to the level of an armed conflict.¹⁹⁵ In particular, the deaths of thousands of soldiers and civilians as well as the wholesale destruction of entire cities pose serious difficulties for any argument that the Chechen struggle does not rise to the level of an armed conflict.¹⁹⁶

Upon further analysis, the Chechen conflict also appears to fall within the narrower scope of Protocol II based on the criteria listed in Article 1(1).¹⁹⁷ Little question exists that Chechen resistance initially exercised, under an organized command system, actual control over Chechnya, enabling it to pursue sustained and concerted military operations against intruding Russian forces, as well as to implement Protocol II.¹⁹⁸ Unlike the conclusion that the fighting in Chechnya

INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 47 (1987) (states are reluctant to admit that strife occurring within their territory has reached proportions of armed conflict).

¹⁹¹ See KALSHOVEN, *supra* note 12, at 137-38.

¹⁹² *Id.* at 59-60.

¹⁹³ See Bond, *supra* note 181, at 272-73 (when a conflict drags on, states do accept some obligation to treat opposing forces in conformity with Common Article 3); Forsythe, *supra* note 181, at 274-76 (listing cases where states and dissident forces have agreed formally or informally to apply Common Article 3). Included among the cases where both sides explicitly accepted Common Article 3 are France-Algeria (1956), Lebanon (1958), Cuba (1959) and Yemen (1962). Forsythe, *supra* note 181, at 275. *But see* Bond, *supra* note 181, at 271-72 (citing examples of internal conflicts within Nigeria, Indonesia and Portugal's African colonies where states refused to apply Common Article 3's provisions). Although not undertaken here, a similar study of cases recognizing the application of Protocol II would prove useful for further analysis of the exact scope of that treaty.

¹⁹⁴ See *supra* notes 182-83 and accompanying text.

¹⁹⁵ See Geneva Conventions, *supra* note 13, art. 3.

¹⁹⁶ See *supra* note 70, and accompanying text (describing high costs in lives and property caused by war in Chechnya).

¹⁹⁷ See Protocol II, *supra* note 13, art. 1(1).

¹⁹⁸ See *id.*; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1351-53 (detailing criteria for Protocol II's application); see also *supra* note 144 (describing Chechen control

must constitute an armed conflict, however, this analysis does not remain free of doubt, particularly from the Russian Federation's perspective.¹⁹⁹ Nevertheless, if one puts aside for the moment this question of Russia's recognition of a Protocol II situation, an objective analysis of the Chechen conflict leads to the conclusion that the fighting in Chechnya falls within the scope of Protocol II.²⁰⁰ With respect to the international legal standards applicable to the Chechen conflict, therefore, the substantive standards of both Protocol II and Common Article 3 appear to govern the conduct of the warring parties.²⁰¹

B. *The Prohibitions of International Law and the War in Chechnya*

Given circumstances warranting the application of the legal standards for non-international armed conflicts, what protections do these norms provide? The Geneva Conventions' Article 3 serves in this respect as a "miniature Bill of Rights," laying out general, baseline principles, rather than specifying any precise guidelines.²⁰² It outlines those standards that parties to an internal conflict are "bound to apply, as a minimum."²⁰³ The text of Article 3 provides in pertinent part:

[E]ach Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race,

of its borders prior to Russian operation); *supra* note 78–81 (describing intensity and duration of Chechen-Russian fighting in Grozny).

¹⁹⁹ For example, the Russian Federation justified its use of force in Chechnya, in part, on the ground that a state of lawlessness existed. *See* Sheets, *supra* note 53. On the basis of this assertion, Russia could refuse to recognize the responsible or organized nature of Chechen secessionists, thereby denying the application of Protocol II. *See id.*; *supra* notes 186–87 and accompanying text. The situation becomes even more complex in light of the Chechen forces' switch from conventional to guerrilla tactics. *See supra* note 83 and accompanying text.

²⁰⁰ *See* Protocol II, *supra* note 13. *See infra* notes 257–269, for a discussion of the problems of recognition with respect to the issues of implementation and enforcement of international law in internal wars.

²⁰¹ *See* Protocol II, *supra* note 13; Geneva Conventions, *supra*, note 13, art. 3.

²⁰² *See* Baxter, *supra* note 119, at 520. Article 3's ambiguity led Forsythe to observe that "[n]o one has been completely sure as to what factual situations the article applies, and no one has been totally sure exactly what is prohibited in whatever situation it is that is regulated." Forsythe, *supra* note 181, at 273.

²⁰³ Geneva Conventions, *supra* note 13, art. 3; KALSHOVEN, *supra* note 12, at 59–60.

colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the [International Committee of the Red Cross] may offer its services to the Parties to the conflict

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.²⁰⁴

As a general principle, therefore, Article 3 requires humane treatment without discrimination for all those who take no active part in the hostilities, including members of the armed forces who have surrendered or are *hors de combat*.²⁰⁵ Article 3 thus only protects non-combatants, with combatants falling outside of its protective ambit.²⁰⁶ In terms of defining "humane treatment," Article 3 lists particular acts which would violate this principle, including murder, the taking of hostages, and the passing of sentences without previous judgments by a constituted court.²⁰⁷

On the whole, however, the provisions of Common Article 3 lack specificity; they do not prohibit particular means of warfare or address

²⁰⁴ Geneva Conventions, *supra* note 13, art. 3.

²⁰⁵ KALSHOVEN, *supra* note 12, at 59–60. In fact, humane treatment amounts to the only requirement of Article 3; the parties are free to act without reference to such provisions as prisoner-of-war status. *Id.* at 60.

²⁰⁶ Bond, *supra* note 181, at 279.

²⁰⁷ See Geneva Conventions, *supra* note 13, art. 3. These specific requirements prove problematic when one considers the very different perspective of a rebel group suddenly obligated to care fully for the sick and wounded or to set up regularly constituted courts, even though such activities may prove impossible in actual circumstances. See Rubin, *supra* note 124, at 485.

rules for sparing the civilian population during hostilities.²⁰⁸ These ambiguities require the extensive use of analogies to the Geneva Conventions, among other documents, to give meaning to Article 3 terms such as "cruel treatment" and "all the judicial guarantees which are recognized as indispensable by civilized people."²⁰⁹ Analogies remain subject, however, to varying interpretations, oftentimes conflicting ones. Reasonable persons can disagree, for example, over issues such as whether firing into an area containing both combatant forces and non-combatants violates the principle of "humane treatment."²¹⁰ As a result, Article 3's broad protections provide little in terms of effective guidelines for the actual conduct of warring parties.²¹¹

In substance, Protocol II attempts to further develop and supplement the general principles established by Common Article 3 for certain non-international armed conflicts.²¹² In scope, its protections extend beyond the non-combatants protected by Common Article 3 to cover "all persons affected by [the] armed conflict."²¹³ As with Article 3, moreover, Protocol II's fundamental principle requires that all persons not currently taking part in the hostilities receive humane treatment, without any adverse discrimination.²¹⁴ Protocol II also contains articles specifically addressing the protection of persons whose liberty has been restricted (Article 5), the wounded and sick (Articles 7-8),

²⁰⁸ See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1326; Bond, *supra* note 181, at 278.

²⁰⁹ See Bond, *supra* note 181, at 279-83. Bond thus used the Hague Conventions, which address the types of weapons prohibited in warfare, to link the prohibition of cruel treatment with the concept of proscribing unnecessary suffering. *Id.* at 279.

²¹⁰ See *id.* at 279-80. What can soldiers do when they are attacked by a sniper located in a hospital? How much, if any, force can they use to subdue him or her without violating the principle of "humane treatment" outlined in Article 3? The answers depend on whom you ask—the patients in the hospital or the soldiers (and possibly civilians) being shot at in the street. See *id.*

²¹¹ Baxter, *supra* note 119, at 528-29. See Bond, *supra* note 181, at 279. None of this, however, detracts from Common Article 3's major accomplishment—establishing the interest of international law in the conduct of armed conflicts occurring within a single State.

²¹² KALSHOVEN, *supra* note 12, at 137. Protocol II's provisions continue, however, to fall far short of the parallel protections available in Protocol I and the Geneva Conventions for international armed conflicts. See Forsythe, *supra* note 181, at 279-82 (explaining that drafters substantially reduced Protocol II's provisions upon inclusion of wars of national liberation within meaning of international armed conflicts).

²¹³ Protocol II, *supra* note 13, art. 2; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1359 (coverage of Protocol II intended to extend to civilian and military personnel, combatants and non-combatants).

²¹⁴ See Protocol II, *supra* note 13, art. 4(1) ("All persons who do not take a direct part or who have ceased to take part in hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction.").

medical units and personnel (Articles 9–12) and the civilian population (Articles 13–17).²¹⁵

In particular, Protocol II's provisions respecting the civilian population provide several protections not specifically available under Common Article 3.²¹⁶ Protocol II clearly establishes, in Article 13(2), that the civilian population shall not be the direct object of attack.²¹⁷ This prohibition extends to those acts that have as their primary purpose the spreading of terror among the civilian population.²¹⁸ In addition, civilians receive "general protection against the dangers arising from military operations" (i.e., collateral damage).²¹⁹ During any time in which civilians take a direct part in hostilities, however, the above protections do not apply.²²⁰

In addition to protecting civilians as individuals, Protocol II also protects those objects indispensable to the civilian population's survival, for example, drinking water and food.²²¹ Attacks on dams, dykes or nuclear energy plants are prohibited because of the severe losses among the civilian population that would result from their destruction.²²² Finally, Article 18 of Protocol II provides that where the civilian population suffers undue hardship owing to a lack of essential supplies, relief actions shall be undertaken subject to the consent of the contracting state concerned.²²³

Protocol II's treatment of civilian protections is also significant in what it does *not* provide. Although it clearly seeks to avoid characterizing large parts of the civilian population as quasi-combatants, Protocol II does not include a definition of "civilian," making it unclear exactly how its protections against attack should apply.²²⁴ Unlike Pro-

²¹⁵ See Protocol II, *supra* note 13.

²¹⁶ See Gasser, *supra* note 123, at 97. An article-by-article analysis of the 28 Protocol II provisions would prove too lengthy for the purposes of this Note. Therefore, only the particular provisions related to the protection of the civilian population are explored herein. Further analysis of the application of the remainder of Protocol II (i.e., its rules relating to the treatment of captured soldiers) must await future study.

²¹⁷ Protocol II, *supra* note 13, art. 13(2).

²¹⁸ *Id.*

²¹⁹ *Id.* art. 13(1); see also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1449 (defining military operations as movements of attack or defense by armed forces in action).

²²⁰ Protocol II, *supra* note 13, art. 13(3).

²²¹ *Id.* art. 14.

²²² *Id.* art. 15; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1462 (objects mentioned in Article 15 constitute an exhaustive list).

²²³ Protocol II, *supra* note 13, art. 18; see also *id.* art. 16 (protecting cultural objects and special places of worship); *id.* art. 17 (prohibiting the forced movements of civilians).

²²⁴ See KALSHOVEN, *supra* note 12, at 144; L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians, in ARMED CONFLICT AND THE NEW LAW* 137, 163 (1989).

tol I, Protocol II lacks a rule providing that the presence of insurgents among the civilian population does not deprive civilians of their protected status.²²⁵ Moreover, amendments specifically prohibiting methods of combat that affect civilians indiscriminately and the use of civilians as shields were ultimately rejected and left out of Protocol II's final version.²²⁶ The exclusion of these rules from Protocol II of course does not mean that such acts are permitted, but rather leaves open the door for competing interpretations of which groups and what circumstances warrant protection.²²⁷ Thus, although Protocol II does represent a significant improvement over the generalities of Common Article 3, problems with interpreting its own specific ambiguities remain.²²⁸

Even after taking into account the ambiguities of Common Article 3 and Protocol II, however, an application of these standards to the situation in Chechnya still suggests that both sides have seriously violated the laws of war for non-international conflicts.²²⁹ Evidence exists that Chechen forces used civilians, civilian centers and captured Russian soldiers as shields throughout the hostilities.²³⁰ Under the Geneva Conventions' Article 3, these facts, if true, should constitute inhumane or cruel treatment of persons not actively engaged in hostilities, or, with respect to the Russian soldiers, fall within the prohibition of hostage taking.²³¹ Similarly, by using civilians and civilian objects as shields, Chechen forces placed civilians in positions likely to become subject to attack, in apparent violation of Protocol II's Article 13(1) requirement that civilians receive protection where possible from the consequences of military operations.²³²

The massive Russian bombing campaign of Grozny and surrounding cities also should constitute a violation of the protections of both

²²⁵ See Protocol I, *supra* note 13, art. 50(3) (presence within civilian population of persons not defined as civilians does not deprive the population of its civilian character); see also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1452.

²²⁶ THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 468-69 (R. Levie ed., 1987) (Drafting Committee's version including articles prohibiting indiscriminate attacks and use of civilians as shields rejected by a vote of 30 to 25, with 34 abstentions). Interestingly enough, as will be discussed *infra*, both of these amendments would have clarified significantly the ambiguities surrounding the question of violations of the humanitarian laws for non-international armed conflicts in the case of Chechnya.

²²⁷ See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 166, at 1452 (absence of specific rule protecting civilian status even when insurgents present should not be considered license to attack).

²²⁸ See, e.g., Doswald-Beck, *supra* note 224, at 163.

²²⁹ See Geneva Conventions, *supra* note 13, art. 3; Protocol II, *supra* note 13, arts. 13-15.

²³⁰ See *supra* notes 76-77 and accompanying text.

²³¹ See *supra* text accompanying note 204 (quoting Article 3's provisions).

²³² See Protocol II, *supra* note 13, art. 13(1).

Common Article 3 and Protocol II.²³³ In addition to the initial bombing campaigns, Russian forces continued to use artillery and rocket fire even after they became aware of the consequent high civilian casualty rate.²³⁴ The Russian forces indiscriminate use of artillery—killing thousands of civilians and destroying residential buildings, hospitals and even an orphanage in the process—did not respect the right of Chechnya's civilian population to humane treatment under Common Article 3.²³⁵ The collateral damage from these attacks also should violate the general protections for the civilian population outlined in Protocol II's Article 13.²³⁶ Although the facts remain unclear on the nature of actual Russian tactics in Chechnya, one can also argue that the Russians' use of extreme force in Grozny and its outskirts effectively constituted *direct* attacks on the civilian population as a whole.²³⁷ The evidence indicating that Russians fired on civilians during their ground assault on Grozny would thus seem to fall squarely within Protocol II's prohibition of direct attacks.²³⁸

In sum, the evidence available supports the conclusion that the conduct of both sides in the Chechen conflict violated the relevant laws of war governing non-international armed conflicts.²³⁹ Neither Russian nor Chechen forces appear adequately to have respected their obligations to treat the civilian population humanely under Protocol II and Common Article 3.²⁴⁰ Difficulties arise, however, when one considers how the international legal order treats these "apparent" violations of the laws of war. It is one thing to argue that international legal standards such as Common Article 3 and Protocol II *should* apply to a particular situation, but quite another to conclude that they *will* apply.²⁴¹

C. Autointerpretation and Implementing the Laws of War in Internal Conflicts

As the previous discussions indicate, the authority to determine whether the rules governing international or non-international armed

²³³ See *supra* notes 68–71, 83 and accompanying text.

²³⁴ See *supra* notes 78, 83 and accompanying text.

²³⁵ See *supra* note 70; see also Geneva Conventions, *supra* note 13, art. 3.

²³⁶ See Protocol II, *supra* note 13, art. 13(1).

²³⁷ See *id.* art. 13(2).

²³⁸ See *id.*; Hiatt, *supra* note 78, at A26.

²³⁹ See, e.g., *Human Rights Body Rebukes Both Sides*, *supra* note 76.

²⁴⁰ See Protocol II, *supra* note 13; Geneva Conventions, *supra* note 13, art. 3.

²⁴¹ See, e.g., Rubin, *supra* note 124, at 495 (noting fairly low point at which legal argument becomes unconvincing to those who hold power tenuously).

conflicts apply, as well as what interpretation the applicable rules should receive, generally falls to states as the basic organs of international law.²⁴² Without any overarching entity authorized to determine both when the law applies and how to interpret the law's substantive meaning, states retain independent authority to invoke and apply their own views.²⁴³ The eminent international legal scholar, Leo Gross, in his famous essay, *States as Organs of International Law and the Problem of Autointerpretation*, further explained the role of states in this process:

The technical organizational insufficiency of international law may, and in fact does, make it difficult to determine whether a state acts in accordance with, or contrary to, international law It is generally recognized that the root of the unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what the appropriate sanction may be. In the absence of such an authority, and failing agreement . . . each state has a right to interpret the law, the right of autointerpretation, as it might be called.²⁴⁴

Under this theory of autointerpretation, therefore, international law permits states to offer and act upon their views of the law.²⁴⁵ A state's view, however, remains just that—one interpretation of the law, not a final decision on its applicability and content.²⁴⁶ Treaties and other agreements for adjudication or arbitration, in contrast,

²⁴² See *supra* notes 149–56 (discussing difficulties of recognition in determining whether a conflict is international or non-international); see also *supra* notes 210–11, 227–28 (discussing difficulties in determining appropriate interpretations of Common Article 3 and Protocol II). In the modern context, states are no longer the sole organs of international law; other entities (e.g., the Security Council, the ICJ, etc.) possess the power to act as organs of the international legal system. No international organization currently exists, however, with full authority to interpret and apply the laws of war for international conflicts, let alone those internal in character.

²⁴³ See, e.g., RICHARD A. FALK, *THE INTERNATIONAL LAW OF CIVIL WAR* 12–13 (1971) (idea of objective criteria for application of laws of war misleading; governments define their relationship to insurgent faction largely in accordance with their political preference and, if necessary, describe this preference in relation to appropriate legal status); Rubin, *supra* note 124, at 474 (discussing process of a state's political decisionmaking to determine legal relations).

²⁴⁴ LEO GROSS, *States as Organs of International Law and the Problem of Autointerpretation*, in LEO GROSS *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 386–87 (Martinus Nijhoff, ed. 1984) (1953). Gross directed this theory specifically at the issue of the *ius ad bellum* and international law; however, its underlying theory applies more broadly. See *id.* at 382–86.

²⁴⁵ See *id.* at 384.

²⁴⁶ *Id.* at 386. In this sense the theory of “autointerpretation” differs markedly from theories of “autodecision” or “autoenforcement,” which contend that states simultaneously make the law and decide with finality the manner of its application. See *id.* at 380–81.

can both establish procedures for settling competing interpretations of international law and hold parties accountable for past violations.²⁴⁷ In such circumstances, states effectively consent to the review of their interpretations of international law by a common arbiter, one capable of issuing an authoritative determination of what law applies and whether a violation has occurred in light of specific circumstances.²⁴⁸

In the sphere of the laws of war, however, the theory of autointerpretation remains the operating norm. No provisions exist for an authoritative resolution by a third party of competing claims on the application, interpretation or violation of the laws relating to either international or non-international conflicts.²⁴⁹ With respect to the laws of war for international armed conflicts, the Geneva Conventions and Protocol I do provide for minimal supervision of the law through the concept of Protecting Powers or, alternatively, the services of the International Committee of the Red Cross (the "ICRC").²⁵⁰ In practice, however, states have rarely utilized the Protecting Power system, and although the ICRC has played a more substantial role, it often has been an extralegal one.²⁵¹

In terms of investigating violations, Protocol I provides for the establishment of an International Fact-Finding Commission (the "IFFC") to investigate breaches of the laws of war, but only in the case of an international armed conflict.²⁵² In order to permit its establishment, moreover, a state must specifically accept the IFFC's competence by means of a unilateral declaration.²⁵³ Once accepted, the IFFC

²⁴⁷ CROSS, *supra* note 244, at 392-93.

²⁴⁸ See *id.* at 392 (listing treaties where procedures exist for making binding determinations of the law).

²⁴⁹ Forsythe, *supra* note 181, at 286.

²⁵⁰ See Geneva Conventions I-III, *supra* note 13, art. 8; Geneva Convention IV, *supra* note 13, art. 9 (providing Convention shall be applied with the cooperation of Protecting Powers); see also Geneva Conventions I-III, *supra* note 13, arts. 9-10; Geneva Convention IV, *supra* note 13, art. 10-11 (providing a role for the ICRC in addition to or in absence of a role for Protecting Powers); Protocol I, *supra* note 13, art. 5 (providing contracting parties under legal duty to designate and accept supervision of Protecting Power or ICRC). A Protecting Power is a state that formally undertakes to protect the interests of a warring state's nationals during an ongoing international conflict. See KALSHOVEN, *supra* note 12, at 62.

²⁵¹ See George H. Aldrich, *Compliance with the Law: Problems and Prospects*, in EFFECTING COMPLIANCE 1-13 (1993); see also KWAKWA, *supra* note 12, at 164-65; Rubin, *supra* note 124, at 486 (describing ICRC role). Since World War II, Protecting Powers have formally played a role in only four instances: in the 1956 Suez crisis, in Goa in 1961, in the 1971 Indo-Pakistan conflict, and in the 1982 Falklands/Malvinas war. KWAKWA, *supra* note 12, at 164.

²⁵² Protocol I, *supra* note 13, art. 90.

²⁵³ *Id.*; see also KALSHOVEN, *supra* note 12, at 131; KWAKWA, *supra* note 12, at 159-60. Although Russia did submit such a declaration, given the previous conclusion that Chechnya does not

mission remains one of investigation; it has no authority to judge the guilt of the warring parties, nor can it release its findings unless all the parties to the conflict request that the Commission do so.²⁵⁴ In reality, therefore, these organizations (i.e., Protecting Powers, ICRC, IFFC) play only a nominal role in giving effect to the provisions in the Geneva Conventions and Protocol I that attempt to hold both individuals and states responsible for violations of the rules for international armed conflicts.²⁵⁵ In any case, contracting states remain free to exercise their right to autointerpretation by insisting that the conflict is non-international in character, and thus these supervision mechanisms do not apply.²⁵⁶

With the interests of only one state formally involved, the right to autointerpretation becomes even more significant in cases of non-international armed conflicts.²⁵⁷ Given the internal nature of such conflicts, other states and international organizations can play a role only when the state concerned consents to their participation by accepting specified procedures in a particular treaty or on an *ad hoc* basis.²⁵⁸ Without a state's formal consent, however, the default rule remains that other states and international organizations lack standing to interfere in that state's internal affairs.²⁵⁹

involve an international armed conflict, this declaration has limited utility with respect to investigating violations of the laws of war in that conflict.

²⁵⁴ KWAKWA, *supra* note 12, at 161.

²⁵⁵ Under Articles 51, 52, 131 and 148 of Geneva Conventions I-IV, respectively, contracting parties agree that no party can absolve itself of any liability for breaches of the Conventions' provisions. *See* Geneva Conventions, *supra* note 13; KALSHOVEN, *supra* note 12, at 67. Protocol I further provides that a contracting party that violates its provisions or the Conventions shall be held responsible and liable to pay compensation if the case demands. *See supra* note 13, art. 91. Both the Geneva Conventions and Protocol I also define those grave breaches for which a state has an obligation to search for and try the responsible individuals. *See* Geneva Conventions, *supra* note 13, arts. 50, 51, 130, 147 of Geneva Conventions I-IV, respectively; Protocol I, *supra* note 13, art. 85; *see also* KALSHOVEN, *supra* note 12, at 68-69, 132-35.

²⁵⁶ *See, e.g., supra* note 243 and accompanying text (describing controlling view of states on status of a conflict).

²⁵⁷ Although wars of national liberation also involve the interests of only a single state, contracting states agree under Protocol I that such conflicts implicate the monitoring mechanisms discussed *supra* notes 250-51 (e.g., Protecting Powers, ICRC, IFFC). *See generally* Protocol I, *supra* note 13.

²⁵⁸ Thus, all members of the United Nations agree to accept a role for the United Nations Security Council whenever it finds a situation that represents a threat to international peace and security. *See* U.N. CHARTER, arts. 39-51 (Chapter VII). The Security Council therefore possesses the authority to find that an internal conflict (e.g., Rwanda) rises to a level threatening international peace and security and to take measures accordingly.

²⁵⁹ *See, e.g., supra* note 16 and accompanying text (discussing requirement of standing in international law).

Nothing in Common Article 3 or Protocol II deviates from this default rule.²⁶⁰ Both Common Article 3 and Protocol II leave to the state involved in a non-international conflict the final interpretation of questions relating to the laws' application, implementation and violation.²⁶¹ Protocol II specifically prohibits other states from "intervening, directly or indirectly, for any reason, whatever, in the armed conflict, or in the internal or external affairs of the High Contracting Party, in the territory of which that conflict occurs."²⁶² Unlike with international conflicts, provisions do not exist in non-international conflicts for introducing the oversight of a Protecting Power or impartial humanitarian organization, nor for establishing issues related to collective and individual responsibility.²⁶³ Thus, while a state undoubtedly accepts certain standards of conduct when it ratifies the Geneva Conventions and their Protocols, it does not follow that the state also agrees to accept an authority, aside from itself, capable of determining how to apply, implement and enforce these standards.²⁶⁴

In light of all this, it becomes apparent that nothing in international law currently restricts Russia's basic right of autointerpretation with respect to events in Chechnya. Whatever the issue—whether it involves Chechnya's status as a "Power," the meaning of the term "humane treatment," or the finding of a violation of some rule—Russia's interpretation of the law will control unless some other authority exists capable of ruling on the propriety of Russia's views.²⁶⁵ In the context of non-international armed conflicts, no such authority exists. Neither Common Article 3 nor Protocol II provides any mechanisms by which its standards could be implemented and enforced without the consent of the Russian Federation.²⁶⁶ Neither Chechnya, nor other states, nor international organizations possess any standing under in-

²⁶⁰ See Protocol II, *supra* note 13; Geneva Conventions, *supra* note 13, art. 3.

²⁶¹ See, e.g., Forsythe, *supra* note 181, at 294; see also Bart De Shutter & Christine Van De Wyngaert, *Coping with Non-International Armed Conflicts: The Borderline Between National and International Law*, 13 GA. J. INT'L & COMP. L. 279, 284 (1983) (effectiveness of Article 3 limited by the absence of precise guidelines for determining to which factual situations it applies).

²⁶² Protocol II, *supra* note 13, art. 3(2).

²⁶³ See KALSHOVEN, *supra* note 12, at 145.

²⁶⁴ See, e.g., Forsythe, *supra* note 181, at 294; GROSS, *supra* note 244, at 391-93 (discussing right of autointerpretation and multilateral treaties).

²⁶⁵ See *supra* notes 149-56, 209-11 and accompanying text (discussing difficulty in determining who constitutes a "Power" and what amounts to inhumane treatment).

²⁶⁶ Although Chechnya certainly has an interest in Russia's interpretations of the law, Chechnya does not possess the requisite status to act as an organ of international law. See *supra* note 150-52 and accompanying text. Conversely, although states and international organizations have sufficient status to act as organs of international law, they lack the requisite legal interest to do so in the case of Chechnya. See *supra* note 16.

ternational law to question Russia's interpretations of the law and facts in Chechnya.²⁶⁷ Common Article 3 and Protocol II may, therefore, establish international law's interest in internal conflicts, but they do not provide adequate, independent mechanisms to interpret that legal interest.²⁶⁸ This does not mean, however, that international law could *never* govern events in Chechnya. In theory, Russia could always agree by treaty or otherwise to a final review of the legality of its conduct in Chechnya. As yet, however, it has chosen not to do so.²⁶⁹

In sum, therefore, one can draw several conclusions from the preceding analysis of international law and the Chechen conflict. First, issues of recognition ultimately will determine the (non)international character of an armed conflict.²⁷⁰ Second, although a number of states (including Russia) accept the relevance of international laws in non-international armed conflicts, the standards agreed upon lack specificity.²⁷¹ As a result, equally reasonable arguments will often reach opposite conclusions as to how international law applies in a specific situation. Finally, the ambiguity of these laws is compounded by the problem of autointerpretation, where a state's views of its non-international conflict will control because no mechanisms exist independent of that state to supervise the laws' implementation and enforcement.²⁷²

Thus, although international law has provided positive laws governing the conduct of warring parties in non-international armed conflicts, it has yet to establish positive law mechanisms to implement and enforce these standards. Given these practical difficulties with respect to the laws of war in non-international armed conflicts, it becomes necessary to analyze alternative or supplementary methods by which the international community can address internal conflicts with international standards.

²⁶⁷ See *supra* note 16 (discussing need for standing before international tribunals).

²⁶⁸ See, e.g., G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflict*, 13 GA. J. INT'L & COMP. L. 253, 276 (1983).

²⁶⁹ Whether Chechnya could agree or disagree to this review poses more interesting questions, given the question of its status under international law. See *supra* notes 149-56 and accompanying text.

²⁷⁰ See *supra* notes 149-56 and accompanying text.

²⁷¹ See *supra* notes 208-11, 224-28 and accompanying text.

²⁷² See *supra* notes 243-48 and accompanying text.

III. AN ALTERNATIVE APPROACH: THE OSCE AND THE IMPLEMENTATION OF POLITICAL AGREEMENTS IN INTERNAL CONFLICTS

The Organization on Security and Cooperation in Europe (the "OSCE"), currently composed of fifty-three member states, oversees the implementation and continuing elaboration of the norms originally established by the Helsinki Final Act of August 1, 1975.²⁷³ By signing the Final Act, participating states accepted and pledged to conform their actions to ten basic principles, including the concepts of sovereign equality, territorial integrity, inviolability of frontiers, and respect for human rights and fundamental freedoms.²⁷⁴ Participating states further committed themselves to a series of periodic follow-up meetings designed both to review the implementation of the Final Act's principles and to develop more specific standards of

²⁷³ See Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1977, 14 I.L.M. 1292 (1975), reprinted in BLOED, *supra* note 95, at 43-100 [hereinafter "Final Act"]; Thomas Buerghenthal, *The CSCE Rights System*, 25 GEO. WASH. J. INT'L L. & ECON. 333, 344-45 (1991). As far back as the 1950's the Soviet Union and the United States began to explore the idea of developing a European conference to achieve progress on issues of security, economics and human rights. See BLOED, *supra* note 95, at 1-2; Russell, *supra* note 95, at 244-45. After a series of multilateral preparatory talks held in Helsinki from 1972-73, the participating states all agreed to an agenda for the planned conference that sought to focus negotiations around four "baskets," or sets, of issues: (1) European security as elaborated through 10 guiding principles, (2) cooperation in the fields of economics, science, technology and the environment, (3) cooperation in humanitarian and other fields, and (4) a follow-up process for any concluded agreements. BLOED, *supra* note 95, at 3-6. Through the idea of "linkage," moreover, states agreed that progress in any one basket required similar progress in the other three baskets. See *id.* at 9. Given its scope, however, this Note will concentrate solely on the 10 basic principles guiding relations between states outlined in the first basket on European security.

²⁷⁴ See Final Act, *supra* note 273, at 1293, reprinted in BLOED, *supra* note 95, at 44-49 (participating states express not only common adherence to principles set out in Final Act, but also their determination to respect and implement them in their mutual relations). The 10 principles can be summarized as follows:

1. Sovereign equality, respect for the rights inherent in sovereignty;
2. Refraining from the threat or use of force;
3. Inviolability of frontiers;
4. Territorial integrity of States;
5. Peaceful settlement of disputes;
6. Non-intervention in internal affairs;
7. Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief;
8. Equal rights and self-determination of peoples;
9. Cooperation among States;
10. Fulfillment in good faith of obligations under international law.

BLOED, *supra* note 95, at 6. The Final Act recognized each principle's primary significance and thus required that the interpretation of any one principle necessitated consideration of the others. See Final Act, *supra* note 273, at 1296, reprinted in BLOED, *supra* note 95, at 49.

conduct.²⁷⁵ Based on a consensus decision-making process, these meetings evolved into forums where states engaged in extensive public dialogue over the methods each had chosen to interpret and comply with agreed-upon principles.²⁷⁶ Eventually, these meetings became institutionalized into a standing organization, today's OSCE, with established mechanisms for pursuing states' compliance with an emerging body of norms.²⁷⁷

A. *The Nature of OSCE Norms—Distinguishing Political and Legal Commitments*

Unlike treaties such as the Geneva Conventions or their Protocols, none of the principles or standards promulgated by the states participating in the OSCE involve an international legal obligation.²⁷⁸ International law requires that for a document to involve a "legal" commitment, the parties to that document must intend it either to create legal rights and obligations or to establish relations governed by international law.²⁷⁹ In issuing the Helsinki Final Act, however, the participat-

²⁷⁵ Known alternatively as the "Helsinki Process" or the "CSCE," each Follow-Up Meeting (Belgrade 1977-78, Madrid 1980-83, Vienna 1986-89, Paris 1990, Helsinki 1992 and Budapest 1994) and Conference on the Human Dimension Meeting (e.g., Paris 1989, Copenhagen 1990 and Moscow 1991) made significant strides in placing human rights issues onto the East-West political agenda. See, e.g., BLOED, *supra* note 95, at 12-26 (listing accomplishments of Helsinki Process up to Vienna Meeting); JOHN FRY, *THE HELSINKI PROCESS* (1993) (analyzing human rights achievements of Helsinki Process in context of Cold War's demise); WILLIAM KOREY, *THE PROMISES WE KEEP* (1993) (discussing achievements of Helsinki Process from American perspective); Buergenthal, *supra* note 273, at 333-367 (detailing Helsinki Process achievements as creating a system for protection of human rights).

²⁷⁶ See, e.g., Max W. Kampelman, *The Helsinki Final Act: Peace Through Diplomacy*, 13 GA. J. INT'L & COMP. L. 327, 329 (1983). With each successive meeting, when asked to justify domestic policies that violated other Final Act principles (e.g., respect for human rights or self-determination), states less frequently invoked the principle of non-intervention in a state's internal affairs. See Russell, *supra* note 95, at 260. At the conclusion of the 1991 Moscow Conference on the Human Dimension, OSCE members "categorically and irrevocably declare[d] that the commitments undertaken in the field of the human dimension of the CSCE [i.e., OSCE] are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned." Conference on Security and Cooperation in Europe: Document of the Moscow Meeting of the Conference on the Human Dimension, Oct. 3, 1991, Preamble, 30 I.L.M. 1670, 1672 (1991) [hereinafter *Moscow Document*].

²⁷⁷ After the Charter of Paris for a New Europe, for example, CSCE participating states agreed to establish a CSCE Council of Ministers and a Committee of Senior Officials as well as a Secretariat to provide both new organs with administrative and operational support. See Buergenthal, *supra* note 273, at 363; see also Nils Eliasson, *Institutional Development of the CSCE: A Challenge of Change*, 4 HELSINKI MONITOR 12, 13 (1993) (detailing other organizations existing under CSCE umbrella).

²⁷⁸ See, e.g., BLOED, *supra* note 95, at 11 (Helsinki documents do not have character of treaties); Buergenthal, *supra* note 273, at 378 (CSCE documents not legally binding in form); Russell, *supra* note 95, at 246 (Final Act morally compelling but not legally binding).

²⁷⁹ Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J.

ing states clearly indicated that they did not intend that document to be binding as a matter of international law.²⁸⁰ The text of the Final Act itself does not clearly state this intention, only because certain states insisted such a clause would de-emphasize the document's otherwise significant results.²⁸¹ In the end, the Final Act's only reference to its own legal status provides that it "is not eligible for registration under Article 102 of the Charter of the United Nations."²⁸² A separate letter sent by the Government of Finland to the United Nations clarified the meaning of this clause by noting that the Final Act's ineligibility stood in contrast to a "treaty" or "international agreement," both of which were eligible for registration under Article 102.²⁸³

The Helsinki Final Act's nature, therefore, places it outside of international law.²⁸⁴ Without evidence pointing to an intent to bind states legally, the Final Act lacks a key characteristic found in treaties and conventions.²⁸⁵ The Helsinki Final Act ultimately amounted, therefore, to a political document, with participating states making political and moral, rather than legal, commitments to conform to its principles.²⁸⁶ OSCE Documents adopted subsequent to the Final Act have maintained essentially the same political character.²⁸⁷ In particular, the terminology adopted in OSCE declarations, distinguishing OSCE "commitments" from international law "obligations," will likely con-

INT'L L. 296, 296 (1977); see also Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, NETH. Y.B. INT'L L. 65, 67 (1982) ("An agreement binding in law is created by the corresponding declarations of the parties expressing their consent to be so bound."); Marian Nash, *International Acts not Constituting Agreements*, 88 AM. J. INT'L L. 515, 517 (1994) (quoting internal United States State Department Memorandum indicating parties "must intend their undertakings to be legally binding" in order to constitute international agreement). In drafting the 1969 Vienna Convention on the Law of Treaties, the International Law Commission defined a treaty as a document "governed by international law," excluding those agreements 1) that were not intended to affect international legal rights and duties or 2) that were governed by national laws. See P. van Dijk, *The Final Act of Helsinki—Basis for a Pan-European System*, NETH. Y.B. INT'L L. 97, 107 (1980).

²⁸⁰ See Bothe, *supra* note 279, at 73; van Dijk, *supra* note 279, at 106.

²⁸¹ Russell, *supra* note 95, at 247 (citing Soviet, Swiss and Romanian objections to including a clause on Final Act's non-legal character).

²⁸² Final Act, *supra* note 273, reprinted in BLOED, *supra* note 95, at 100; see also Russell, *supra* note 95, at 247, Schachter, *supra* note 279, at 296. Article 102 provides that "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." U.N. CHARTER art. 102, ¶ 1.

²⁸³ Russell, *supra* note 95, at 248 (quoting text of letter); Schachter, *supra* note 279, at 296.

²⁸⁴ See, e.g., *Human Rights: The Helsinki Process*, 84 AM. SOC'Y INT'L & COMP. L. 113, 119 (1990) (remarks by Mala Tabory) (CSCE documents lie outside legal rule of *pacta sunt servanda*).

²⁸⁵ See *id.*

²⁸⁶ BLOED, *supra* note 95, at 11; Bothe, *supra* note 279, at 65.

²⁸⁷ Buergenthal, *supra* note 273, at 378.

tinue to prevent OSCE standards from becoming legally binding at any time in the near future.²⁸⁸

The fact that OSCE documents lack a legal character, however, does not necessarily lead to the conclusion that OSCE principles and standards are not binding.²⁸⁹ A commitment does not have to be *legally* binding to have binding force.²⁹⁰ Legal rules are but one means by which the international community may formulate shared expectations.²⁹¹ States remain equally free to enter into *politically* binding agreements where each expects and relies upon compliance by the other parties.²⁹² Indeed, a review of state practice shows the conclusion of numerous non-legal, political agreements, the obligations of which states have taken quite seriously.²⁹³ *Politically* binding obligations, therefore, may contain a normative force that binds parties to act consistently with agreed-upon principles or standards in a manner often equivalent to that established by *legally* binding treaties or conventions.²⁹⁴ In light of this, one can conclude that as politically binding agreements solemnly entered into by the participating states, the declarations of the OSCE possess a normative character.²⁹⁵

The primary distinction between legal obligations (e.g., treaties or conventions) and political obligations (e.g., the Final Act or the more recent OSCE Code of Conduct) rests on the legal consequences that attach to the obligation. Where acts occur in conformity or breach of international law, legal results *may* follow.²⁹⁶ At the same time, however, acts in conformity or breach of politically binding agreements also create results, but only those political in nature.²⁹⁷ This distinction

²⁸⁸ *Id.*

²⁸⁹ BLOED, *supra* note 95, at 11.

²⁹⁰ van Dijk, *supra* note 279, at 110.

²⁹¹ See Bothe, *supra* note 279, at 66.

²⁹² See Schachter, *supra* note 279, at 299.

²⁹³ See, e.g., Bothe, *supra* note 279, at 65, 81–83 (citing non-legal agreements adopted in areas of trade and monetary relations, including UNCTAD's Generalized System of Preferences); Nash, *supra* note 279, at 515, 517–18 (citing non-legal nature of 1917 U.S.-Japan "Gentleman's Agreement" on Japanese immigration, 1941 Atlantic Charter, 1978 Bonn Declaration and 1982 Shanghai Communiqué).

²⁹⁴ See van Dijk, *supra* note 279, at 118.

²⁹⁵ Buergenthal, *supra* note 273, at 381.

²⁹⁶ See Rubin, *supra* note 15, at 156–57.

²⁹⁷ Thus, non-compliance with a non-legal obligation, such as an OSCE norm, does not give rise to a cause of action before international legal bodies such as the ICJ or claims for reparations as a matter of international law. See, e.g., *Aegean Sea Continental Shelf* (Greece v. Turkey), 1978 I.C.J. 3, 39, 44 (ICJ declining to exercise jurisdiction when document on the basis of which jurisdiction is claimed lacked legal character). Still, states retain expectations in political agreements that parties will modify their practices in accordance with the relevant norms, and upon the breach of those expectations, political responses can occur (e.g., economic sanctions, sever-

means, therefore, that the instruments established by the OSCE to implement and enforce its political norms can be regarded only as political mechanisms; like OSCE documents and the norms they contain, they have no legal character.²⁹⁸

B. OSCE Norms and Processes as Applied to the Armed Conflict in Chechnya

None of the original ten principles for relations between states laid out in the Helsinki Final Act deals directly with normative rules for the conduct of parties engaged in an armed conflict.²⁹⁹ The Helsinki Final Act's guiding principles do contain several provisions on the right to use force, including prohibitions against its use among participating states.³⁰⁰ With respect to a state's treatment of its own civilians, as in the case of an internal armed conflict, however, the Final Act refers only to a participating state's obligation to respect human rights and the right to self-determination.³⁰¹ The primary significance of these references is to grant human rights the same status as more traditional international principles such as territorial integrity and non-intervention in a state's internal affairs.³⁰² As legitimate subjects of

ance of diplomatic relations, public criticism of breaching state, etc.). See Schachter, *supra* note 279, at 300, 303; van Dijk, *supra* note 279, at 115. The actual advantage of international law in this respect lies in the fact that both legal and political enforcement mechanisms may be available in the event of an international legal violation, while only political results may follow a violation of a politically binding norm. See Bothe, *supra* note 279, at 87.

²⁹⁸ See *supra* notes 284–87 (characterizing norms developed in Helsinki Process as non-legal in nature). The recent OSCE Convention on Conciliation and Arbitration provides the only exception to this rule by establishing a dispute resolution mechanism in which OSCE states may participate by ratifying an optional treaty. See generally Gerard J. Tanja, *Peaceful Settlement of Disputes Within the CSCE: Bridge over Troubled Water*, 4 HELSINKI MONITOR 22 (1993).

²⁹⁹ See Final Act, *supra* note 273, reprinted in BLOED, *supra* note 95, at 44–49.

³⁰⁰ For example, Principle 2—Refraining from the Threat or Use of Force—refers to the participating states' commitment to refrain "in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State." Final Act, *supra* note 273, reprinted in BLOED, *supra* note 95, at 45. Principle 6—Non-Intervention in Internal Affairs—also prohibits armed "intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State." Final Act, *supra* note 273, reprinted in BLOED, *supra* note 95, at 47.

³⁰¹ In the Final Act, participating states promised to "respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion." Final Act, *supra* note 273, reprinted in BLOED, *supra* note 95, at 47. The participating states also reaffirmed their commitment to the principle that all peoples always have the right to determine their internal and external political status without external interference. See *id.* at 48.

³⁰² See, e.g., Buergenthal, *supra* note 273, at 339–40 ("By linking human rights to peace and

international concern, moreover, the Final Act's human rights principles also become valid topics of inquiry for other participating states.³⁰³

Subsequent OSCE documents detailed and expanded upon the general human rights norms laid out in the Final Act.³⁰⁴ With respect to establishing standards of behavior for participating states engaged in armed conflicts, the most important of these documents undoubtedly is the December 1994 "Code of Conduct on Politico-Military Aspects of Security."³⁰⁵ This document does not introduce many new substantive rules for states fighting in an armed conflict, but rather incorporates all the obligations of international humanitarian law as political commitments of OSCE participating states.³⁰⁶ OSCE political norms, therefore, now embrace the relevant standards of conduct found in international law, including the Geneva Conventions and their 1977 Protocols.³⁰⁷ Moreover, with respect to internal security missions (i.e., internal armed conflicts), the Code of Conduct requires states to accept additional obligations to use only that level of force commensurate with their needs and to take due care to avoid injury to civilians and their property.³⁰⁸

The OSCE Code of Conduct's new regulations including the requirement that states give due care to civilians in internal security missions, do not, however, establish standards in any greater detail than international law's Common Article 3 or Protocol II.³⁰⁹ The Code of Conduct, like the international humanitarian law that it incorporates,

friendly relations, the participating states transformed human rights from a marginal item on the pan-European political agenda into a subject of central importance to it.").

³⁰³ See Russell, *supra* note 95, at 260.

³⁰⁴ See, e.g., Buerghenthal, *supra* note 273, at 349-67 (detailing normative process of OSCE Vienna, Copenhagen, Paris and Moscow meetings); see also Victor Y. Johnson, Recent Developments, *International Human Rights—Helsinki Accords—Conference on Security and Cooperation in Europe Adopts Copenhagen Document on Human Rights*, 20 GA. J. INT'L. & COMP. L. 645, 653-55 (1990) (describing human rights advances found in various OSCE documents, particularly the Copenhagen Document on Human Rights).

³⁰⁵ Code of Conduct on Politico-Military Aspects of Security, Conference on Security and Cooperation in Europe: Budapest Document—Towards a Genuine Partnership in a New Era, Dec. 6, 1994, at 21 [hereinafter "Code of Conduct"] (U.S. State Department copy on file with author).

³⁰⁶ See *id.* at 27, 28 ("[t]he provisions adopted in this Code of Conduct are politically binding").

³⁰⁷ *Id.* at 27 (participating state shall ensure that its forces are "commanded, manned, trained and equipped in ways that are consistent with the provisions of international law . . . related to the use of armed forces in armed conflict including . . . Geneva Conventions of 1949 and the 1977 Protocols additional thereto . . .").

³⁰⁸ See *id.*

³⁰⁹ See *id.*; see also Protocol II, *supra* note 13; Geneva Conventions, *supra* note 13, art. 3.

lacks specificity.³¹⁰ It merely delineates principles to which states *should* adhere, rather than fixing clear-cut rules of conduct to which states *must* adhere.³¹¹ Nevertheless, the Code of Conduct remains significant for establishing the existence of such *politically* binding OSCE norms, which participating states should follow when engaged in internal hostilities.³¹²

Furthermore, in addition to establishing norms relating to the conduct of armed conflicts, the OSCE system also contains mechanisms for the implementation and enforcement of these standards.³¹³ Under the so-called Human Dimension Mechanism, a four-step compulsory process permits states to inquire into other state's implementation and enforcement of OSCE commitments.³¹⁴ First, any OSCE state asked for information about its implementation processes must reply to that request within ten days.³¹⁵ Second, in the event that the state's answer proves unsatisfactory, the inquiring state may convene a bilateral meeting with the answering state on issues related only to the initial inquiry.³¹⁶ Third, should both of these attempts fail to satisfy the inquiring state, it may inform all other states about its concerns.³¹⁷ Fourth, an issue that cannot be resolved through this process may be specifically addressed at an annual meeting of the OSCE Conference on the Human Dimension, a subcommittee of the OSCE dedicated to implementing its human rights commitments.³¹⁸ Finally, in the event

³¹⁰ See Code of Conduct, *supra* note 305; see also Protocol II, *supra* note 13; Geneva Conventions, *supra* note 13, art. 3.

³¹¹ See generally Code of Conduct, *supra* note 305. Although under the Code of Conduct, participating states accept obligations that "will ensure" the observance of certain conditions, those conditions as listed are ambiguous enough to be susceptible to varying interpretations. See, e.g., *id.* at 26 (participating state "will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law"); see also *id.* at 27 (participating state "will ensure that its defense policy and doctrine are consistent with international law related to the use of armed forces").

³¹² See *id.* at 28.

³¹³ See, e.g., Buergenthal, *supra* note 273, at 369-75 (outlining OSCE institutional framework to deal with states not observing OSCE commitments). The Code of Conduct explicitly recognizes the applicability of such OSCE mechanisms to its principles. See Code of Conduct, *supra* note 305, at 28 (appropriate OSCE "bodies, mechanisms and procedures will be used to assess, review and improve . . . the implementation of this Code").

³¹⁴ See Conference on Security and Cooperation in Europe: Concluding Document of the Vienna Meeting, Jan. 17, 1989, 28 I.L.M. 531, reprinted in BLOED, *supra* note 95, at 181, 213-14 [hereinafter Vienna Concluding Document]; see also BLOED, *supra* note 95, at 24; Buergenthal, *supra* note 273, at 370-71.

³¹⁵ Vienna Concluding Document, *supra* note 314, reprinted in BLOED, *supra* note 95, at 213.

³¹⁶ *Id.*; Buergenthal, *supra* note 273, at 370.

³¹⁷ Buergenthal, *supra* note 273, at 370.

³¹⁸ *Id.*

of an emergency situation, the Senior Council—one of two operating arms of the OSCE—may convene and take immediate action by consensus.³¹⁹

In addition to the Human Dimension Mechanism, a number of other avenues remain available in the event of a dispute about a state's compliance with its OSCE obligations. Given a consensus of participating states, acting through the Senior Council, the OSCE can send short term *rapporteur* or expert missions to investigate a situation that may violate OSCE norms.³²⁰ The OSCE also possesses capabilities to undertake longer missions or even peacekeeping operations to assist in resolving or ending hostilities.³²¹ In cases of clear, gross and uncorrected violations of an OSCE commitment, moreover, other OSCE states, under the so-called "consensus minus one" rule, can impose sanctions on the offending state.³²²

Perhaps the most useful mechanism of the OSCE, however, is also its oldest. Under the Helsinki Final Act and subsequent OSCE documents, participating states have an obligation to respond, when asked, to requests regarding their implementation (or lack thereof) of OSCE commitments.³²³ Termed the "mobilization of shame," this OSCE process provides a public forum where participating states must openly defend their interpretations of the scope and substantive meanings of OSCE principles.³²⁴ In areas where adjudication remains unlikely, this process of dialogue and publicity provides a dynamic alternative.³²⁵

A review of the OSCE's role in the Chechen conflict demonstrates both the normative force of its agreements as well as the utility in internal armed conflicts of its implementation mechanisms. Although

³¹⁹ See Rob Siekmann, *The Linkage Between Peace and Security and Human Rights in the CSCE Process*, 5 HELSINKI MONITOR 43, 47-49 (1994); see also Code of Conduct, *supra* note 305, at 10 (changing name of Committee of Senior Officials to Senior Council).

³²⁰ See Heather Hulburt, *CSCE Conflict Resolution in Practice*, 5 HELSINKI MONITOR 25, 26-34 (1994). In certain circumstances, the OSCE also anticipates sending missions without the investigated state's consent, although practical difficulties in placing personnel in such situations make this provision generally unworkable. See, e.g., Doughty, *supra* note 96.

³²¹ Hulburt, *supra* note 320, at 26-34; see also Siekmann, *supra* note 319, at 48-49. To date OSCE has dispatched both long- and short-term missions to several areas in the former Yugoslavia, Moldova, Georgia, Estonia, Latvia and most recently, Chechnya. See Wilhelm Hoynck, *The Role of the CSCE in the New European Security Environment*, 5 HELSINKI MONITOR 16, 20 (1994).

³²² Siekmann, *supra* note 319, at 49.

³²³ See, e.g., Vienna Concluding Document, *supra* note 314, reprinted in BLOED, *supra* note 95, at 213; see also Russell, *supra* note 95, at 260.

³²⁴ Johnson, *supra* note 304, at 662.

³²⁵ The OSCE Code of Conduct affirmed this mechanism with respect to its own norms. See Code of Conduct, *supra* note 305, at 28 ("Each participating State is responsible for the implementation of this Code. If requested, a participating State will provide appropriate clarification regarding its implementation of the Code.").

the Code of Conduct, like its legal counterparts, suffers from a number of ambiguities, all the member states of the OSCE conceded its applicability to the fighting in Chechnya.³²⁶ As part of the OSCE's mandatory process of discussion, even the Russian delegate eventually acknowledged that, although Russia possessed a right to maintain its territorial integrity, the manner in which it had done so in Chechnya violated its citizens' human rights.³²⁷ More importantly, OSCE mechanisms also operated to cause Russia to permit several OSCE missions to travel to Chechnya and to observe the conditions there.³²⁸ The Russian Federation even went so far as to permit a permanent OSCE mission to Chechnya that could assist in restoring the rule of law as well as monitor the extent to which the warring parties observe both OSCE commitments and international humanitarian law.³²⁹ As for the missions' results, the first two delegations found that Russia's bombing campaigns violated OSCE and international legal norms by causing a massive loss of life within the civilian population.³³⁰ As a result of these conclusions, moreover, Russia again found itself admitting that its conduct in Chechnya violated its citizens' most basic right to life.³³¹ In the end, therefore, both the OSCE mission and the OSCE debates over Russian and Chechen conduct provided a forum, if not for resolving the dispute, then at least for providing the international community with a role in what was universally acknowledged as an "internal matter."

IV. THE TWO MODELS: LEGAL AND POLITICAL INTERNATIONAL NORMS IN INTERNAL ARMED CONFLICTS

An examination of the two models discussed above reveals little difference in scope or substance. In scope, both international law and the OSCE Code of Conduct provide different standards of conduct depending on whether conflicts occur between states or within a single state.³³² In terms of non-international armed conflicts, the standards of Common Article 3 and Protocol II for humane treatment and prohibition against attacks on civilians differ little in substance from the

³²⁶ See *supra* note 104, and accompanying text. Indeed, OSCE states also agreed that violations of international humanitarian law had occurred, but such statements lack legal force, given the OSCE's entirely political nature. See *id.*

³²⁷ *Id.*

³²⁸ See *supra* notes 108–12 and accompanying text.

³²⁹ See *supra* notes 113–18 and accompanying text.

³³⁰ See *supra* notes 109–10, 112 and accompanying text.

³³¹ See *supra* note 111 (quoting Russian Federation Justice Minister Kovalyov).

³³² In fact, by incorporating international humanitarian law into the OSCE normative frame-

OSCE Code of Conduct's requirements of due care and proportionality.³³³ Each standard—one legal, the other political—establishes a state's duty to avoid the indiscriminate use of force against its own civilian population.³³⁴

Where international law's standards for armed conflicts and the OSCE's politically binding "Code of Conduct" diverge, however, is in the results that flow from an alleged violation.³³⁵ Under the general theory of autointerpretation, unless a state consents to submit its interpretation of circumstances to a common arbiter, its view of the legality or illegality of that situation will control.³³⁶ This does not mean that a state may determine as a matter of international law whether its acts are *per se* legal because other states always remain free to agree or disagree with the first state's views.³³⁷ Rather, the theory of autointerpretation merely recognizes the possibility in many circumstances of the absence of an agreed-upon, independent legal authority to adjudicate, implement or enforce accepted legal principles.

Under international law, therefore, Russia can maintain that its conduct in Chechnya remained consistent with its international legal obligations without having to submit that claim to a legal process that would test its validity. Neither Common Article 3 nor Protocol II (nor the whole area of the laws of war, for that matter) provides, as a matter of positive law, enforcement mechanisms to resolve disputed claims in specific circumstances.³³⁸ Thus, in Chechnya and other conflicts like it, states alleging a violation of the laws governing internal armed conflicts can do no more than make assertions, individually or collectively, in the face of counter-assertions by the accused state(s). Regarding Chechnya, for example, Europe and the United States could declare that Russia's conduct violated international law all they wanted,

work, the Code of Conduct establishes essentially the same principles of conduct as international law for international armed conflicts. See *supra* notes 306–07 and accompanying text.

³³³ See *supra* notes 205, 214–25, 308 and accompanying text (describing standards under Common Article 3, Protocol II, and OSCE Code of Conduct).

³³⁴ Protocol II and the OSCE Code of Conduct expressly acknowledge this duty. See Protocol II, *supra* note 13, art. 13(1); see also Code of Conduct, *supra* note 305, at 27. With respect to Common Article 3, however, such a duty must be read into the meaning of the requirement of "humane treatment." See Geneva Conventions, *supra* note 13, art. 3.

³³⁵ See *supra* notes 296–98 (discussing difference in results that flow from violation depending on whether it involves legal or political norms).

³³⁶ See *supra* notes 243–48 and accompanying text.

³³⁷ See *supra* note 246 (distinguishing theory of autointerpretation from theories of autodecision and autoenforcement).

³³⁸ See *supra* notes 260–64 and accompanying text.

but such assertions lack legal force—they did not overrule Russia's initial counter-assertions, nor give rise to legal consequences.³³⁹

The distinguishing characteristic of the OSCE framework, therefore, lies not in the nature of the norms to which participating states agreed, but rather the process they utilize to implement and enforce those norms. The OSCE provides above all a *forum* in which disputing sides agree to air their dispute, even if the substantive basis of that dispute is a political, rather than a legal, agreement.³⁴⁰ In addition, the OSCE also can send observer missions to troubled areas to oversee directly the manner in which states implement or enforce their OSCE commitments. The OSCE, thus, supplies both politically binding norms and the political processes to implement them; international law provides only legally binding norms, without any corresponding legal enforcement mechanisms.³⁴¹ Although the OSCE process admittedly is often limited to mere debate, or relatively minor observer missions, given the past treatment of "internal matters" in international relations, the significance of these procedures should not be underestimated.³⁴² To date, states still remain incapable of agreeing on procedures that will implement and enforce, as a matter of law, international legal norms for international, let alone internal, armed conflicts.

This analysis of the OSCE should not, however, lead to the conclusion that its normative framework should be considered superior to international law. The OSCE remains, after all, a *political* body, relying on the political will of its members to enforce its commitments. International law, on the other hand, *if* properly accompanied by legal enforcement mechanisms, avoids this reliance on states' political will because it implements, enforces and adjudicates norms as a matter of law. The OSCE, therefore, stands not as competitor to international law, but rather as a supplement to it. In the absence of legal mecha-

³³⁹ See, e.g., Gordon, *supra* note 69, at 12 (United States reminding Russia of its obligations under the Geneva Conventions).

³⁴⁰ See *supra* notes 322–23 and accompanying text.

³⁴¹ See *supra* notes 265–69 (describing absence of implementation or enforcement mechanism for international humanitarian law).

³⁴² Richard Falk noted in this regard how:

[T]he need to explain, to justify, even if no adversary stronger than public opinion was available, would tend to strengthen the position of more moderate pressures within the principal governments The greatest importance of international institutions may be to provide forums within which adversary communication occurs; standards of accommodation may gradually take shape, often by tacit adjustment of behavior and objectives.

FALK, *supra* note 243, at 26.

nisms to enforce the protections of international legal norms such as Common Article 3 or Protocol II, the OSCE demonstrates the value of utilizing politically binding norms through accepted political enforcement processes to address intrastate conflicts.³⁴³

CONCLUSION

The conflict in Chechnya reveals the extent to which an organ like the OSCE can serve as an effective, supplementary model for addressing internal armed conflicts. By relying on the Russian Federation's political commitments under the Code of Conduct, OSCE participating states effectively used the OSCE's public forum both to crack the defense of non-intervention in internal affairs and to provide a political role for the international community in addressing that conflict. Without any agreements beyond the basic legal principles set out in Common Article 3 and Protocol II, international humanitarian law currently does not provide similar legal mechanisms for enforcing Russia's international legal obligations. Ultimately, neither the OSCE nor international law can bring an end to the suffering and horror of war, but the OSCE does provide political mechanisms and a forum that call states such as Russia to account for their actions. In the absence of the political will to create binding *and* effective legal norms for the conduct of internal warfare, the OSCE supplies an alternative method by which politically binding agreements, accompanied by political enforcement procedures, provide a role for the international community in constraining the conduct of parties to hellish, "internal matters," like Chechnya.

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³⁴³ Indeed, the OSCE Code of Conduct actually embraces international humanitarian law as part of a participating state's politically binding commitments. *See supra* notes 306-07 and accompanying text. The use of OSCE missions in Chechnya, moreover, actually led Russian authorities to admit that its forces had violated not only OSCE principles, but also international humanitarian law by using disproportionate and indiscriminate force against the civilian population. *See supra* notes 104, 111 and accompanying text.